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THE FEE AWARDS ACT OF 1976: EXAMINING THE FOUNDATION FOR LEGISLATIVE REFORM OF ATTORNEY'S FEES SHIFTING

RANDALL R. RADER*

INTRODUCTION

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.¹

Since first established by the Supreme Court in 1796,² the basic rule for the compensation of counsel within the American judicial system has been that each litigant pay his own attorney. In the absence of a statutory rule to the contrary, courts do not involve themselves in private economic transactions between litigants and their chosen legal representatives. Regarding the power of judicial officers to require a losing party to pay the attorney's fees of a successful litigant, the Supreme Court has forthrightly pronounced that attorney's fees "are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor."³

In 1967, Chief Justice Earl Warren articulated some reasons why American courts opted not to apply the English rule authorizing courts to set compensation for attorneys: "[S]ince litigation is at best uncertain, one should not be penalized for merely defending or prosecuting a lawsuit, and . . . the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponent's counsel."⁴ The American rule also has the virtue of ensuring that an attorney only serves one master, thus avoiding

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1. 42 U.S.C. § 1988 (1976).

2. *Arcambel v. Wiseman*, 3 Dall. 306 (1796).

3. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967) (attorney's fees are not recoverable under the Lanham Act).

4. *Id.* at 718.

potential conflicts which might arise if an attorney's compensation were determined by a source other than his client.

American courts have fashioned two common law exceptions to the traditional rule that each party pay his own attorney. The first exception to the American rule arises when a party, at his own expense, creates a fund or achieves a substantial benefit in which others share. This exception, known as the common-fund doctrine, does not shift the cost of attorneys to the losing party, but rather to those who benefit from the suit.⁵ As stated by the Supreme Court in 1980, "[t]he common-fund doctrine . . . is entirely consistent with the American rule against taxing the losing party with the victor's attorney's fees . . . each class member [has an] equitable obligation to share the expenses of litigation."⁶

The second exception to the American rule is that "a federal court may award counsel fees to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons."⁷ In cases involving bad faith, the rationale for assessing fees against the unsuccessful litigant is punitive. In "narrowly defined circumstances," an attorney, as well as a party, who abuses judicial processes can be charged with the fees of his opponent's attorney.⁸

Prior to 1975, federal courts had begun to forge a third exception to the American rule. On the theory that the courts should provide some incentive and reward for attorneys who enforce certain important rights, some lower federal courts had created a "private attorney general" rationale for shifting attorney's fees.⁹ In the case of *Alyeska Pipeline Service Co. v. Wilderness Society*,¹⁰ the Supreme Court ruled that federal courts, in the absence of express statutory authorization, lack power to

5. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970) (absence of statutory authorization did not preclude fee award to minority shareholders entitled to relief for misrepresentation in corporate merger); *Trustees v. Greenough*, 105 U.S. 527 (1881) (bondholders in successful action against bond security fund trustees for waste and mismanagement were entitled to counsel fees).

6. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 481-82 (1980) (class action by bondholders).

7. *Hall v. Cole*, 412 U.S. 1, 5 (1973).

8. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765 (1980) (award of fees for abuse of discovery held not authorized by 28 U.S.C. § 1927, but within Court's inherent powers).

9. For an extensive listing of lower federal court cases which employed the private-attorney-general approach, see *Alyeska Pipeline Co. v. Wilderness Soc'y*, 421 U.S. 240, 270 n. 46 (1974).

10. 421 U.S. 240 (1974) (plaintiffs sought an injunction to prevent the issuance of construction permits for the trans-Alaska oil pipeline).

create such an exception.¹¹ The primary reason given by the Court for rejecting the private attorney general exception to the American rule was that "it would be difficult, indeed, for the courts, without legislative guidance, to consider some statutes important and others unimportant and to allow attorneys' fees only in connection with the former."¹² Applying these principles, the Court held that fees could not be awarded simply on the basis of the public interest nature of litigation.

Alyeska also clarified the basic rule that Congress is free to create exceptions to the American rule by enacting statutes specifically authorizing the award of attorney's fees to a prevailing party. In response to the *Alyeska* case, Congress has repeatedly enacted such statutory exceptions. With such enactments, Congress has stated its intent to rely upon "private attorneys general," in lieu of administrative programs and sanctions, to judicially enforce many of its policies.¹³

As these federal fee shifting statutes have multiplied to well over 100,¹⁴ the number of fee awards and the complexity of litigation to determine the amount of such awards has increased almost exponentially.¹⁵ For instance, during one month of 1980, the United States Supreme Court rendered six major attorney's fees rulings, nine rulings for that entire year.¹⁶ In the same

11. [C]ongressional utilization of the private attorney concept can in no sense be construed as a grant of authority to the Judiciary to jettison the traditional rule against non-statutory allowances to the prevailing party and to award attorneys' fees whenever the court deems the public policy furthered by a particular statute important enough to warrant the award.

Id. at 263.

12. *Id.* at 263-64.

13. *See, e.g.*, H.R. REP. No. 1558, 94th Cong., 2d Sess. 2-3 (1976) (reports accompanying the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988 (1976)).

14. *See* E. LARSON, FEDERAL COURT AWARDS OF ATTORNEY'S FEES, App. C. (1981); Rose, *Reform of Civil Rights Fee Award Practices Needed*, Legal Times, Feb. 13, 1984, at 13. (Mr. Rose speaks of "approximately 129" fee shifting statutes.)

