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Eminent Domain - Attorney Fees - Reliance upon a One-Third Contingent Fee Agreement in Awarding Reasonable Attorney Fees Was an Error

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EMINENT DOMAIN—ATTORNEY FEES—RELIANCE UPON A ONE-THIRD CONTINGENT FEE AGREEMENT IN AWARDING REASONABLE ATTORNEY FEES WAS AN ERROR

After initial offers to purchase[1] had been rejected, the City of Bismarck filed a complaint in eminent domain asking for the condemnation of the Thom land[2] for airport expansion.[3] The Thoms had a one-third contingent fee agreement with their attorney.[4] After a jury award of $363,640 in the condemnation proceedings, motions were filed leading to a lower court finding that $71,213.13[5] was a fair and reasonable amount for attorney's fees.[6] The lower court ordered the city to pay that amount along with certain other costs, including expert witness fees of $6,327.[7] The city appealed, contending the trial court erred in not using guidelines for determining reasonable attorney's fees previously set down by the North Dakota Supreme Court.[8] The city asserted that reliance on the contingent fee agreement by the trial court was an abuse of discretion under state statute.[9] The North Dakota Supreme Court affirmed the award of expert witness fees made by the trial court,[10] and reversed and remanded the award of attorney's fees.[11] *City of Bismarck v. Thom*, 261 N.W.2d 640 (N.D. 1977).

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1. City of Bismarck v. Thom, 261 N.W.2d 640, 641 (N.D. 1977). The Thoms were offered $150,000 for the land. *Id.*
2. *Id.*
3. *Id.*
4. *Id.* at 642.
5. *Id.* In accordance with the agreement between the client and attorney, the fee due on the award was $71,213.33. The twenty cent error was in the judgment. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* The statute provides as follows:

> The court may in its discretion award to the defendant reasonable actual or statutory costs or both, which may include interest from the time of taking except interest on the amount of a deposit which is available for withdrawal without prejudice to right of appeal, costs on appeal, and reasonable attorney's fees for all judicial proceedings. If the defendant appeals and does not prevail, the costs on appeal may be taxed against him. In all cases when a new trial has been granted upon the application of the defendant and he has failed upon such trial to obtain greater compensation than was allowed him upon the first trial, the costs of such new trial shall be taxed against him.

N.D. CENT. CODE § 32-15-32 (1976).

10. 261 N.W.2d at 647. In finding no abuse of discretion on the part of the trial court in the awarding of expert witness fees the court said:

> William Knudson [the expert witness] did much of the pretrial investigation of comparable sales of the land taken in preparation of the trial. He made the pretrial investigation which would have been required by someone else, and probably at a higher per diem rate.
>
> The trial court determined that the fee allowed was appropriate and that William Knudson was an expert witness and was entitled to be compensated as such.

Id.

11. 261 N.W.2d at 647. The trial court was instructed to hold an evidentiary hearing to determine reasonable attorney's fees in conformity with the court's opinion. *Id.*

In the Order on Motion for Costs, including Attorney Fees, Appraisers Charges and Fees Allowed in Condemnation Actions signed by Judge Graff, December 17, 1976, the criteria for awarding attorney's fees were set out as follows:

North Dakota defines eminent domain as the right to take private property for public use, and specifies that private property shall not be taken or damaged for public use without just compensation first having been made to or paid into court for the owner.[12] The state further allows the court at its discretion to allow the defendant landowners reasonable actual or statutory costs or both, including reasonable attorney's fees for all judicial proceedings.[13]

Historically, the power of eminent domain has been counterbalanced with the duty to provide just compensation.[14] The just compensation requirement seeks to protect the individual landowner when eminent domain is exercised.[15] It is founded upon the equitable principle of fairness.[16] The government must compensate[17] for the taking

