GEORGE MARBLEY, KATIE McCLAIN, and ELLEN BEAUREGARD on behalf of themselves and all others similarly situated, Plaintiffs, -against- MARY JO BANE, individually and as the Commissioner of the New York State Department of Social Services, JAMES P. McCAFFREY, as Commissioner of Albany County Department of Social Services, ORA LANGDON, as Commissioner of the Franklin County Department of Social Services, on behalf of themselves and all other county commissioners of Social Service Districts within the State of New York, Defendants.

93-CV-393

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

1995 U.S. Dist. LEXIS 19030

December 18, 1995, Dated
December 20, 1995, FILED

COUNSEL: [*1] APPEARANCES:

PUBLIC UTILITY LAW PROJECT OF NEW YORK, INC., OF COUNSEL: B. ROBERT PILLER, ESQ., CHARLES BRENNAN, ESQ., GERALD NORLANDER, ESQ., Albany, New York, for plaintiffs.

G. OLIVER KOPPELL, Attorney General for the General, State of New York, The Capitol, OF COUNSEL: JEFFREY DVORIN, ESQ., Asst. Attorney, Albany, New York, for State defendants.

FRANKLIN COUNTY DEPARTMENT OF SOCIAL SERVICES, OF COUNSEL: JONATHAN C. WOOL, ESQ., Franklin County Courthouse, Malone, New York, for defendant Langdon.

JUDGES: Thomas J. McAvoy, Chief U.S. District Judge

OPINION BY: Thomas J. McAvoy

OPINION

MEMORANDUM, DECISION & ORDER

I. BACKGROUND & FACTS

This motion is by the plaintiff, and seeks attorney's fees pursuant to 42 U.S.C. § 1988. The motion is before the court having been remanded by the Circuit court for "a determination of whether the litigation was a legally sufficient cause of the change in the Policy and - if so - the amount, if any, of reasonable attorney's fees." Marbley v. Bane, 57 F.3d 224, 235 (2d Cir. 1995).

The facts in this case are well-known, and need not be recited at length herein. In brief, the plaintiffs brought this suit as two classes of individuals [*2] living in federally subsidized housing who, pursuant to a New York state Department of Social Services policy ("Policy"), automatically had their Home Energy Assistance Program ("HEAP") payments reduced or eliminated.

Effective in October 1992, new language in section 927 of the Federal Housing and Community Development Act ("Act") sought to ameliorate the situation by effectively stating that individuals in federally subsidized housing could not have their HEAP payments reduced. The plaintiffs' attorneys advised the state of the change in the law by a letter dated February 2, 1993. [1] In the February 2, 1993 letter, the plaintiffs also threatened the state with litigation if the state did not remedy their apparently unlawful practice.

1 Although it would be surprising to the court that the Department of Social Services had no

knowledge of the passage of section 927.

On February 12, 1993, the state Department of Social Services ("DSS") responded to the plaintiffs' letter and, although stating that DSS considered [*3] its Policy to be "sound" and "correct" under federal and state law, indicated to the plaintiffs that DSS had sought the opinion of the U.S. Department of Health and Human Services ("HSS") with respect to section 927 of the Act. The letter also informed the plaintiffs that their February 2, 1993 letter had been attached to DSS' letter to HHS.

On March 25, 1993, the plaintiffs filed the present action with this court. The plaintiffs sought various forms of declaratory, injunctive and monetary relief. The parties engaged in discovery, and on August 20, 1993, the plaintiffs moved for summary judgment.

On August 23, 1993, the defendant Commissioner released for public comment the draft HEAP plan for 1993-1994. That draft deleted the challenged Policy, without explanation.

II. DISCUSSION

A. Partially Prevailing Party

The plaintiffs argue that they are "partially prevailing parties" in this action, and as such, are entitled to an award of reasonable attorney's fees. In essence, the plaintiffs argue that the present lawsuit was the "catalyst" for a change in the state Policy that automatically reduced or eliminated HEAP subsidies to tenants in federally-subsidized housing [*4] who paid for their heat out of their own pockets. The Policy is no longer contained in the HEAP plans.