15. Larson, *Attorney's Fees Under the Civil Rights Attorney's Fees Awards Act of 1976*, 1981 CLEARINGHOUSE REV. 309.

16. *Hughes v. Rowe*, 449 U.S. 5 (1980) (award of fees for defense of complaint against state corrections officers held improper under 42 U.S.C. § 1988); *Maher v. Gagne*, 448 U.S. 122 (1980) (award of fees under Civil Rights Attorney's Fees Award Act against state not barred by eleventh amendment); *Maine v. Thiboutot*, 448 U.S. 1 (1980) (award of fees to persons unlawfully deprived of welfare benefits upheld under 42 U.S.C. § 1983 and 1988); *Roadway Express v. Piper*, 447 U.S. 752 (1980) (award of fees within Court's inherent power); *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980) (federal district court's award of fees for successful prosecution of discrimination claim held proper under 42 U.S.C. § 2000 e-5(k)); *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719 (1980) (award of fees under 42 U.S.C. § 1988 to enforce prohibition against attorney advertising); *Hanrahan v. Hampton*, 446 U.S. 754 (1980) (plaintiff who did not prevail on

year, the Fifth Circuit Court of Appeals issued over 50 reported decisions on attorney's fees.¹⁷ Many of these awards are not inconsequential. In one case, the Center for Law in the Public Interest was awarded \$2,204,534.99.¹⁸ A further indication that litigation over attorney's fees has snowballed is that the West Publishing Company's case annotations accompanying 42 U.S.C. § 1988, the Civil Rights Attorney's Fees Awards Act of 1976,¹⁹ now occupy over 179 pages of fine print.²⁰

Ironically, the statutory exception is threatening to engulf the entire American rule on award of attorney's fees. Already these exceptions have called into question one of the primary policy underpinnings for the rule. In *Fleischmann v. Maier Brewing Co.*,²¹ the Supreme Court provided an important explanation for the American rule by determining that "the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney's fees would pose substantial burdens for judicial administration."²² The time, expense, and difficulties of proof in attorney's fees litigation engendered by the multiplication of private attorney general statutes already impose substantial burdens on judicial administration. In this regard, Justice Brennan recently wrote that attorney's fees litigation all too often "serves no productive purpose, vindicates no one's civil rights, and exacerbates the myriad problems of crowded appellate dockets."²³ In a similar tone, the entire Court in 1983 commented that "a request for attorneys' fees should not result in a second major litigation."²⁴ In that same 1983 case, Justice Brennan wrote a colorful concur-

merits not entitled to fees under Civil Rights Attorney's Fees Awards Act); *Bloomer v. Liberty Mutual*, 445 U.S. 74 (1980) (stevedore-employer not required under Longshoremen's and Harbor Workers Compensation Act to share longshoremen's legal costs against shipowner); *Boeing v. Van Gemert*, 444 U.S. 472 (1980) (award of fees to attorneys representing class of all holders of defendant company's convertible debentures approved under common-fund theory).

17. See E. LARSON, *supra* note 14, App. D.

18. *Keith v. Volpe*, 501 F. Supp. 403 (C.D. Cal. 1980) (attorneys successfully challenged freeway project to ensure compliance with affirmative action and environmental regulations).

19. 42 U.S.C. § 1988 (1976).

20. 42 U.S.C.A. § 1988 (West 1981) at 155-305 and (West Supp. 1983) at 13-48. The Foreword of a new three-volume treatise on attorney's fees litigation aptly characterizes this alarming growth. "[This] new field of law . . . has grown so fast and become so complex that it has baffled the efforts of courts and lawyers to comprehend and apply it." Cutler, *Forward* to M. DERFNER & A. WOLF, *COURT AWARDED ATTORNEY FEES* (1983).

21. 386 U.S. 714 (1967).

22. *Id.* at 718.

23. *Hensley v. Eckerhart*, 103 S. Ct. 1933, 1950 (1983) (Brennan, J., concurring in part, dissenting in part).

24. *Id.* at 1941.

rence capturing the Court's frustration. Justice Brennan determined "[u]ltimately [the fee shifting statute's] straightforward command is replaced by a vast body of artificial, judge-made doctrine, with its own arcane procedures, which, like Frankenstein's monster, meanders its well-intentioned way through the legal landscape leaving waste and confusion (not to mention circuit splits) in its wake."²⁵

Although Congress has not consciously determined to repeal the American rule, its enactment of myriad fee shifting statutes has seriously eroded the foundations of that 197-year-old policy. E. Richard Larson, author of a major treatise on court-awarded attorney's fees, shares this assessment:

The bread-and-butter character of fee awards, not surprisingly, has spawned an extraordinary amount of fee litigation in recent years. . . . The explosion of fee litigation has occurred primarily because the "American rule"—under which parties are required to bear their own fees—has now become the exception rather than the rule.²⁶

Congress has yet to review comprehensively the impact of its piecemeal enactments on the overall policy of the American rule. The time is ripe for that comprehensive consideration. By focusing on 42 U.S.C. § 1988, this article intends to examine current anomalies in federal fee shifting policy with an eye to legislative corrections which might reinforce the basic policies of the American rule while also supplying adequate incentives to obtain competent counsel for meritorious claims.

CIVIL RIGHTS ATTORNEY'S FEES AWARD ACT OF 1976

The Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. § 1988, best presents the plethora of issues created by current congressional fee shifting policies. Section 1988 was enacted in direct response to the *Alyeska* case. The Senate report provided:

This amendment . . . gives the Federal courts the discretion to award attorney's fees to prevailing parties in suits brought to enforce the civil rights acts which Congress has passed since 1866. The purpose of this amendment is to remedy anomalous gaps in our civil rights laws created by the [*Alyeska* case].²⁷

The House of Representatives noted "[t]he application of these standards will insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights, while avoiding windfalls to attorneys."²⁸

25. *Id.* at 1951.

