CASE ARGUED ON APRIL 14, 1988

NO. 87-5304

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAROLD WEISBERG,

Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF FOR THE APPELLEE

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QUESTION PRESENTED

Whether this case must be remanded for further proceedings under Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 107 S. Ct. 3078 (1987).

ARGUMENT

THERE IS NO REASON TO REMAND THIS CASE FOR FURTHER PROCEEDINGS UNDER DELAWARE VALLEY II

By order of April 15, 1988, this Court directed the parties to address the necessity of remanding this case in order for the

district court to assess Harold Weisberg's claim for a contingency enhancement under Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 107 S. Ct. 3078 (1987) (Delaware Valley II). The Department of Justice submits that a remand is unwarranted for two independent reasons.

First, Weisberg's belated factual representations regarding his contingency claim are not sufficient, even if taken at face value, to justify a contingency enhancement under Delaware Valley II. As a result, his eligibility may be determined as a matter of law without further district court proceedings. Second, by awarding fees based on Weisberg's current hourly rate of $100/hour rather than his historical rate of $75/hour, the district court already has given Weisberg a 33 percent fee enhancement. Because that enhancement is not justified on any other ground, and because it exceeds the 30 percent enhancement that Weisberg seeks on contingency grounds, Weisberg already has received a larger attorney's fee than even a justified contingency claim would warrant. Both of these factors distinguish this case from Thompson v. Kennickell, 836 F.2d 616 (D.C. Cir. 1988), in which this Court found it necessary to remand a contingency enhancement claim for further proceedings under Delaware Valley II.

I. Weisberg's Allegations Are Insufficient, Even If True, To Support a Contingency Enhancement Under Delaware Valley II

Any analysis of a claim for a contingency enhancement must start with the recognition that Delaware Valley II permits contingency enhancements only in extraordinary circumstances. In Thompson v. Kennickell, supra, this Court characterized the

standard for obtaining contingency enhancements under Delaware Valley II as a "stringent" one, amounting to a rule of "'Hardly ever!'" (836 F.2d at 621). Other Courts of Appeals have been equally emphatic in recognizing that "contingency multipliers should be granted only rarely" under Delaware Valley II. Student Public Interest Research Group of New Jersey, Inc. v. AT&T Bell Laboratories, Nos. 86-5895 & 86-5927 (3d Cir. March 24, 1988) (SPIRG), slip op. at 33; accord, Coup v. Heckler, 834 F.2d 313, 324 (3d Cir. 1987) (Delaware Valley II "severely limits the occasions in which contingency enhancement is appropriate"); Norman v. Housing Authority, 836 F.2d 1292, 1302 (11th Cir. 1988) (under Delaware Valley II contingency enhancements "may" be appropriate "in the rare case").[1] As we now will show, the facts that Weisberg is offering to prove fall far short -- even if true -- of establishing the kind of extraordinary showing necessary to obtain a contingency enhancement under these standards. Indeed, if the representations on which Weisberg relies are deemed legally sufficient to support a contingency enhancement, the standard of "Hardly ever" will be transformed into one of "Almost always" -- precisely the result rejected by the Supreme Court in Delaware Valley II.

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[1]Given Delaware Valley II's substantial narrowing of the circumstances in which contingency enhancements may be awarded, Weisberg's reliance on pre-Delaware Valley II decisions for the proposition that fee awards in contingent cases are presumptively proper (Supp. Br. at 6-7) is misconceived.

J.A. 268; Weisberg v. U.S. Department of Justice, Civil Action No. 75-1996 (D.D.C. Jan. 20, 1983), slip op. at 18 ("1983 Opinion"). Because Weisberg's putative unpopularity already has been taken into account, any further enhancement of the award to reflect this factor would be double-counting. Cf. Delaware Valley II, 107 S. Ct. at 3091 (O'Connor, J., concurring) ("the stubbornness of the defendants [in opposing the plaintiff] * * * should already be reflected in the number of hours expended and the hourly rate, and cannot be used again to increase the fee award").