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> [H]eard the motion for costs . . . the city having caused its return to the motion to be filed, with affidavits in support of its position, together with a brief, and the landowners having submitted affidavits showing their items of expense, including attorneys fees, appraisers fees, with other items of expense and the parties having caused their arguments to be made by their counsel, and it having been shown to the Court that counsel for defendants entered into a contingent fee contract providing for one-third of the increase, between the original offer and the verdict of the jury, the contingent fee contract being the kind in general use in North Dakota in similar cases, and which was filed herein, together with a record of cases showing allowances in other condemnation trials, in the state, in which similar fees were upheld, and it also appearing to the court that the jury verdict in this case caused a settlement to be made in the case of the City of Bismarck against the Patterson Land Company, due to be tried about two weesk after this trial was completed, that settlement being for approximately $5,000 per acre.
>
> That it appeared to the Court that counsel for the defendants handled the testimony of the expert witness of the plaintiff with skill and dexterity based upon pretrial work that they accomplished in the case, and attorney fees of one-third of the difference, for the work done in this case, or the sum of $71,213.13 is a reasonable and proper fee in the light of the litigation, the preparation thereof, the skill of the presentation, the results obtained, and the diligence shown by the counsel for the defendant owners.

City of Bismarck v. Thom, Civ. No. 24830 (4th D. N.D., Dec. 2, 1975).

12. N.D. CENT. CODE § 32-15-01 (1976). The statute provides as follows:

> Eminent domain is the right to take private property for public use. Private property shall not be taken or damaged for public use without just compensation first having been made to or paid into court for the owner. In case such property is so taken by a person, firm, or private corporation, no benefit to accrue from the proposed improvement shall be allowed in ascertaining the compensation to be made therefor. Such compensation in all cases shall be ascertained by a jury unless a jury is waived. The right of eminent domain may be exercised in the manner provided in this chapter.

Id.

13. N.D. CENT. CODE § 32-15-32 (1976).

14. "[The right of eminent domain] cannot be exercised except upon condition that just compensation shall be made to the owner. . . ." Searl v. School Dist. No. 2, 133 U.S. 553, 562 (1890).

15. Monongahela Navigation Co. v. United States, 148 U.S. 312, 324-25 (1893); Opinion of the Justices, 118 Me. 503, 513-14, 106 A. 865, 871-72 (1919); In re Mt. Wash. Rd. Co., 35 N.H. 134, 142 (1857).

16. *See, e.g.*, United States v. Commodities Trading Corp., 339 U.S. 121, 124 (1950); Ives v. Addison, 155 Conn. 335, 341, 232 A.2d 311, 314 (1967).

17. The duty to provide just compensation is stated as follows in the U.S. Constitution: "[N]or shall private property be taken for public use without just compensation." U.S. CONST. amend. V, § 4.

Every state except New Hampshire and North Carolina have constitutional provisions similar to the fifth amendment's just compensation clause. In each of those states the requirement is well-established by statute or case law. 1 P. NICHOLS, EMINENT DOMAIN § 1.3 (3d rev. ed. 1974).

In Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897), the Supreme Court held that the just compensation requirement contained in the fifth amend-

of private lands for public purposes with public funds. In that way the just compensation requirement distributes the cost of public projects equally among all members of society to ensure that no individual suffers disproportionately for the public good.[18]

There has been no uniformity on the issue of whether just compensation includes costs, such as attorney's fees, of securing that guarantee.[19] Twenty-nine states have statutes[20] which begin with the proposition, stated directly or by implication, that the condemnor pays the costs of condemnation proceedings. There are frequently provisions allowing recovery of costs only if the award is in excess of any offer by the condemnor, and some set maximum amounts even in those cases.[21] North Dakota and eight other jurisdictions[22]

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ment was imposed on the states through the fourteenth amendment's due process clause, and was also founded on common law principles pre-dating the Constitution. The common law notion of fairness required the sovereign to compensate for property taken from an individual landowner to promote the common welfare. The just compensation requirement was a settled principle of equity recognized by all civilized governments. *See* Gardner v. Newburgh, 2 Johns. Ch. 162 (N.Y. 1816).

18. Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893). For a discussion of how the just compensation requirement functions as a cost distribution device, *see* Holtz v. Superior Court, 3 Cal. 3d 296, 303, 475 P.2d 441, 445, 90 Cal. Rptr. 345, 349 (1970).

19. *See* Guy, Land Condemnation: A Comparative Survey of North Dakota Statutory Law, 51 N.D.L. REV. 387, 432 (1974).