26. Larson, *supra* note 15, at 309.

27. S. REP., No. 1011, 94th Cong., 2d Sess., 1, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5908.

28. H.R. REP., *supra* note 13, at 9.

The proponents of the Fees Act, as well as most of its opponents, generally agreed on the Act's objective, namely that the "civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate . . . important congressional policies."²⁹ The real question was how to achieve that objective. Because the terms of the Act are few, the operative language consists of only 24 words, the legislative history has been critical to discerning the means Congress chose to reach its purpose. Selected excerpts from that history have been cited to support three different concepts of how Congress intended to ensure that civil rights laws are not left without a means of judicial enforcement.

One viewpoint, with little support in report language or floor speeches, posits that the Act was "not simply to enable civil rights plaintiffs to obtain attorneys, but also to equalize the resources of the parties in these cases by providing the civil rights lawyers with the same economic incentives . . . available to defendant's counsel."³⁰ This position draws support from a few statements made during the debate about potentially disparate resources of civil rights plaintiffs and governmental defendants.³¹ The House report, however, places those comments in their proper context. When discussing the bill's dual standard with respect to prevailing defendants and prevailing plaintiffs, the House report notes that "applying the same standard of recovery to such prevailing defendants would further widen the gap between citizens and government officials and would exacerbate the inequality of litigating strength."³² Congress did take into account the potential disparities between the litigating resources of civil rights plaintiffs and governmental defendants, but it did not attempt to equalize the compensation of plaintiff's and defendant's lawyers. If Congress' objective had been to equalize the resources of the parties, it would not have put the plaintiff at risk of receiving no attorney's fee compensation if he failed to prevail, nor would it have left the award of or amount of the fee to the discretion of the judge.³³ If Congress had wanted to ensure that in all cases civil rights attorneys received the same compensation as defendant attorneys, Congress would

29. S. REP., *supra* note 27, at 2.

30. *Counsel Fees in Public Interest Litigation*, ASS'N OF THE BAR OF THE CITY OF N.Y. REP. 8 (1984).

31. 122 CONG. REC. S.17051 (daily ed. Sept. 29, 1976) (statement of Senator Tunney); H.R. REP., *supra* note 13, at 7.

32. *See supra* note 31.

33. 122 CONG. REC. S.17052 (daily ed. Sept. 29, 1976) (statement of Senator Kennedy).

have had to compensate them for the effort expended in bringing losing, as well as winning, lawsuits.

Congress was simply not interested in equal attorney remuneration when it enacted section 1988. The bulk of the legislative history focuses not on attorneys and their economic incentives, but on redressing civil rights violations and helping citizens who may lack the resources to pursue a meritorious case. Congress focused on needy plaintiffs with meritorious suits, not lawyer remuneration. In the words of Senator Kennedy, "this bill is not for the purpose of aiding lawyers."³⁴ Congress considered the disparate resources of potential litigants only to the degree that it provided a different standard of fee recovery for prevailing defendants and plaintiffs.

The second position on the question of Congress' means for giving civil rights plaintiffs access to the courts is that the Act is designed to encourage litigation.³⁵ At times, language in the reports and debates leave this impression. For example, the Senate report explains that "Congress has commonly authorized attorney's fees in laws under which private attorneys general play a significant role in enforcing our policies. . . . In the civil rights area, Congress has instructed the courts to use the broadest and most effective remedies available to achieve the goals of our civil rights laws."³⁶ The Senate report referred to Title VII of the Civil Rights Act as an example of how Congress had carried out those policies in the past by encouraging judicial enforcement of individual rights.³⁷ Once again, however, Congress did not provide fee awards for all civil rights plaintiffs, but only for *prevailing* civil rights plaintiffs. Congress repeatedly expressed concern that the Act could spawn more litigation.³⁸ Instead of encouraging litigation for litigation's sake, the Act concentrated on removing financial barriers to meritorious lawsuits.

Thus, the most documented position concerning Congress' intent is best explained by the Senate report:

In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to

34. *Id.*

35. 122 CONG. REC. S.16251 (daily ed. Sept. 21, 1976) (statement of Senator Hugh Scott) ("Congress should encourage citizens to go to court. . . .").

36. S. REP., *supra* note 27, at 3.

37. *Id.*

38. 122 CONG. REC. S.16880 (daily ed. Sept. 28, 1976) (statement Senator William Scott) (" . . . this will encourage further litigation . . . we already have a backlog of cases. . . ."); 122 CONG. REC. S.16254 (daily ed. Sept. 21, 1976) (statement of Senator Allen) ("This bill would stir up litigation."); 122 CONG. REC. S.16270 (daily ed. Sept. 21, 1976) (statement of Senator Long) ("For the Government to be paying the lawyers to sue people . . . can be a never-ending thing. . . .").

hire a lawyer. If private citizens are to be able to assert their civil rights and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.³⁹

The key word here is "opportunity." This point of view posits that the Act was intended to remove financial barriers to meritorious adjudications, rather than to encourage suits for their own sake. Senator Mathias, a strong proponent of the Act, expressed this principle by claiming that the goal, to provide access to the courts for those seeking to enforce their civil rights laws, is clear and compelling.⁴⁰ Senator Tunney, the Act's Senate sponsor, echoed that the Act would afford successful plaintiffs "the opportunity to recover what it costs them to vindicate these rights in courts."⁴¹

In accord with this last and prevalent view, considerable language in the House and Senate Reports and other statements during floor consideration in both houses indicated that the Act was a "narrowly drawn" and a "rather limited and cautious [first step]" to enforce only "major civil rights laws."⁴² Nonetheless, it has become the most expansive of all fee shifting statutes. Much of this result can be attributed to the Supreme Court case of *Maine v. Thiboutot*⁴³ which made the Act applicable to a wide range of federal laws beyond the scope of civil rights policies.⁴⁴ In *Thiboutot*, the Court held that section 1983, the Ku Klux Klan Act of 1871, was not limited to civil rights laws but created a potential tort action for every federal statute.⁴⁵ Justice Powell, dissenting, apprehended the significance of this holding for attorney's fees litigation by claiming that "ingenious pleaders may find ways to recover attorney's fees in almost any suit against a state defendant."⁴⁶ He further noted that some section 1983 claims were being pled as an afterthought in order to obtain fees.⁴⁷ Commenting on this warning by Justice Powell, a recent study by the National Association of Attorneys General noted

39. S. REP., *supra* note 27, at 2.

40. 122 CONG. REC. 16251 (daily ed. Sept. 21, 1976) (statement of Senator Mathias).

