PETITION FOR REHEARING AND
SUGGESTION OF REHEARING EN BANC

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 82-1229

HAROLD WEISBERG,

Appellant/Cross-Appellee

v.

U.S. DEPARTMENT OF JUSTICE,

Appellee/Cross-Appellant

AND CONSOLIDATED NOS. 82-1274,
82-1722 and 83-1764

On Appeal from the United States District Court
for the District of Columbia

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PETITION FOR REHEARING AND SUGGESTION OF THE APPROPRIATENESS OF REHEARING EN BANC

Harold Weisberg, Appellant and Cross-Appellee, petitions for rehearing, and suggests rehearing en banc.

CONCISE STATEMENT OF THE ISSUES AND THEIR IMPORTANCE

1. Whether contingency adjustments of an attorneys' fees lodestar may be awarded where counsel has incurred a substantial risk of non-compensation that is not accounted for in the lodestar, or whether such adjustments may be awarded only in "exceptional" cases. The panel indicated that under Blum v. Stenson, ___ U.S. ___, 104 S. Ct. 1541 (1984), the latter is the case. This

conflicts with the holding in Copeland v. Marshall, 641 F.2d 880 (D.C.Cir. 1980)(en banc) and National Assn. of Concerned Vets v. Sec. of Defense, 675 F.2d 1319 (D.C.Cir. 1982).

2. Whether the duration and magnitude of an attorney's investment of his time is ever justification for an upward admustment of the lodestar rate. The panel decision may be read as suggesting that the duration and magnitude of an attorney's investment of his time may never justify an upward adjustment of the lodestar rate. This conflicts with the holding in Craik v. Minnesota State University Bd., 738 F.2d 348 (8th Cir. 1984), and is of exceptional importance because it is likely to deter lawyers from undertaking large-scale Freedom of Information Act requests, notwithstanding the fact that the potential public benefit may, at least in some rough measure, correspond to the magnitude of the project undertaken. It thus would serve to defeat Congress' objective to maximize diclosure so that a fully informed discussion of public issues may be had.

3. Whether the exists a right to contract where the parties cannot agree at the outset as to the duration of the agreement. The panel's ruling that a valid contract fails unless the parties agree on its duration is contrary to the clear weight of authority and may have serious ramifications in the field of contract law.

4. Whether in a case involving the doctrine of promissory estoppel a party may escape liability by showing that he received no consideration from the party who relied on the promise. The

panel cited no authority for its ruling that benefit to the promisor is a necessary element of promissory estoppel, and it is well-settled that the doctrine is an exception to the usual rule that both parties must receive consideration, the detrimental reliance of the promisee being properly viewed as a substitute for consideration. 17 Am. Jur. 2d Contracts, §89; Murray on Contracts, § 392, 393.

5. Whether the panel overlooked and misapprehended pertinent facts in ruling that the Department of Justice reasonably interpreted Weisberg's December 23, 1974 request to include information about listed individuals as related to the FBI's MURKIN files and not as to "individual files."

ARGUMENT

I

In this case plaintiff's counsel placed at risk approximately 1,000 hours of work over a period of eight years. In Copeland, 641 F.2d at 892-893, this Court ruled that a district court has discretion to award a risk adjustment "to compensate for the risk that the lawsuit would be unsuccessful and that no fee at all would be obtained." See also, Concerned Veterans, 675 F.2d at 1323: "The [Copeland] Court noted that a premium should generally be awarded if counsel would have obtained no fee in the event the suit was unsuccessful" (emphasis added).

The panel appears to read Blum, supra, as permitting a contingency adjustment only in "the exceptional case" involving "highly comples or novel issues."[1/] Slip op. at 49. If correct, this would alter the holding in Copeland. But it must be pointed out that the fee applicants in Blum did not request a risk adjustment, and the Court declined to rule on this issue, stating: "[w]e have no occasion in this case to consider whether the risk of not being the prevailing party . . . and therefore not being entitled to an award of attorney's fees from one's adversary, may every justify an upward fee adjustment." 104 S. Ct. at 1550, n.17. Blum did make references to "the exceptional case," but these remarks, placed in context, all refer to adjustments for quality rather than risk.

Congress modeled the Freedom of Information Act's attorneys' fees provision after similar provisions in civil rights laws. As the Supreme Court noted in Hensley v. Eckerhart, 103 S. Ct. 1933, 1937-1938 (1983), in passing these provisions Congress approved the factors for fee calculation set forth in Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974). One of these factors is" "Whether the fee is fixed or contingent." Hensley, 103 S. Ct. at 1937, n.3.