20. ALA. CODE tit. 18, § 1-31 (1975); CONN. GEN. STAT. ANN. § 13a-77 (West 1964); DEL. CODE tit. 10, § 6111 (1974); FLA. STAT. ANN. § 73.091 (West Supp. 1977); GA. CODE ANN. § 36-605 (1970); IND. CODE ANN. § 32-11-1-10 (Burns Supp. 1977); IOWA CODE ANN. § 472-33 (West 1971); KAN. STAT. ANN. § 26-507 (Weeks 1973); ME. REV. STAT. tit. 23 § 157 (Supp. 1977); MD. ANN. CODE art. 21 § 12-107 (1973); MASS. GEN. LAWS ANN. ch. 79, § 8A (West 1969); MINN. STAT. ANN. § 117.175 (West 1977); MISS. CODE ANN. § 11-27-25 (1972); MO. ANN. STAT. § 523.070 (Vernon 1953); NEB. REV. STAT. § 76-723 (1976); N.H. REV. STAT. ANN. § 233:25 (1977); N.J. STAT. ANN. § 20:1-13 (West 1969); N.M. STAT. ANN. § 22-9-59 (Supp. 1975); N.C. GEN. STAT. § 136-119 (1974); OHIO REV. CODE ANN. § 5519.02 (Page Supp. 1977); OKLA. STAT. ANN. tit. 69 § 1203 (West Supp. 1977); OR. REV. STAT. § 35.346 (1973); PA. STAT. ANN. tit. 26 § 1-519 (Purdon Supp. 1978); TENN. CODE ANN. § 23-1539 (Supp. 1977); UTAH CODE ANN. § 78-34-9 (1977); VT. STAT. ANN. tit. 19 § 233 (1968); VA. CODE § 25-46.32 (1973); WASH. REV. CODE ANN. § 8.04.080 (1961); W. VA. CODE § 54-2-16 (1966).

21. Indiana sets a maximum of $2,500 for litigation costs if the judgment, exclusive of interest and costs, is greater than the amount specified in the last offer of settlement made by the condemnor. IND. CODE ANN. § 32-11-1-10 (Burns Supp. 1977).

Pennsylvania has a statutory allowance in all cases limited to $500. PA. STAT. ANN. tit. 26, § 1-610 (Purdon Supp. 1977). Full recovery for reasonable expenses actually incurred for appraisal, attorney and engineering fees is allowed where the landowner successfully challenges the condemnor's right to appropriate the property or procedures followed by the condemnor, where the condemnation is revoked by the condemnor, and where the condemnor is forced to bring an inverse condemnation proceeding. PA. STAT. ANN. tit. 26, §§ 1-406(e), 1-408, 1-609 (Purdon Supp. 1977).

ALAS. R. CIV. P. 82 and 72 provide a discretionary scheme for allowing attorney's fees in all civil cases with a sliding scale rough guideline based on the amount of recovery and whether the controversy is contested or not, and whether or not it is settled or goes to trial. But in eminent domain proceedings, attorney's fees are allowed only if the final judgment is at least 10 per cent greater than the greatest amount previously made available to the landowner.

The avalanche of appeals under the Alaska system was so great that the state bar association passed a resolution calling for repeal of the enabling legislation. Comment, *Award of Attorney's Fees in Alaska: An Analysis of Rule* 82, 4 U.C.L.A.-ALAS. L. REV. 129, 130, 145 (1974).

22. ALAS. R. CIV. P. 82 (Supp. 1968), 72 (Supp. 1963); ARIZ. REV. STAT. ANN. § 12-1128 (Supp. 1977); IDAHO CODE § 7-718 (1948); NEV. REV. STAT. § 37.190 (1973); N.D. CENT. CODE § 32-15-32 (Supp. 1973); WIS. STAT. ANN. § 32.05 (West Supp. 1978); WYO. R. CIV. P. 71.1 (Supp. 1975).

have provisions allowing attorney's fees,[23] sometimes at the discretion of the court.[24]