41. *See supra* note 31.

42. 122 CONG. REC. H.35126 (daily ed. Sept. 21, 1976) (statement of Rep. Kastenmeier) ("narrowly drawn," "only a first step and a rather limited and cautious one"); 122 CON. REC. S.16252 (daily ed. Sept. 21, 1976) (statement of Senator Kennedy) ("major civil rights laws").

43. 448 U.S. 1 (1980).

44. *Id.* at 4.

45. *Id.* (The Ku Klux Klan Act imposes civil liability on any person who, under color of state law, violates "the Constitution and laws" of the United States).

46. *Id.* at 24.

47. *Id.*

that unfortunately Justice Powell's prediction had become reality in that fees were being routinely sought in cases having little or no bearing on civil rights.⁴⁸ The National Association of Attorneys General study then proceeded to cite examples of litigants "pad[ding] their meritorious state law complaints with weak or meritless civil rights claims in order to obtain fees under Section 1988."⁴⁹

Beyond its applicability to countless federal statutes, another reason for section 1988's preeminence among fee shifting statutes is the weight given to its permissive legislative history in construing other statutes. For example, the Supreme Court relied on the legislative history of section 1988 to award fees to a public interest law firm which had won a Title VII suit.⁵⁰

Because of its preeminence among fee shifting statutes, section 1988, the Fees Act, has also been the focus of criticism from academicians, the bar, and the bench for its production of a flood of inconclusive litigation. It was this law to which the Supreme Court addressed itself when it noted that fees litigation is "one of the least socially productive types of litigation imaginable."⁵¹ It was this law that was before the Court of Appeals for the Seventh Circuit when it lamented that "fee proceedings have become the main event rather than the side show" and that "the [attorney fees] tail is wagging the [civil rights] dog."⁵² It was this law to which Justice, then Judge, Sandra Day O'Connor referred when recommending that action should be taken to limit its use.⁵³ It was this law that prompted the National Association of Attorneys General to conclude that legislative reform was urgently needed to curtail the burden and expense of fee awards. The Association further noted that exorbitant awards were not the sole problem, in that the costs of opposing unjustified claims for fees were also becoming troublesome.⁵⁴ It was this law which prompted several witnesses before the Senate Judiciary

48. *Civil Rights Attorney's Fees Awards Act of 1976*, REP. TO CONGRESS OF NAT'L ASS'N OF ATT'Y GEN. 12 (Feb. 3, 1984) [hereinafter cited as NAAG REP.].

49. *Id.*

50. *See, e.g., New York Gaslight Club, Inc. v. Carey*, 447 U.S. at 70-71 n. 9 (1980).

51. *Hensley v. Eckerhart*, 103 S. Ct. 1933, 1944 (1983).

52. *Mills v. Eltra Corp.*, 663 F.2d 760, 761 (7th Cir. 1981) (attorney sued to recover fees for services rendered in a stockholder's disclosure suit to set aside a merger).

53. Justice O'Connor asserted that this "could be accomplished either directly, or indirectly by limiting or disallowing recovery of attorney fees. Such a move would be welcomed by state courts, as well as state legislatures and executive officers." O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801, 810 (1981).

54. NAAG REP., *supra* note 48.

Subcommittee on the Constitution to testify in general that "the manner in which the courts have implemented the Act provides an incentive for the bringing of frivolous lawsuits."⁵⁵ This law forms the backbone of federal fee shifting policy and serves as an excellent laboratory for examination of the erosion of the American rule.

Court Discretion: Special Circumstances

The operative language of the Fees Act states that "the court *in its discretion, may allow* the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."⁵⁶ The discretionary language of section 1988 was stressed during the process of its enactment.⁵⁷ The Senate Report, however, suggested that the standard for the discretionary award of attorney's fees had been well articulated by a 1968 case dealing with awards under the fee shifting aspects of the Civil Rights Act of 1964. That case ordered that the prevailing party "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."⁵⁸ What the Senate report failed to take into account is that the fee shifting provisions of the 1964 Civil Rights Act were designed to encourage plaintiffs to seek judicial relief,⁵⁹ while section 1988 was designed to ensure that the costs of litigation did not prevent the adjudication of meritorious claims.⁶⁰ Thus, the Senate report endorsed a standard broadly designed to encourage litigation for a bill with the narrower objective of overcoming economic obstacles to meritorious litigation.⁶¹ The discretionary language of section 1988 was designed to allow courts to ascertain when an award of fees was necessary to remove obstacles to litigation for

55. *S. 585: Hearings Before the Subcomm. on the Constitution of the Senator Comm. on the Judiciary, 97th Cong., 2d Sess.* 101 (1982) (statement of James B. Brennan) [hereinafter cited as *Hearings*].

56. 42 U.S.C. § 1988 (1976) (emphasis added).

57. For example, the House report states:

The second key feature of the bill is its mandate that fees are only to be allowed in the discretion of the court. Congress has passed many statutes requiring that fees be awarded to a prevailing party. Again the Committee adopted a more moderate approach here by leaving the matter to the discretion of the judge.

H.R. REP., *supra* note 13, at 8.