1/ The panel stated that "it does not appear that this litigation involved highly complex or novel issues." Slip op at 49. But see Weisberg v. U.S. Dept. of Justice, 631 F.2d 824 (D.C. Cir. 1980), a case involving issues in this lawsuit which consumed approximately four years of litigation. The first sentence of that opinion reads: "In this case a novel question is presented: whether administrative materials copyrighted by private parties are subject to the disclosure provisions of the Freedom of Information Act (FOIA)." (Emphasis added) Id. at 825.

Thus, the legislative history of the civil rights statutes would appear to forecast the result of the Supreme Court's resolution of the "risk" issue when it confronts it. Additionally, it must be noted that the only four members of the Supreme Court to address the standard for contingency adjustments have expressly endorsed the Copeland rule. Hensley, 103 S. Ct. at 1947-1948 (Justice Brennan, Marshall, Blackmun and Stevens, concurring in part and dissenting in part). Because all four of those Justices joined in the opinion in Blum, Blum cannot be read to overrule Copeland.

II

The panel asserts that "the fact that this litigation was lengthy and time consuming provides no justification for an upward adjustment under Blum. . . ." Slip op. at 49. To the extent that this assertion is based upon the panel's reading of Blum as allowing a contingency adjustment only for "exceptional" cases involving "highly complex or novel" issues, it is in error for the reasons stated above.

On the issue of whether the magnitude of a case may itself warrant a contingency adjustment, the panel's opinion is in conflict with Craik v. Minnesota State University Bd., 738 F.2d 348, 350-351 (8th Cir. 1984), in which the Eighth Circuit ruled that a contigency increase is appropriate in cases requiring a massive undertaking, stating:

> The investment of that much time out of one's law practice with no real hope of compensation if the appeal should prove unsuccessful is indeed a major risk, one that we think should be taken into account in setting a reasonable fee.

This case involved an expenditure of time roughly comparable to that in Craik.

The panel followed its flat statement that the fact that this litigation was lengthy and time consuming "provides no justification for an upward adjustment under Blum" with the remark that "the hourly rate awarded Mr. Lesar was based on present rates, rather than past rates, and adequately compensates him for time spent on this litigation." Slip op. at 49. But an hourly rate based on present rather than past rates merely compensates for inflation and loss of investment income which would have accrued had the attorney been paid at the time services were rendered, and it is highly doubtful that it fully compensates for these.

Certainly it does not compensate for risk. Obviously, attorneys in the marketplace do not charge the same rates for services which are compensated regardless of the outcome or result of the litigation as they do for services which involve risk. A merchant does not charge the same price for goods sold for cash on the counter as he does for the same goods shipped on a contingency that he will be paid for them if and when they reach a distant land months or years later.

The panel's reading of Blum poses a threat to the objectives which Congress intended to foster when it enacted the attorneys'

provision. Few, if any, lawyers will be able or willing to devote themselves to pursuing large projects in the public interest if they know that if they lose they will collect nothing, and if they win years later they will receive only what they could get without risk by representing fee-paying clients, if that.

III

The District Court found that Weisberg and the Department of Justice had not entered into a valid contract. It based this conclusion ultimately on one fact: that Weisberg and the Department had not agreed as to the precise length of time to be spent on the consultancy project. Neither the District Court nor the Government was able to cite a single case for the proposition that an otherwise valid contract fails unless the parties agree on its duration. This is hardly surprising, as virtually every attorney-client arrangement entered into on an hourly basis is undertaken without a specific agreement as to duration.

As pointed out by Weisberg in the court below, the weight of authority, indeed, all known existing authority, is that an otherwise valid employment contract is not unenforcible simply because duration was not agreed to at the outse. To the contrary, the prevailing view is that such an agreement might be considered terminable at will or after a reasonable time, but would not be deemed invalid. Lewis J. Hardcliff Coal Co., 237 F. Supp. 6 (D.C. Pa. 1965); Atchison T. & S.F. Ry. Co. v. Andrews, 211 F.2d 264

(1954); Murray on Contracts, §27 (2d ed. 1974).

By finding duration to be an "essential" and "material" term upon which agreement must be reached or there can be no contract, the District Court and the panel now essentially withhold the right to contract in all situations where the parties are unable to determine the exact length of the contracting period.

Because the District Court and panel findings are contrary to the clear weight of authority and may have serious ramifications in the field of contract law, the Court of Appeals should review this issue en banc.