In *United Development Corporation v. State Highway Department*,[25] the court pointed out that the legislature provided for the awarding of costs to a prevailing party in civil actions.[26] In addition, the court stated that the owner of an interest in real estate whose property is taken by eminent domain proceedings can recover the costs of the action.[27] The North Dakota Supreme Court affirmed an award of attorney's fees that corrsponded with a contingent fee agreement.[28] The decision also stated the guidelines for determining reasonable attorney's fees under North Dakota statutory provisions.[29] The reasonable fee was the result of balancing the facts and circumstances of the particular case, the amount and character of the services renderd, the results, obtained, the customary fee charged for the services and the ability and skill of the attorney.[30] The supreme court also mentioned that the minimum fee schedule of the North Dakota Bar Association may be used as an indicator of the reasonableness of the fee.[31]

The North Dakota Supreme Court in *Morton County Board of Park Commissioners v. Wetsch*[32] ruled that basing an award of attorney's fees on a contingent fee agreement without consideration of other factors was improper, in spite of a statement by the lower court that such fees were reasonable. The court reiterated the factors from *United Development* and stated that attorney's fees which

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23. The just compensation guarantee of the fifth amendment does not require that the condemnee be reimbursed for attorney's fees. *See, e.g.*, Dohany v. Rogers, 281 U.S. 362, 368 (1930); United States v. 100 Acres of Land, 468 F.2d 1261, 1270 (9th Cir. 1972), *cert. denied*, 414 U.S. 822 (1973); United States v. 2,353.28 Acres of Land, 414 F.2d 965, 972 (5th Cir. 1969); United States v. 15.3 Acres of Land, 158 F. Supp. 122, 125 (M.D. Pa. 1957); United States v. 251.81 Acres of Land, 50 F. Supp. 81, 83 (W.D. Ky. 1943).

24. North Dakota enacted N.D. CENT. CODE § 32-15-32 in 1957. United Dev. Corp. v. State Highway Dep't, 133 N.W.2d 439, 443 (N.D. 1965) decided by the North Dakota Supreme Court in 1965, was the first appeal of attorney's fees awarded under this section. Since that time the court has ruled five times on appeals of attorney's fees in eminent domain cases. City of Bismarck v. Thom, 261 N.W.2d 640 (N.D. 1977); Sauvegeau v. Hjelle, 213 N.W.2d 381 (N.D. 1973); Mun. Airport Auth. of Fargo v. Stockman, 198 N.W.2d 212 (N.D. 1972); Morton County Bd. of Park Comm'rs v. Wetsch, 142 N.W.2d 751 (N.D. 1966); Morton County Bd. of Park Comm'rs v. Wetsch, 136 N.W.2d 158 (N.D. 1965).

25. 133 N.W.2d 439 (N.D. 1965).

26. N.D. CENT. CODE § 28-26-01 (Supp. 1977) provides as follows:

> 1. Except as provided in subsection 2, the amount of fees of attorneys in civil actions must be left to the agreement, express or implied, of the parties.
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> 2. In all civil actions the court may, in its discretion, upon a finding that the pleading was frivolous, award reasonable actual or statutory costs, or both, including reasonable attorney's fees to the prevailing party.

27. N.D. CENT. CODE § 32-15-32 (1976).

28. There was an attempt to tax $9,000 in costs for various attorneys employed by the defendants. The total contingent fee owed, however, was shown to be $4,650. The court allowed the latter amount. United Dev. Corp. v. State Highway Dep't, 133 N.W.2d 439, 445-46 (N.D. 1965).

29. *Id.* at 446.

30. *Id.*

31. *Id.*

32. 136 N.W.2d 158 (N.D. 1965) [hereinafter cited as Wetsch I].

the trial court finds reasonable could be less than, more than, or equal to the contingent fee amount.[33]

In a second action by the same name[34] the North Dakota Supreme Court expanded on a South Dakota court holding that "the court is an expert on what is a reasonable fee."[35] The supreme court provided additional guidelines to be considered by the appeals court when reviewing a trial court's award of attorney's fees.[36] When reviewing an award of attorney's fees, the appeals court must consider that the trial court judge would be in a position to recognize the character of the litigation, the preparation and skill of the presentation, and the results obtained in the case before him and to temper that with his own knowledge and experience in awarding reasonable attorney's fees.[37] Absent an affirmative showing that the award constituted an abuse of discretion, the award would not be overturned on appeal.[38] Using the *United Development* criteria[39] the court affirmed an award of an amount equal to the amount called for by the contingent fee contract.[40]