58. S. REP., *supra* note 27, at 3 (quoting from *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968)).

59. *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968).

60. *See supra* notes 32-41 and accompanying text; *Hensley v. Eckerhart*, 103 S. Ct. 1933, 1937. ("The purpose of section 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances."); *see also* S. REP., *supra* note 27, at 2, 3, 6; H.R. REP., *supra* note 13, at 1-3, 6.

61. M. DERFNER & A. WOLF, *supra* note 20, at § 10.01; NAAG REP., *supra* note 48, at 22-23.

similarly situated plaintiffs.⁶² The Supreme Court has not directly considered the questions raised by the nature of the judicial discretion conferred by the statute, but a recent ruling repeated the Senate Report language and tends to cement in place the special circumstances limitation.⁶³

The practical effect of the special circumstances limitation on the judges' discretion is that rarely have fees been denied as unjust. The Court of Appeals for the Fifth Circuit in *Riddle v. Democratic National Committee*,⁶⁴ explained that special circumstances should be found only in unusual cases. The opinion offered two examples of such cases.⁶⁵ The first type of case identified by the court as unworthy of fees arises when a litigant attempts to falsely gain the benefits of section 1988 by cloaking a private state law tort claim in language asserting a violation of 42 U.S.C. § 1983. The second type of case arises when the plaintiff achieves the result sought by the lawsuit, but his adjudication did not contribute to that result.⁶⁶ Clearly the discretion to deny claims for fees under these few special circumstances is narrow.

The Ninth Circuit, however, has upheld denials of fees when the plaintiffs' suit wins monetary damages sufficient to cover the costs of litigation. In *Buxton v. Patel*,⁶⁷ the claimants won damages in excess of their attorney's fees which were discretionarily denied by the district court. The Ninth Circuit upheld the district court because the litigants were "adequately compensated" and because their "chance of success was sufficiently high to enable them to attract competent counsel who were undeterred by the prospect of having to look to the appellants for payment of their fees."⁶⁸ This ruling is consonant with the avowed purpose of section 1988, namely, removing economic barriers to meritorious litigation. The reasoning of the Ninth Circuit reinvigorates the judicial discretion necessary to carry out that intent and preclude abuse of fee shifting policies.

In the bulk of all litigation over the special circumstances test, courts have concluded that the test should not apply. It is not a special circumstance when: the plaintiff had access to or employed the services of a public-funded legal aid bureau or the

62. See *supra* note 61.

63. *Hensley v. Eckerhart*, 103 S. Ct. 1933, 1937 (1983).

64. 624 F.2d 539 (5th Cir. 1980).

65. *Id.* at 544. See also *Judicial Discretion and the 1976 Civil Rights Attorney's Fees Awards Act: What Special Circumstances Render an Award Unjust*, 51 *FORDHAM L. REV.* 320 (1982).

66. *Knights of KKK v. East Baton Rouge Parish School Bd.*, 643 F.2d 1034, *vacated and remanded*, 454 U.S. 1075, *on remand*, 679 F.2d 64 (5th Cir. 1981).

67. 595 F.2d 1182 (9th Cir. 1979).

68. *Id.* at 1185.

plaintiff is a public-funded agency;⁶⁹ the plaintiff had the capacity to pay for an attorney without resort to the Fees Act;⁷⁰ the plaintiff's case benefited only himself as opposed to benefiting the public more generally;⁷¹ the plaintiff will not be personally benefitted by the award of fees;⁷² the plaintiff only won nominal damages or damages far exceeded by the amount of the fee award request;⁷³ the plaintiff refused a favorable settlement;⁷⁴ the plaintiff's request would have to be satisfied out of tax revenues and could cause financial difficulty for or a reduction in services provided by the governmental entity to be held liable;⁷⁵ the plaintiff's case was very simple, requiring little attorney time;⁷⁶ the plaintiff's fee request is substantially comprised of time spent by attorneys in pursuit of the fee itself;⁷⁷ the plaintiff only achieved partial success;⁷⁸ the plaintiff committed perjury during trial;⁷⁹ or finally when, the plaintiff's suit was based on actions undertaken by the defendant in good faith or in reliance on previous court orders.⁸⁰

Under the special circumstances limitation, the discretion of the federal judiciary to determine when fees are warranted to surmount financial hurdles to meritorious claims is, in most

69. *Blum v. Stenson*, 104 S. Ct. 1541 (1984) (plaintiff represented by attorneys from Legal Aid Society of New York); *Seattle School Dist. v. Washington*, 633 F.2d 1338 (9th Cir.), *aff'd*, 458 U.S. 457 (1980) (plaintiffs were three school districts); *Bills v. Hodges*, 628 F.2d 844 (4th Cir. 1980) (plaintiffs were tenants who had sufficient funds to pay fees).

70. *Entertainment Concepts v. Maciejewski*, 631 F.2d 497 (7th Cir.), *cert. denied*, 450 U.S. 919 (1980) (defendant municipal officials held liable for attorney's fees in their official capacities); *cf. International Oceanic Enters. v. Menton*, 614 F.2d 502 (5th Cir. 1980) (wealthy corporation was not entitled to fees for successful challenge of zoning ordinance).

71. *Perez v. University of Puerto Rico*, 600 F.2d 1 (1st Cir. 1979) (students brought suit against university for impaired due process rights in summary suspensions).

72. *Herrera v. Valentine*, 653 F.2d 1220 (8th Cir. 1981) (original plaintiff replaced by administrator of her estate).

73. *Milwe v. Cavuoto*, 653 F.2d 80 (2d Cir. 1981) (plaintiff awarded judgment of one dollar); *Skoda v. Fontani*, 646 F.2d 1193 (3d Cir. 1981) (one dollar awarded to plaintiff).