IV

Weisberg is likewise entitled to an award of consultancy fees under the theory of promissory estoppel. The panel affirmed the District Court's finding that "Mr. Weisberg did not act reasonably in proceeding with work on the consultancy agreement," and hence concluded there was no "reasonable reliance," a necessary element of promissory estoppel.

The panel cited three factors in support of its finding of unjustifiable reliance. However, a close examination of these factors reveals that all three favor Weisberg and compel a finding of reasonable reliance by him.

The first factor cited by the panel was that Weisberg began his work "long before the March 15, 1978 conversation" where the

Department and Weisberg agreed on an hourly rate. However, contrary to the panel's decision, the aforementioned conversation took place on January 15, 1978, two months earlier.[2/]

While Weisberg may have begun his work prior to an agreement on the hourly rate,[3/] he also performed many hours of work after the issue of compensation was settled.[4/] At the very least, the panel's reasoning would indicate reliance by Weisberg for all hours performed after January 15, 1978, and he should be compensated for these hours.

The second factor cited by the panel involved "the entire course of dealing between the parties--in particular the disputes concerning the amount to be paid and the specific form of the work product to be produced. . . ." The panel found that these "disputes" should have put Weisberg on notice that "further negotiations were necessary." Slip op. at 38. However, as noted above,

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2/ The confusion as to dates stems from an error in Lynne Zusman's April 7, 1978 letter to Mr. Lesar, which begins by correctly identifying the date of their telephone conversation as January 15, 1978, but later puts it at March 15, 1978. [JA 334] Zusman's May 12, 1978 affidavit corrects the error [JA 309], and the May 16, 1978 Lesar affidavit states it was January 16, but the context makes it clear that January 15 was the date actually referred to. [JA 315] The Metcalfe and Zusman depositions further confirm the date was January 15, 1978. [R. 257a-257c]

3/ Of course, Weisberg did not commence work on the consultancy arrangement until after the November 21, 1977 meeting in the chambers of the District Court where all terms, save the exact duration and rate of compensation, were agreed upon.

4/ Given the panel's mistaken belief that the hourly rate was not settled until March 15th, it is entirely possible that the panel did not understand that Weisberg worked many hours on the consultancy contract after the rate of compensation was agreed upon.

the rate of compensation was agreed to on January 15, 1978, and Weisberg has been denied compensation for all work after that date as well.

Secondly, there was no dispute about the "specific form of the work product" until after almost all of the consultancy work was completed. If one properly focuses on Weisberg's state of mind and the representations which had been made to him during the period which he performed almost all of the work, one can only conclude that he acted reasonably in proceeding with work pursuant to the consultancy arrangement.

The third factor cited by the panel, which it found the most important of the three, is the most puzzling of all. The panel found that promissory estoppel was inappropriate because the Government did not benefit from Weisberg's work.[5/]

Neither the District Court, the panel or the Government cited a single case which indicates that benefit to the promisor is a necessary element of promissory estoppel. The most widely accepted statement of this doctrine, found in section 90 in the Restatement of Contracts (Second), and cited by the panel, makes no mention of benefit to the promisor. Indeed, it is well settled that the doctrine is an exception to the usual rule that both parties must receive consideration, and the detrimental reliance of the promissee

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5/ The Government did benefit from Weisberg's work, as the two reports he submitted were used extensively by Quinlan J. Shea, Jr., the Department of Justice official who supervised the administrative review of the documents at issue in this case. See Brief for Appellant/Cross-Appellee at 42-43.

is properly viewed as a substitute for consideration. See 17 Am Jur. 2d Contracts, §89; Murray on Contracts, § 392-393.

Therefore, the District Court and the panel clearly erred in denying Weisberg promissory estoppel relief because the Government supposedly received no consideration for its promise. As none of the reasons cited by the District Court and the panel withstand close scrutiny of the record and relevant case law, Weisberg's petition for rehearing and suggestion of rehearing en banc should be granted.

V

The panel found that with respect to the items of Weisberg's December 23, 1975 request, "the FBI and the Department reasonably interpreted the request to include information about these individuals as related to the Murkin files and not to individual files, if any exist." Slip op. at 25. In support of this conclusion, the panel offers various reasons. It cites, for example, the supposed fact--found by it and not by the District Court--that the request was framed in this manner and that "the parties conducted this litigation consistently with this understanding for almost five years before Mr. Weisberg's objections finally came to the fore in November, 1980, some nine months after the District Court enteret its February 1980 finding as to the scope of the search.