The supreme court in *Municipal Airport Authority of Fargo v. Stockman*[41] added a fifth consideration to the test stated in *United Development* and *Wetsch I*, specifically, "careful, conscientious and capable manner—customary fee—contingent fee contract—ability and skill."[42] A concurring minority clarified this by stating that any contingent fee agreement should not be considered by the trial court in determining reasonable attorney's fees.[43] When all factors were considered,[44] the court affirmed an award of attorney's

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33. *Id.* at 159.
34. Morton County Bd. of Park Comm'rs v. Wetsch, 142 N.W.2d 751 (N.D. 1966) [hereinafter cited as Wetsch II].
35. Kerr v. Kerr, 74 S.D. 454, 54 N.W.2d 357 (1952).
36. Wetsch II, 142 N.W.2d at 752.
37. *Id.*
38. Wetsch II, 142 N.W.2d at 752, *quoting* Bartholomay v. St. Thomas Lumber Co., 124 N.W.2d 481 (N.D. 1963).
39. *See* text accompanying note 30 *supra.*
40. Wetsch II, 142 N.W.2d at 753.
41. 198 N.W.2d 212(N.D. 1972).
42. *Id.* at 215.
43. The fee charged is not a reasonable fee because it is a fee which [the attorney] is permitted to charge his client under their contingent fee agreement; it is a reasonable fee because of the character of the services rendered, the results obtained, the customary charges for such services, and the ability and skill of the attorney rendering the services. The contingent fee agreement, in such situation, should not be considered by the trial court in determining what is a reasonable attorney fee. *Id.* at 217 (Strutz, C.J., concurring).
44. In determining reasonable attorney's fees the court considered the motion for allowance of attorney fees, the affidavits supporting that motion, the return of the Airport Authority, briefs by the parties, oral presentations, and files and records in the case. The court determined that one and a half years were spent in the preparation for trial, that trial represented five consolidated suits, that the trial lasted three and one half days, and that analysis of the commercial and industrial potential of the property took legal skill, technique and considerable preparation. Total attorney's fees of $43,466.83, one-third of the award in excess of the amount offered, constituted reasonable fees. Mun. Airport Auth. of Fargo v. Stockman, 198 N.W.2d 212, 214, 216 (N.D. 1972).

fees which was exactly the same as the fee called for under the contingent fee contract.[45]

Stockman reiterated the principle stated in *Wetsch II* that the court was an expert in determining reasonable attorney's fees and that the determination of the trial judge is final in the absence of an affirmative showing of an abuse of discretion.[46]

The supreme court in *City of Bismarck v. Thom*[47] determined that the special concurring opinion in *Stockman*[48] did not intend the term "customary fee charged" to include the contingent fee agreement and asserted that the term instead referred to the hourly rate or its equivalent.[49]

The court in *Hughes v. North Dakota Crime Reparations Board*[50] considered reasonable attorney's fees under the North Dakota Crime Victims Reparations Act[51] and adopted guidelines[52] expanding those set out in the eminent domain cases.[53] The court said in awarding reasonable attorney's fees it would consider the following: the time and labor required;[54] the novelty and difficulty of the question;[55]

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45. *Id.* at 214.

Sauvegeau v. Hjelle, 213 N.W.2d 381 (N.D. 1973), reaffirmed the *United Development* test and the *Wetsch II* assertion that it is within the trial court's authority to award attorney's fees equal to the contingent fee. *Savegeau* was a case of a partial taking of land for freeway purposes in which the court held that attorney's fees would be based on the difference between the jury's award and the amount deposited in court rather than the award and an amended offer made by the state during the course of trial.

> The record supports the position that the commissioner's original deposit was based on an erroneous appraisal. We cannot say as a matter of law, based upon the record here, that the subsequent increase in appraised valuation by the Commissioner was not due to the skill, knowledge, experience and efforts of counsel for the landowners, showing the need for an increase in the deposit by the Commissioner. *Id.* at 381, 393.