74. *Coop v. South Bend*, 635 F.2d 652 (7th Cir. 1980) (unless party unduly prolongs litigation with no hope of a greater recovery).

75. *Entertainment Concepts v. Maciejewski*, 631 F.2d 497 (7th Cir.), *cert. denied*, 450 U.S. 919 (1980); *Johnson v. Mississippi*, 606 F.2d 635 (5th Cir. 1979); *Sharrock v. Harris*, 489 F. Supp. 913 (S.D.N.Y. 1980).

76. *Staten v. Housing Auth. of Pittsburgh*, 638 F.2d 599 (3d Cir. 1980).

77. *Criterion Club of Albany v. Board of Comm'rs*, 594 F.2d 118 (5th Cir. 1979).

78. *Sethy v. Alameda County Water Dist.*, 602 F.2d 894 (9th Cir.), *cert. denied*, 444 U.S. 1046 (1979).

79. *Price v. Pelka*, 690 F.2d 98 (6th Cir. 1982).

80. *Ramos v. Koebig*, 638 F.2d 838 (5th Cir. 1981); *Entertainment Concepts v. Maciejewski*, 631 F.2d 497 (7th Cir.), *cert. denied*, 450 U.S. 919 (1980); *Johnson v. Mississippi*, 606 F.2d 635 (5th Cir. 1979).

cases, a nullity. A recently enacted fee shifting statute applicable only to suits against the federal government has restored such discretion by specifying that judges may not award fees when the government's case is substantially justified.⁸¹ This particular statute, the Equal Access to Justice Act, like section 1988, is intended to remove obstacles to litigation rather than to encourage lawsuits. This suggests that Congress is becoming more sensitive to the need for reasonable standards to govern judicial discretion to deny fees.

Awards Against State and Local Officers

Several of the categories denied special circumstances consideration deserve additional commentary due to their significance in continuing litigation. For example, lawsuits assessing fee awards against state and local officials in their official capacities have presented many recurring issues. Until a recent pronouncement by the Supreme Court, a frequent issue was whether awarding attorney's fees against a state violates the eleventh amendment's proscription against federal court assessment of damages against states.⁸² In *Hutto v. Finney*,⁸³ several inmates in an Arkansas state prison sued prison officials under 42 U.S.C. § 1983 alleging that the conditions of their confinement constituted cruel and unusual punishment. On the basis of orders to halt the use of isolation cells, the plaintiffs prevailed. When the lower court also granted \$20,000 in attorney's fees to be paid out of state funds, the state attorney general asserted the eleventh amendment as a bar. The Court upheld the fee and determined that "a financial penalty may be the most effective means of insuring compliance with a court order."⁸⁴ The court also noted that "the principles of federalism that inform the Eleventh Amendment doctrine surely do not require federal courts to enforce their decrees only by sending high state officials to jail."⁸⁵ *Hutto* establishes that attorney's fees may be assessed against a state regardless of the eleventh amendment. The Supreme Court reasoned that the eleventh amendment is no bar because attorney's fees are part of the cost of litigation.

81. 5 U.S.C. § 504(a)(1) (1982); 28 U.S.C. § 2412(d)(1)(A) (1982). Congress created this provision to preclude awards against the government in instances of "good faith . . . interpretations of law that often underlie vigorous enforcement efforts." S. REP. No. 253, 96th Cong., 2d Sess. 7 (1980).

82. U.S. CONST. amend. XI: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

83. 437 U.S. 678, *reh'g denied*, 439 U.S. 1122 (1978).

84. *Id.* at 691.

85. *Id.*

In the words of the Court, "costs have traditionally been awarded without regard for the States' Eleventh Amendment immunity" against federal suits creating state liabilities.⁸⁶

The Fifth Circuit case of *Universal Amusement Co. v. Hofheinz*⁸⁷ concisely summarizes the conclusions of earlier Supreme Court pronouncements regarding a state or local official's defense of good faith. In *Universal* the court determined that "the good faith of an official is irrelevant to an award of attorney's fees against him in his official capacity, but bad faith must be shown in order to hold an official personally liable for attorney's fees."⁸⁸ The basic rule relies on language in the congressional reports specifically authorizing fees to the prevailing party regardless of the good faith of the defendant.⁸⁹ Thus, fees have been assessed against a city even when its public officials acted in full reliance on existing state and federal case law.⁹⁰

Fees for Public-Funded Entities

Another issue litigated extensively is the appropriateness of granting attorney's fees out of public coffers to entities that are already publicly financed. The basis of this argument is that, by funding a legal services organization, Congress has already removed any obstacle to litigation faced by the needy plaintiff and has thus satisfied the purpose of the Fees Act. This contention was stated most graphically during Senate Judiciary Committee hearings by Leroy S. Zimmerman, Attorney General for the State of Pennsylvania:

The Pennsylvania Legislature, as well as other States lawmaking bodies, cannot anticipate such [high fee] awards and funds for their payment must be diverted for necessary governmental functions. The inability to anticipate for budgetary purposes always is onerous to State legislatures but is manifestly unfair when the awards are made to legal services organizations already funded by public moneys. This double-dipping must be stopped by the Congress.⁹¹

In one case, the Fifth Circuit did uphold a denial of fees to a publicly-funded legal services organization, but not on the basis of a "double dipping" argument or on the intent of the Fees Act.⁹² The Fifth Circuit noted that the legal services attorney's work was duplicative and unnecessary to the resolution of the

86. *Id.* at 695.

87. 616 F.2d 202 (5th Cir.), *modified*, 646 F.2d 996 (1980).

88. *Id.* at 204 n. 1.

89. S. REP. *supra* note 27, at 5.

90. *Johnson v. Mississippi*, 606 F.2d 635 (5th Cir. 1979) (defendants relied on earlier case upholding constitutionality of a similar statute).