The only other evidence that Weisberg offers to show that he could not have obtained representation in this case without a contingency enhancement is the asserted fact (Supp. Br. at 10) that he was unable to obtain representation in unspecified FOIA cases prior to 1974. Even taking this assertion as true, its probative value is virtually nil. Its principal defect, which Weisberg himself appears to recognize, is that the FOIA's exemption for law enforcement records (the class of records at issue in this case and others pursued by Weisberg) was far more expansive prior to 1974 than after the 1974 FOIA amendments. See, e.g., Weisberg v. U.S. Department of Justice, 489 F.2d 1195 (D.C. Cir. 1973) (en banc), cert. denied, 416 U.S. 993 (1974). As a result, obtaining law enforcement records under the FOIA prior to 1974 was difficult if not impossible. The fact that attorneys may have been reluctant to pursue FOIA claims on Weisberg's behalf prior to 1974 thus has a far more obvious explanation than the prospect of not receiving contingency enhancements.

Weisberg has failed to offer, or even to suggest that he would be able to offer, testimony from other attorneys that they would have been willing to undertake this case on a contingent basis if a fee enhancement were available but would not have been willing to take on the case if an enhancement were unavailable. Testimony of this kind is the minimum which should be required to carry a plaintiff's burden of proving that he "'would have faced substantial difficulties in finding counsel'" (Delaware Valley II, 107 S. Ct. at 3091 (O'Connor, J., concurring)) without a contingency enhancement. Cf. Jenkins ex rel. Agyei v. Missouri, 838 F.2d 260, 268 (8th Cir. 1988) (testimony by attorneys that they would not take a case on any basis or would not take it without regular payments is insufficient under Delaware Valley II). Without a colorable offer of proof along these lines, there is no basis for holding that Weisberg's contingency enhancement claim is sufficient as a matter of law under Delaware Valley II, and hence no occasion for a remand for further evidentiary proceedings.

B. Market Treatment of Contingent Cases

The second prerequisite for obtaining a contingency enhancement under Delaware Valley II is an affirmative showing that "the rates of compensation in the private market for contingent fee cases as a class differ from those where counsel is paid, win or lose, on a regular basis." Thompson, 836 F.2d at 621 (emphasis in original) (citing Delaware Valley II, 107 S. Ct. at 3089-90 (O'Connor, J., concurring)). Weisberg's offer of proof regarding

this issue, on which he again bears the burden of proof (ibid.), is inadequate as well.

In essence, Weisberg argues (Supp. Br. at 6-9) that FOIA cases taken on a contingent basis can be assumed to command a substantial risk premium because FOIA cases by their nature are risky suits in which the chance of losing -- and hence the chance of not being paid contingent fees -- are inevitably great.[2] Weisberg's portrayal of the hardships of FOIA litigation is, we submit, grossly overdrawn; even a casual inspection of decided FOIA cases shows that hundreds of FOIA plaintiffs have managed to prevail in litigation, as Weisberg himself prevailed (with respect to the first of his two FOIA requests) in this case. More important, however, it is not sufficient to offer reasons why a risk premium should exist in FOIA cases; it is incumbent on a party seeking a contingency enhancement to prove that a risk premium does exist. And that Weisberg has not undertaken (or offered) to do.

At a minimum, an FOIA plaintiff must offer to come forward with direct evidence of the prevailing contingent and noncontingent rates in the relevant legal market. The Third Circuit has held that a successful claim for contingency enhancement under Delaware Valley II "will most certainly require expert testimony

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[2]Weisberg also points to circumstances particular to this case, such as the status of his attorney as a solo practitioner (Supp. Br. at 8-9), but it is abundantly clear under Delaware Valley II that such case-specific risks have no role to play in assessing contingency enhancement claims. See 107 S. Ct. at 3090 (O'Connor, J., concurring) (denying feasibility of "translat[ing] the extra economic risk endured by smaller firms * * * or by firms that take unpopular cases * * * into a percentage enhancement").