46. 198 N.W.2d at 213.
47. 261 N.W.2d 640 (N.D. 1977).
48. *See, supra* note 43.
49. 261 N.W.2d at 643.
50. 246 N.W.2d 774 (N.D. 1976).
51. N.D. CENT. CODE § 65-13-13 (Supp. 1977) provides as follows:

> As part of an order, the [reparations] board shall determine and award reasonable attorney's fees, commensurate with services rendered, to be paid by the state to the attorney representing the claimant. Additional attorney's fees may be awarded by a court in the event of review. Attorney's fees may be denied on a finding that the claim or appeal is frivolous. Awards of attorney's fees shall be in addition to awards of reparations and may be made whether or not reparations are awarded. It is unlawful for an attorney to contract for or receive any larger sum than the amount allowed.

Id.

52. *See* Johnson v. Georgia Highway & Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974).
53. Hughes v. North Dakota Crime Reparations Bd., 246 N.W.2d 774, 777 (N.D. 1976).
54. Johnson v. Georgia Highway & Express, Inc., 488 F.2d 714, 717 (5th Cir. 1974). Although hours spent should not be the only basis for determining a fee, they are a necessary ingredient. The trial judge should weigh the hours claimed in light of his own knowledge, experience, and expertise in the time required to complete analogous activities. The possibility of duplication must be considered if more than one attorney is involved. If there are more lawyers in the courtroom than necessary, the additional time should be discounted. Investigation, clerical work, and compilation of facts and statistics, even if performed by an attorney, should be compensated at a lesser rate. *Id.*
55. *Id.* at 718. Cases of first impression generally require more time and effort. The attorney should be appropriately compensated for accepting the challenge of undertaking a case which might make new law. *Id.*

the skill requisite to perform the legal service properly;[56] the preclusion of other employment by the attorney due to acceptance of the case;[57] the customary fee;[58] whether the fee is fixed or contingent;[59] time limitations imposed by the client or the circumstances;[60] the amount involved and the results obtained;[61] the experience, reputation, and ability of the attorney;[62] the undesirability of the case;[63] the nature and length of the professional relationship with the client;[64] and awards in similar cases.[65]

In utilizing these criteria in establishing its new guidelines, the court in *Thom* also looked to two cases decided by the Second Circuit Court of Appeals in 1974 dealing with reasonable attorney's fees under the Clayton Act.[66] The court in *Thom* maintained that despite the difference between antitrust actions and eminent domain pro-

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56. *Id.* The trial judge should carefully observe the attorney's work product, preparation, and general ability in court, using his own experience as a lawyer and his observations from the bench. *Id.*

57. *Id.* Once otherwise available business is foreclosed, first, because of conflicts of interest which occur from the case and, second, from the fact that once the case is assumed the attorney has made a commitment of time to his client and has reduced or eliminaed time for other purposes. *Id.*

58. *Id.* The customary fee in the community for similar work should be considered. However, the fee for strictly legal work should never fall below the $20 per hour prescribed by the Criminal Justice Act, 18 U.S.C. § 3006A(d)(1) (Supp. 1978). As long as minimum fee schedules are in existence and are customarily followed by the lawyers in a given community, they should be taken into consideration. 488 F.2d at 718.

59. *Id.* The fee quoted to the client or the percentage of recovery agreed to is a helpful guideline in demonstrating the attorney's expectations. Such arrangements are not binding on the court, and may limit the amount of the award to the maximum the client is contractually bound to pay, or less. *Id.*

60. *Id.* Priority work which delays the attorney's other legal work is entitled to a premium. This is particularly important when counsel joins a case well along in proceedings. *Id.*

61. *Id.* Although the court should consider the amount of damages, it should not overlook the decision's effect on the law. If the decision corrects across-the-board [problems] the attorney's fee award should reflect the relief granted. *Id.*

62. *Id.* at 718-19. Most fee schedules reflect an experience differential. There should also be a difference reflecting a specialty if there is corresponding ability. *Id.*

63. *Id.* at 719. For example, civil rights attorneys face hardships in their communities because of their desire to help the civil rights litigant. Often the person's decision to help eradicate discrimination will not be pleasantly received by the community, having an adverse economic impact on the person's practice. *Id.*

64. *Id.* An attorney in private practice may vary his fee for similar work in light of the professional relationship with the client. The court may consider this factor in its determination. *Id.*

65. *Id.* Reasonableness may also be judged in light of awards made in similar litigation in and out of the court's circuit. *Id.*

66. City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974) [hereinafter cited as Grinnell I]. It dealt with private antitrust national class actions. Of interest here is the ruling that a $10 million settlement was not inadequate as a matter of law but that $1.5 million in attorney's fees was excessive. The court adopted the concept that the purpose of the equitable fee award is to "compensate the attorney for the reasonable value of services benefitting the . . . claimant." *Id.* at 470, *quoting* Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 167 (3d Cir. 1973).