91. *Hearings, supra* note 55, at 86.

92. *Taylor v. Sterrett*, 640 F.2d 663 (5th Cir. 1981).

case.⁹³ The Supreme Court has been urged to rule that representation by a publicly-funded lawyer constitutes a special circumstance warranting denial of fees. Relying on the House report's assertion that "a prevailing party is entitled to counsel fees even if represented by an organization"⁹⁴ and two court of appeals decisions,⁹⁵ the Court in dicta rejected that argument.⁹⁶ Although financial obstacles to any case brought by such attorneys have already been removed, this language from the Court has apparently allowed attorney fee awards to publicly-funded lawyers.

Prevailing Parties

Section 1988 authorizes the award of a reasonable attorney's fee only to the prevailing party. Determining who is a prevailing party for fee awards is one of the most frequently litigated issues in the entire body of attorney's fees law. As the words "prevailing party" suggest, a litigant must both show that he is the proper party and that he has prevailed in order to establish a claim for counsel fees.

Proper Party Status

In a complex lawsuit with many different parties, each may have a different relationship to the litigant who initiated the suit to vindicate his own rights. A party who intervenes at the appeal stage, for instance, will not make nearly the same contribution to the case in terms of time or substance as is made by the initial parties. A footnote in the Senate Report acknowledges that Congress intended intervenors to enjoy some eligibility for fee awards.⁹⁷ A 1982 opinion of the Court of Appeals for the District of Columbia considered this footnote and nonetheless drew a sharp distinction between intervenors and parties who prevailed on their own. In the Voting Rights Act case of *Donnell v. United States*,⁹⁸ the defendant was the federal government, which hardly needed the assistance of an intervenor. Rather than automatically approving fees for the defendant-intervenor, the District of Columbia Circuit established a new three-part test governing an intervenor's eligibility to recover attorney's fees. The court determined that a district court must first ascertain whether the original party adequately represented the in-

93. *Id.* at 670.

94. H.R. REP., *supra* note 13, at 8.

95. *Blum v. Stenson*, 104 S. Ct. 1541 (1984).

96. *Id.* at 1547.

97. S. REP., *supra* note 27, at 4 n. 4.

98. 682 F.2d 240 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1204 (1983).

tervenor's position.⁹⁹ Second, the court must determine whether the intervenor's participation introduced any different theories than were presented by the original party and third, whether the intervenor's contribution was of importance to the court.¹⁰⁰ In essence, this test is likely to bar an intervenor from recovering attorney's fees unless his contribution to the success of the litigation was substantial and not merely duplicative.

Another proper party question involves defendants. If a defendant prevails, the plain meaning of section 1988 would suggest that he is eligible on the same basis as other litigants to claim counsel fees. This issue came before the Supreme Court when the Equal Employment Opportunity Commission sued a company on a Title VII charge that had ripened for adjudication two years before the Commission was granted authority to sue in its own name.¹⁰¹ Since the charge was not properly pending before the Commission when it obtained the authority to sue, the case was dismissed. The defendant company had prevailed. When the Supreme Court considered the defendant's claim for attorney's fees, however, it noted two strong reasons for treating a prevailing defendant differently than a prevailing plaintiff. The Court determined first that "the plaintiff is the chosen instrument of Congress to vindicate a 'policy that Congress considered of the highest priority.'"¹⁰² Second, when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law.¹⁰³ The plaintiff, not the defendant, is the private attorney general delegated by Congress to enforce civil rights. Accordingly, prevailing plaintiffs and prevailing defendants are governed by a dual standard.

Although a prevailing defendant must abide by a different standard to recover attorney's fees, the statute by its terms authorizes a recovery for any prevailing party. In a Title VII case, the Supreme Court concluded that "a district court may in its discretion award attorneys' fees to a prevailing defendant . . . upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."¹⁰⁴

A few years later, the Supreme Court considered the prevailing defendant problem in the context of section 1988. In

99. *Id.* at 247-48.

100. *Id.*

101. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1977).

102. *Id.* at 418 (quoting *Newman v. Piggie Park Enterp.*, 390 U.S. 400, 402 (1968)).

103. *Id.*

104. *Id.* at 421.

Hughes v. Rowe,¹⁰⁵ the plaintiff, a state penitentiary inmate, lost his case and was directed to pay the defendant \$400 in counsel fees. After reciting the standard for defendant claims for attorney's fees enunciated for Title VII cases, the Court determined:

Although arguably a different standard might be applied in a civil rights action under 42 U.S.C. 1983, we can perceive no reason for applying a less stringent standard. The plaintiff's action must be meritless in the sense that it is groundless or without foundation. The fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for the assessment of fees. . . . These limitations apply with special force in actions initiated by uncounseled prisoners.¹⁰⁶

This reasoning is further confirmed by the Court's recent ruling in *Hensley v. Eckerhart*.¹⁰⁷ A footnote in that case reiterates the standard derived from the Title VII case and applies it to Section 1988.¹⁰⁸ In practice, the standard for the award of attorney's fees to a prevailing defendant under the Fees Act is not likely to be appreciably different from the common law exception to the American rule for abuse of judicial process.

Prevailing

The 94th Congress obviously intended to include within the meaning of "prevailing party" the plaintiff who obtains the final judgment of the court in his favor on each contested issue. When the plaintiff wins only some of his issues, or when he wins an interlocutory motion, or when the case is resolved by settlement out of court, or the case is dismissed as moot due to some extrajudicial act, the intent of Congress is less clear and, consequently, often litigated. The extent to which the plaintiff must prevail is the question posed by the first of these questions.