The Second Circuit has held that a party need not receive a favorable final judgment to be considered a prevailing party in a lawsuit. See Marbley v. Bane, 57 F.3d 224, 233 (2d Cir. 1995) (citation omitted). Rather, as stated by the Supreme Court, "[a] lawsuit sometimes produces voluntary action by the defendant ... *e.g.,* ... a change in the conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor." Hewitt v. Helms, 482 U.S. 755, 760-61, 107 S. Ct. 2672, 2675-76, 96 L. Ed. 2d 654 (1987). This so-called "catalyst theory" has been accepted by the Second Circuit, although with the recognition that it remains ill-defined. See Marbley, 57 F.3d at 234. Nevertheless, the circuit court has recently articulated the governing rule: "recovery of fees on a catalyst theory requires an applicant to demonstrate a causal connection between the litigation and the recovery of benefits." McManus v. Gitano Group, Inc., 59 F.3d 382, 384 (2d Cir. 1995) *(citing,* Marbley, [*5] 57 F.3d at 234-35.). In Marbley, that requirement of a causal connection is met when a plaintiff secures "a goal sought in litigation, by threat of victory (and not by dint of nuisance and threat of expense) ..." 57 F.3d at 234-35.

B. Catalyst And Threat Of Victory

The plaintiffs argue that their actions were the catalyst for the state's change in policy, and that this lawsuit presented a threat of victory, thereby satisfying the standard set forth by the Second Circuit. See Id. More specifically, the plaintiffs claim that the defendants knew of the change in section 927 in early November 1992, shortly after it was enacted. Notwithstanding that alleged knowledge, the state continued to adhere to its now apparently unlawful Policy in the 1993 HEAP plan. The plaintiffs also argue that the defendants consistently defended the legality of the Policy until releasing the draft HEAP plan for 1994, just three days after the plaintiffs moved for summary judgment in this case. Prior to that time the plaintiffs had demanded a change in policy by letter, had filed a lawsuit seeking a myriad of relief, engaged in discovery which apparently revealed no empirical evidence to support [*6] the state's rationale for the Policy, and had moved for summary relief. According to the plaintiffs, all these reasons show that the plaintiffs were the catalyst for the change in policy, and show that they posed a threat of victory.

The defendants argue that the plaintiffs' actions had no bearing whatsoever on the decision to change the Policy. Rather, the defendants argue that prior to the commencement of this litigation, they sought guidance from HHS as to the propriety of the Policy. The defendants then point out that HHS did not respond until June 8, 1993, well after the litigation had commenced. Moreover, the defendants argue that HHS did not give a definitive response.

In its response, HHS refused to interpret section 927, but did "provide guidance" as to how HHS would view the state's continuation of the Policy, and such "guidance ... was not supportive." Memorandum Of Law In Opposition To Plaintiff's [sic] Application For Attorney's Fees at 4. The defendants claim that the HHS letter

recognized that most states had not become aware of the enactment of section 927 until after the HEAP plans for 1993 had been drafted and money had been spent in furtherance of those plans, [*7] and accordingly, HHS would tolerate such plans. The defendants then state that "based on the June 8th letter, and on additional information which had recently become available, [2] the Department decided to revise its 1994 HEAP schedules to provide full HEAP benefits to subsidized housing tenants who pay separately for heat." Id., at 5. The defendants point out that the fact that the Policy was changed during the pendency of the litigation does not establish a right to recover fees. Marbley, 57 F.2d 227, 234.

2 This information remains unidentified.

The court does not find either side compelling. As noted by the Second Circuit, the plaintiffs' justification for being granted prevailing party status, "may entail some *post hoc* reasoning ..." Id., at 233. The plaintiffs essentially argue that because the defendants announced a change in the Policy three days after they moved for summary judgment, the litigation was the catalyst for that change.

The defendants seem wedded to a notion that the date [*8] of commencement of litigation has some magical preclusive effect on an opponents' subsequent application for fees. The court concedes that the bulk of the case law relating to a determination of prevailing party status is in the context of a party who has filed an action and prevailed to some degree with a final judgment. However, that should not preclude consideration of the issue for those whose actions in furtherance of their litigation goals transpired prior to the commencement of the action. See, generally Marbley, 57 F.3d at 234-35; *see also,* Colorado Environmental Coalition v. Romer, 796 F. Supp. 457 (D. Colo. 1992) (applying catalyst test).