from someone familiar with the economics of the legal profession" and may also require the testimony of "an expert economist * * * , even one able to develop some kind of econometric model." Blum v. Witco Chemical Co., 829 F.2d 367, 380 (3d Cir. 1987). Weisberg has not suggested that he can present such testimony, much less that such testimony would corroborate his demand for a contingency enhancement. And if his proffered "evidence" is inadequate to demonstrate that a risk premium exists, it is a fortiori inadequate to prove that the market awards the particular risk premium (30 percent) that he is demanding. In short, Weisberg simply cannot prevail by offering speculation about the workings of legal markets rather than affirmative economic evidence.[3]

II. Weisberg's Current Fee Award Already Compensates Him For Any Contingency Enhancement To Which He Might Be Entitled

When the district court originally calculated Weisberg's fee award in 1983, it found the reasonable hourly rate to be $75/hour, the same rate at which Weisberg's attorney had been reimbursed in two other then-recent FOIA cases. See 1983 Opinion at 18-19. Following this Court's decision in Weisberg v. United States Department of Justice, 745 F.2d 1476 (D.C. Cir. 1984), which remanded for further proceedings regarding attorney's fees, the district court recalculated Weisberg's fee award using an hourly rate of $100/hour, Weisberg's then-current hourly rate. See J.A.

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[3]Neither will it do for Weisberg to invite this Court to take "judicial notice" of what Weisberg claims to be the structure of the market for FOIA representation (Supp. Br. 9). The fact that Weisberg is reduced to inviting judicial notice of inherently disputable evidentiary matters simply underscores the shortcomings in his offer of proof.

268. In so doing, the district court effectively provided Weisberg with a 33 percent enhancement of his original lodestar fee.

Setting Weisberg's claim for a contingency enhancement to one side for the moment, the district court had no basis for awarding Weisberg such an enhancement. The district court regarded the use of current rates as a means of compensating Weisberg for the delay attendant on obtaining reimbursement.[4] But as we explained in detail in our principal brief (at 36-37), the Supreme Court's decision in Shaw v. Library of Congress, 106 S. Ct. 2957 (1986), squarely forecloses courts from awarding delay enhancements under fee-shifting statutes which (like FOIA's) do not expressly authorize such enhancements. And in Thompson, this Court held that Shaw prohibits "using current billing rates * * * to compensate attorneys for delay in payment" in litigation against the federal government. 836 F.2d at 819.

As matters now stand, therefore, Weisberg has received a 33 percent fee enhancement to which -- again reserving the question of

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[4]In explaining its decision to increase the hourly rate from $75/hour to $100/hour, the district court pointed to the fact that "more than four years have passed since that [$75/hour] determination and over twelve years have passed since plaintiff filed this suit." J.A. 268. The district court also noted the experience of Weisberg's counsel in FOIA matters and Weisberg's asserted unpopularity with government officials (id.), but the district court already had taken those additional factors into account (in identical language) in setting the original $75/hour rate in 1983. See 1983 Opinion at 18 (giving weight to "Mr. Lesar's extensive experience in litigating FOIA cases" and "the comparative undesirability of this case due to plaintiff's unpopularity with many government officials"). The only factor which had changed since the district court's original lodestar calculation, and hence the only factor which can account for the increased hourly rate, is the added delay in reimbursement.

a contingency enhancement -- he is not entitled. Unless Weisberg not only is entitled to a contingency enhancement, but is due an enhancement of 33 percent or more, there is no basis for setting aside this award in favor of a still greater enhancement. But even if it is assumed that Weisberg is entitled to a contingency enhancement, the enhancement which he himself has requested is no more than 30 percent.

Thus, even if Weisberg's claim for a contingency enhancement were accepted in full, he would be entitled to no more than -- indeed, to less than -- he already has received. Under these circumstances, there is no basis for disturbing the district court's award. If it so chooses, this Court therefore may decline to order a remand without having to pass on the legal sufficiency of Weisberg's contingency claim under Delaware Valley II.

CONCLUSION

For the foregoing reasons and the reasons given in the appellee's principal brief, the judgment of the district court should be affirmed.

Respectfully submitted,

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May 2, 1988

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of May, 1988, I have served the foregoing Supplemental Brief For Appellee on the appellant by causing copies to be delivered by hand to his counsel, James H. Lesar, 918 F Street, N.W., Suite 509, Washington, D.C. 20004.

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