The November, 1980 date cited by the panel is instructive. November 11, 1980, is the date of Weisberg's Motion to Compel

a Further Search. That motion represented that Weisberg had charged "repeatedly throughout the long history of this case" that there has been no search at all for records responsive to many items of [his] requests, particularly his request of December 23, 1975." Unless that statement was false, it disputes the panel's characterization of the "understanding" of the parties of his request.

The statement was not false. Without attempting to relate all instances on which Weisberg indicated that he expected that searches be undertaken for the items of his December 23, request susceptible of such searches, a few may be selected which show that Weisberg did not acquiesce in the Department's interpretation of his request. For example, at the May 24, 1978 status call, some two and a half years prior to the date given by the panel as the date when he first raised the issue, Weisberg's counsel stated:

> The request does not specify MURKIN files, it specifies categories of information and the FBI filing procedures mean that there is information relevant to the request which is contained in files which are not part of what they call MURKIN files. One obvious example of that is the request asks for records pertaining to surveillance on numerous people. . . . Those materials may be contained and I think will be contained in other files which have not been searched.

Tr. at 17. [R. 73]

This was not an isolated instance. Earlier, Weisberg wrote Deputy Assistant Attorney General William Schaffer that "[w]ith the search limited to MURKIN," retrieving records responsive to the "surveillance item" [Item 11 of the December 23rd request] "is an assured impossibility." November 25, 1977 Weisberg letter to Schaffer, p. 4. [JA 757]

At the February 26, 1980 hearing, plaintiff's counsel protested again that:

> Well, very simply, they have not even made a claim that they have searched for most of the items in the December 23rd request.

Tr. at 16. [R. 174]

The panel, overlooking all the many indications in the record that Weisberg had repeated objected to having the Department or the FBI substitute their interpretation of his request for what he actually wanted, finds that Weisberg did not raise this issue until "some nine months after the District Court entered its February 1980 finding as to the scope of the search," and then berates him for tardily raising this issue after the District Court foreclosed it by that order. But the District Court's February 26, 1980 finding was carefully qualified, stating only that a proper and good faith search had been made "for all items responsive to plaintiff's request in the FBI Headquarters' Murkin files. . . ." (Emphasis added) [JA 477] This, obviously, is not the same as a finding that a good faith search had been made for all items of the request, or even a finding that the search of the Murkin files reasonably satisfied the request. The Court herself made clear the limitation on her ruling at a later hearing, stating that "we will not get back into the MURKIN files," but adding

> Now I know that many of the things that you are saying have to do with things not in the MURKIN file and I am willing to go into all of those things. . .

Tr. at 12. [R. 181] Thus, the District Court herself did not accord her February 26, 1980 finding the intepretation placed on

by the panel.

The panel also cites the Stipulation as evidence of the alleged "understanding" regarding the interpretation of the December 23rd request. Slip op. at 26. The panel misunderstands the Stipulation. The Stipulation was entered into soon after the processing of the MURKIN Headquarters records was completed. It occurred in the context of very heated courtroom sessions and was from plaintiff's point of view intended to use what leverage he had to force a resolution of an issue which had been held in abeyance while the FBI completed its processing of the MURKIN Headquarters documents and other issues were litigated (the fee waiver and copyrighted photographs issues): namely, plaintiff's demand that the FBI search its field offices files for responsive records. The quid pro quo for the Department, as spelled out within the four corners of the Stipulation, was not the resolution of all issues left in the case but that upon the FBI's compliance with certain deadlines plaintiff would forego the Vaughn Index he was demanding and the District Court was threatening.

Nor can the Department's or the FBI's so-called interpretation of Weisberg's December 23rd request be called reasonable. That request contained a number of items that obviously were for records not contained MURKIN files, such as the Invaders and the Memphis Sanitation Workers files, which by definition included records compiled before Dr. King was killed and an FBI investigation of his murder begun. The FBI has in effect conceded that it could not

"reasonably" interpret his December 23rd request as limited to MURKIN materials by claiming that it has always maintained that certain groups and subjects, such as the Invaders and the Memphis Sanitation Workers Strike "were not within the scope of plaintiff's requests." Department's Supplemental Brief at 6 n.5. How much more unreasonable can an interpretation of a request be than to interpret as "outside the scope" that which it expressly asks for? How, if an agency is to be permitted thus to substitute its wishes for the actual terms of a requesters request, can a requester ask for records the agency doesn't want to search for and can eliminate from the request?

CONCLUSION

For the foregoing reasons this Court should rehear this case as to the foregoing issues. Because of the importance of these issues, it should do so en banc.

Respectfully submitted,

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