In Colorado Environmental Coalition, the plaintiff was found to be a prevailing party even though the dispute was settled *before the case was filed.* The issue related to alleged violations by the state of the Safe Drinking Water Act over a period of three years. The Colorado Environmental Coalition court found that the actions of the plaintiff, i.e., sending a notice of violations letter and entering into settlement negotiations, was the catalyst for the defendants' actions. Id., at 459. The court further reasoned [*9] that looking to the date the complaint is filed is "a much too cramped definition of 'litigation'" for the purposes of the Act. Id., at 460. The court then highlighted the fact that a more expansive definition of litigation that extended to "when the plaintiff sent the statutorily required notice of violations letter and threatened to bring a citizen suit" was preferred. Id. The court then concluded that "a plaintiff who forces compliance with the mandate of Congress should not be penalized because a defendant bows to the inevitable before the complaint is even filed." Id.

At the outset, the court notes that the plaintiffs seek fees pursuant to 42 U.S.C. § 1988. The aim of the statute is to ensure that the private plaintiff has access to the courts, that competent counsel be attracted to prosecute such actions, and to effectuate the intent of Congress. See, generally Blanchard v. Bergeron, 489 U.S. 87, 109 S. Ct. 939, 103 L. Ed. 2d 67 (1989); Sherrill v. J. P. Stevens & Co., 441 F. Supp. 846 (W.D.N.C. 1977). Accordingly, the court agrees with the Colorado Environmental Coalition court that an expansive rule for determining prevailing party status should be [*10] applied in this case. 796 F. Supp. at 460.

In the present case, the defendants admit that the HHS letter was a factor that prompted DSS to change the Policy in the 1994 HEAP plan. The record shows that the defendants only sought the guidance of HHS after being notified of their failure to comply with section 927 of the Act and being threatened with a lawsuit in the plaintiffs' February 2, 1993, letter. There are no facts to suggest that the defendants even contemplated seeking HHS review of the Policy prior to the plaintiffs' February 2, 1993, letter. To the contrary, as stated in the defendants' February 12, 1993, letter, the defendants were quite resolute as to their position. Moreover, the defendants attached the February 2, 1993, letter to their own February 12, 1993, letter to HHS. There can be little clearer indication to this court that the February 2, 1993 letter, in which the plaintiffs pointed out the failure to comply with federal law and threatened to sue, was the catalyst for the defendants' ultimate reversal as to the Policy.

As to the threat of victory, the Second Circuit ruled that the eleventh amendment bar, applied by this court to dismiss the plaintiffs' claims, [*11] did not bar the plaintiffs' claims from inception, but rather "barred a *subsequent* declaratory judgment or injunction ..." Marbley, 57 F.3d at 235. Prior to the application of the eleventh amendment, this court had essentially determined that the plaintiffs could go forward, thus

evincing a threat of victory. See Marbley, 57 F.3d at 235 ("... the district court is not required to resolve the merits of the lawsuit in order to decide an application for attorney's fees.").

Based on the foregoing analysis, the plaintiffs are prevailing parties for the purposes of determining an award of reasonable attorney's fees.

C. Calculation Of Attorney's Fees

"The 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. 424, 434, 103 S. Ct. 1933, 1939, 76 L. Ed. 2d 40. In general, the reasonable rate used in a determination of the amount of attorneys' fees to be awarded "should be calculated according to the prevailing rates in the community *'for similar services by lawyers of reasonably comparable skill, experience and reputation.'"* Cefali v. Buffalo Brass [*12] Co., Inc., 748 F. Supp. 1011, 1018 (W.D.N.Y. 1990) (quoting Chambless v. Masters, Mates & Pilots Pension Plan, 885 F.2d 1053, 1058-59 (2d Cir. 1989)), *cert. denied,* 496 U.S. 905, 110 S. Ct. 2587, 110 L. Ed. 2d 268 (1990) (emphasis in original). The Second Circuit has articulated that the proper rule is for the district court to "consider the prevailing rates in the district in which the court sits." Polk v. New York State Dep't. of Correctional Servs., 722 F.2d 23, 25 (2d Cir. 1983) (awarding attorneys' fees under Section 1988).

The rationale for this rule lies in its simplicity and neutrality. Donnell, 220 U.S. App. D.C. 405, 682 F.2d 240, 251. It allows the district court to determine "the prevailing market rate within its jurisdiction, an inquiry about which it should develop expertise." Id. Further, such a rule does not work

> to any clear advantage for either those seeking attorneys' fees or those paying them. High-priced attorneys coming into a jurisdiction in which market rates are lower will have to accept those lower rates for litigation performed there. Similarly, some attorneys may receive fees based on rates higher than they normally command if those higher rates are [*13] the norm for the jurisdiction in which the suit was litigated.

