

Amici Request En Banc Review of Standards on Fee-Splitting

New York Law Journal (Online)

September 18, 2009 Friday

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New York Law Journal

Length: 879 words

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Body

Recent federal court decisions establish a "virtually insurmountable" standard for determining fees for out-of-district counsel that will "rob some civil rights plaintiffs of the only representation they can find," insists a broad coalition of 30 public interest organizations and private law firms.

An [amicus brief filed yesterday](#) on behalf of the group by the Brennan Center for Justice and Paul, Weiss, Rifkind, Wharton & Garrison asks the U.S. Court of Appeals for the Second Circuit for en banc consideration of the standard adopted in *Lochren v. County of Suffolk*, 08-2723-cv, and [Simmons v. New York City Transit Authority](#), 575 F.3d 170 (2009).

In *Lochren*, the circuit concluded that to be compensated at their standard rates, out-of-district counsel must "persuasively establish that a reasonable client would have selected" them "because doing so would likely (not just possibly) produce a substantially better result" than a lawyer within the district.

This approach "ignores the fact that the Eastern and Southern District are part of a single integrated city," the *Lochren* amici wrote. They say that it ignores the "high frequency" with which Eastern District civil rights plaintiffs, including those in Long Island, turn to Manhattan-based counsel.

List of Amici

Alterman & Boop
Anti-Discrimination Center
Asian American Legal Defense and Education Fund
Beldock Levine & Hoffman
Brennan Center for Justice
Brian L. Bromberg Law Office
Chittur & Associates
Conover Law Offices
Eisenberg & Schnell
Emery Celli Brinckerhoff & Abady
Fair Housing Justice Center
Housing Works
Impact Fund
Janice Goodman Law Offices

Kraus & Zuchlewski
Lambda Legal Defense and Education Fund
Lansner Kubitschek Schaffer & Zuccardy
LatinoJustice PRLDEF
League of Women Voters of New York State
Legal Action Center
Legal Aid Society of New York City
MFY Legal Services
National Consumer Law Center
National Employment Law Project
National Employment Lawyers Association, New York
National Women's Law Center
Neighborhood Economic Development Advocacy Project
Neufeld Scheck & Brustin
New York Lawyers for the Public Interest
Vladeck, Waldman, Elias & Engelhard

The standard "substantially limits, if not eliminates, the ability of victims of civil rights violations with claims arising in the Eastern District to have access to the larger and frequently more experienced pool of Manhattan counsel," the brief says. "Manhattan counsel are also more likely to be economically equipped to take on civil rights cases in which counsel will receive no fee at all if the plaintiff does not prevail."

In *Lochren*, six female police officers claimed that the Suffolk County Police Department gave them limited duty assignments when they were pregnant. While they sought more than \$1 million in fees, Eastern District Magistrate Judge Arlene Rosario Lindsay reduced that amount to \$578,704 to be divided among the New York Civil Liberties Union, the American Civil Liberties Union, Outten & Golden of Manhattan, Leon Friedman of Manhattan, and Rosen Leff of Hempstead. The plaintiffs were awarded \$56,087 in damages.

Earlier this month, the circuit upheld the ruling, citing the standard articulated in *Simmons*.

Simmons created a presumption in favor of using the customary rates in the district where a case is litigated. To overcome this presumption, a lawyer has to show that using counsel from the district would have led to a "substantially inferior result" ([NYLJ, Aug. 4](#)).

'Single, Integrated City'

The amici maintain that the standard violates common sense and contravenes the goal of the federal civil rights fee-shifting statute, 42 U.S.C. §2000e-5(k), which permits litigants with meritorious claims to retain competent counsel.

Under that standard, judges will have to ask "such unanswerable questions" as to whether a hypothetical client would characterize a result obtained by a Manhattan lawyer as "substantially better," or merely "better" than an alternative result obtained by a lawyer from the district, they contend.

"The resulting unpredictability will cause some civil rights counsel to avoid taking out-of-district cases, making it impossible to find representation, in direct contravention of Congress' intention," the amici say.

Laura K. Abel, deputy director of the Brennan Center, said in an interview that the Lochren/Simmons decisions "narrow the pool" of attorneys available who can afford to take on civil rights matters, adding that these lawyers "need to have some reliable source of income" to keep the lights on and pay for legal research.

And in some instances, plaintiffs need the expertise of organizations, which is not necessarily available outside of Manhattan, she added.

Gregory Scott Antollino, the attorney who represented the plaintiff in Simmons and whose fee was cut by 21 percent, said he did not ask for en banc review of that ruling because doing so would have not been in the interest of his client, whose award would have been delayed.

In addition to Ms. Abel, David S. Udell and Mitali Nagrecha of the Brennan Center and Sidney S. Rosdeitcher of Paul Weiss worked on the amicus brief.

Mr. Friedman, who also teaches at Hofstra University School of Law, represents the plaintiffs on appeal. He was not available for comment.

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