The Grinnell I court, *citing* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 245 F. Supp. 258, 302 (M.D. Pa. 1965), *vacated on other grounds*, 377 F.2d 776 (3d Cir. 1967), *aff'd in part and rev'd in part*, 392 U.S. 481 (1968), adopted eight "generally accepted factors to be weighed in determining a reasonable attorney's fee", as follows: (1) whether the plaintiff's counsel had the benefit of a prior judgment or decree in a case brought by the government; (2) standing of the counsel at bar for both sides; (3) time and labor spent; (4) magnitude and complexity of the litigation; (5) responsibility undertaken; (6) amount recovered; (7) the knowledge the court has of conferences, arguments presented and of work shown by the record to have been done by attorneys prior to trial; and, (8) what it would be reasonable for counsel to charge a victorious plaintiff.

ceedings, the same factors should be considered in establishing reasonable attorney's fees.[67]

For a North Dakota trial court to determine reasonable attorney's fees pursuant to statute[68] and in accordance with the guidelines set up in *Thom* it is first necessary to determine the number of hours expended[69] and the appropriate hourly rates.[70] These are to be the predominant factors.[71] In addition, the trial court should consider the factors established in *United Development*.[72]

The Thom ruling specifies that reasonable attorney's fees cannot be based on any single item and allows the trial judge to include other factors he finds significant.[73] However, the court must rely on evidence and justify its award in specific findings.[74]

The dissent in *Thom* argued that the majority decision to base awards on hourly rates guarantees the result that "heads the State wins, and tails, the landowner loses."[75] The dissent pointed out that if the attorney fails to get an award greater than the amount on deposit for settlement, he gets nothing,[76] which is the classic contingent fee situation. In addition, under the *Thom* decision, the attorney would get only an hourly rate, and the risk of no recovery would still exist without the balancing benefit of the possibility of a large increase.[77]

The new guidelines appear to provide wide latitude in setting awards of reasonable attorney's fees. Even if it happens that awards continue at the contingent fee level as they have in the past, the lower courts are at least put on notice that they must fully document and justify such awards.

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Risk in litigation was listed as an additional factor to be considered. 245 F. Supp. at 302.

In a subsequent decision, City of Detroit v. Grinnell Corp,, 560 F.2d 1093 (2d Cir. 1977) [hereinafter cited as Grinnell II], the award of attorney's fees and other costs for employment of paraprofessionals and accountants determined on remand was appealed. The court reduced the award to a reasonable amount, the reduction reflecting the lack of any risk of litigation factor, lack of complexity of the issues, the fact that although the class action expanded from 21 clients with purchases of $1 million to 14,000 claimants with total purchases of $38 million the increase did not appear to have resulted exclusively from the ingenuity and preseverance of the attorney, the case had many precedents, and the elimination of a charge for time spent in preparing the fee application which benefitted the attorney, but not the client. *Id.*

67. 261 N.W.2d at 645.

68. N.D. CENT. CODE § 32-15-32 (1976).

69. 261 N.W.2d at 646. Findings of hours expended should be based upon contemporaneous records or, when not available, upon reasonable reconstruction or estimates of time. *Id.*

70. *Id.* This is to be based upon the attorney's experience and reputation and can be adjusted upwards or downwards on the basis of an objective evaluation of the complexity and novelty of the litigation and the corresponding degree of skill displayed by the attorney. *Id.*

71. *Id.*

72. 133 N.W.2d at 443.

73. 261 N.W.2d at 646.

74. *Id.*

75. *Id.* at 650 (Vogel, J., dissenting).

76. *Id.*

77. *Id.*