Id. Therefore, the appropriate hourly fee to be applied in calculating an award of attorneys' fees is the prevailing rate in the district in which the suit is litigated, irrespective of the fee usually charged by the attorney.

Certain exceptions to this rule have been articulated. Such exceptions include: (1) the need for "special expertise of counsel from a distant district," Polk, 722 F.2d at 25, (2) "when local counsel are unwilling to handle the case," In Re "Agent Orange" Product Liability Litigation, 611 F. Supp. 1296, 1308 (E.D.N.Y. 1985), *aff'd in part and rev'd in part,* 818 F.2d 226 (2d Cir. 1987), and (3) "when a lawyer files a suit in his or her home district that is properly maintainable there, and the case is transferred to the forum district . . . ." Id. *(quoting,* Polk, 722 F.2d at 25). However, the District of Columbia Circuit articulated that a case for which much of the work must be performed away from the district court's community does not alone provide a sufficient reason for deviating from the general rule. Donnell, 682 F.2d at 252.

This case does not fit into [*14] any of the articulated exceptions to the locality rule. Accordingly, the Court will apply the prevailing market rates found within the Northern District of New York in its calculation of attorneys' fees to be awarded to plaintiffs. The defendants have suggested a schedule of hourly rates which the court finds appropriate given that it reflects the expertise and experience of the attorneys involved. Therefore, the court will award attorneys' fees in the present action based on the following hourly rates:

Attorney	Hourly Rate
Piller, Esq.	$150
Norlander, Esq.	$150
Brennan, Esq.	$135

Fletcher, Esq.	$100

These rates were used by the court to compute the so-called "loadstar" figure. The court has reviewed the time sheets submitted by the plaintiffs' counsel, the papers in opposition to those time sheets, and the reply papers to the opposition. The court has determined that the amount of time recorded on the time sheets is reasonable given the complexity of the issues and the scope of the case. Applying the rates set forth above to the time calculations submitted to the court yields a loadstar figure of $ 147,222.50. [3]

3 This amount does not include costs and expenses in the amount of $ 225.00.

[*15] The calculation of the fee award does not end with the computation of a sum from the reasonable fees multiplied by the hours expended, the so-called loadstar. Other factors "may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained.'" Hensley, 461 U.S. at 435, 103 S. Ct. at 1940. The defendants argue that the time expended on various projects related to this action is excessive, and that such experienced attorneys should be "embarrassed" for billing such amounts of time. The court does not share the defendants' view. At a minimum, the court recognizes that the plaintiffs' counsel is not a law firm billing private clients on a regular basis, and may not demand the same level of efficiency suggested by the defendants. [4] Moreover, the court does not find that the time expended on any project was unreasonable.

4 The court nevertheless stresses its unwillingness to tolerate unreasonable expenditures of time.

The plaintiffs have suggested that [*16] the court divide the litigation into three phases and adjust the fee award accordingly. The court, however, declines the plaintiffs' invitation, and will determine the fee adjustment based on an assessment of the relief sought versus the relief gained.

The plaintiffs sought no less than eight separate forms of declaratory, injunctive, and monetary relief. [5] The plaintiffs have not received a final judgment, and thus many forms of relief sought were not obtained. It appears to the court that the sole relief gained by the action was DSS' conformity with section 927 of the Act. The court, however, recognizes that much of the declaratory relief sought by the plaintiffs was aimed at effectuating that very result. In fact, much of the relief sought was mooted by the state's compliance with section 927. Nevertheless, it is clear that the plaintiffs did not receive a damages award, an amount that may well have been significant. In addition, the plaintiffs did not prevail as to any injunctive relief sought. Thus, the court determines that having secured only a fraction of the relief sought, that the loadstar figure should be reduced to reflect that fact. The court determines that the loadstar [*17] figure should be reduced by two-thirds, with the one-third award representing a reasonable fee award for the relief gained by the plaintiffs.

5 Complaint at 18 (WHEREFORE clause).

For the foregoing reasons, the Court awards attorney's fees to the plaintiffs in the amount of $ 49,296.16.

IT IS SO ORDERED.

Dated December 18, 1995

at Binghamton, New York

Thomas J. McAvoy

Chief U.S. District Judge