One test for the eligibility of a partially successful plaintiff for fees has been plainly enunciated by the First Circuit. In *Nadeau v. Helgemoe*,¹⁰⁹ the First Circuit held that plaintiffs who obtain favorable judgment on some, but not all, of the claims before the court prevail "if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit."¹¹⁰ Requiring only some success on any significant issue is a lenient standard. For instance, the plaintiffs in *Familias Unidas v. Briscoe*¹¹¹ sought ten thousand dollars in damages to redress enforcement of an allegedly

105. 449 U.S. 5 (1980).

106. *Id.* at 14-15.

107. *Hensley v. Eckerhart*, 103 S. Ct. 1933 (1983).

108. *Id.* at 1937 n. 2.

109. 581 F.2d 275 (1st Cir. 1978).

110. *Id.* at 278-79.

111. 619 F.2d 391 (5th Cir. 1980).

unconstitutional state law. On appeal, the plaintiff was awarded only nominal damages and a declaratory judgment that the statute was unconstitutional. Nonetheless, they were found to have "prevailed" sufficiently to receive attorney's fees.¹¹²

An alternative test for the degree of success necessary to "prevail" was articulated by the Fifth Circuit in *Taylor v. Sterett*.¹¹³ To prevail under that formulation, a party must have been "successful on the central issue as exhibited by the fact that he has acquired the primary relief sought."¹¹⁴ In *Taylor*, the plaintiff sued to enforce an earlier court order requiring changes in jail conditions. Since the order was already being carried out, the plaintiff could not demonstrate that he had obtained compliance with the order in any way other than what was already underway. Prevailing on the "central issue" of the case is certainly a more demanding standard than achieving "some of the benefit" sought in the complaint.

In *Hensley*, the Supreme Court acknowledged this split in the circuits by noting that the standard for prevailing "has been framed in various ways."¹¹⁵ The Court then cited the *Nadeau* standard as a "typical formulation," which it further characterized as "generous."¹¹⁶ The Supreme Court did not decide which standard was proper, however, and it failed to resolve the conflict. *Hensley* did set standards for deciding when partial success may "reasonably" be compensated, which should overshadow the significance of the prevailing test altogether.

Interlocutory orders present another issue with respect to "prevailing." In general, a party who prevails on some trial issue short of a final judgment is not eligible for attorney's fees. The case which best represents this rule is *Hanrahan v. Hampton*,¹¹⁷ in which the plaintiffs sought fees on the basis of a victory on appeal which reversed the directed verdicts against them and returned their case to the discovery stage. The Supreme Court held that they had not yet prevailed in the sense necessary to obtain fees.¹¹⁸ It is evident that the nature of the preliminary

112. *Id.* at 406 (the amount of fees, however, was limited to work performed only on issues on which plaintiffs were successful).

113. 640 F.2d 663 (5th Cir. 1981).

114. *Id.* at 669.

115. *Hensley v. Eckerhart*, 103 S. Ct. 1933, 1939 (1983).

116. *Id.*

117. 446 U.S. 754 (1980).

118. The Court determined that:

Congress intended to permit the interim award of counsel fees only when a party has prevailed on the merits of at least some of his claims. For only in that event has there been a determination of the substantial rights of the parties, which Congress determined was a necessary foundation for departing from the usual rule in this country that each party is to bear the expense of his own attorney . . . As is true of other proce-

ruling can affect the eligibility for fees. If the matter decided *pendente lite* is evidentiary or procedural, it does not qualify the winning plaintiff for fees. If, on the other hand, the preliminary ruling provides the plaintiff with some of the benefits sought on the merits of the case, it may warrant a fee award. In *Battle v. Anderson*,¹¹⁹ for example, the district court in the midst of a complicated procedural case issued a "remedial" order requiring the state to change some aspects of its penal system. On appeal, the Tenth Circuit remanded the orders to the district court with instructions that granted the plaintiffs some of their requested benefits. At the same time, the court granted the requested attorney's fees on the basis of the *Nadeau* standard. The plaintiff had achieved some of the benefits sought at the time of bringing the suit.¹²⁰

Settlement, of course, terminates a lawsuit short of the final judgment generally necessary for a fees award. The Senate Report, however, anticipated settlements, and determined that "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief."¹²¹ Citing this language, the Supreme Court determined that "[t]he fact that the respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees."¹²² This does not mean, however, that a district court will not carefully scrutinize a settlement to ascertain if attorney's fees are warranted.¹²³

The effect of fee shifting on settlements has stimulated considerable legal commentary. To substantiate their contention that section 1988 discourages settlements, Professors Fioretti and Convery stated that, "the more hours the attorney spends on the case, the higher his potential fee award. The motivation then is not to settle, but to proceed to trial, where the hourly

dural or evidentiary rulings, these determinations may affect the disposition on the merits, but were themselves not matters on which a party would prevail.

Id. at 758-59.

119. 457 F. Supp. 719 (E.D. Okla. 1978).

120. 614 F.2d 251, 258 (10th Cir. 1980).

121. S. REP., *supra* note 27, at 5.

122. *Maher v. Gagne*, 448 U.S. 122, 129 (1980).

123. In *Parker v. Matthews*, the Court asserted that "to award attorneys' fees where there has been a settlement . . . must be determined by a close scrutiny of the totality of the circumstances surrounding the settlement, focusing particularly on the necessity for bringing the act and whether the party is the successful party with respect to the central issue." 411 F. Supp. 1059, 1064 (D.D.C. 1976), *aff'd*, 561 F.2d 320 (D.C. Cir. 1977). This holding is in harmony with the concept of gaining the central benefits sought when the suit was filed.

rates are even higher."¹²⁴ Their article further argued that the disincentive to settle harms both the plaintiff and the interests of judicial administration. According to the authors:

The purpose of the Civil Rights Act as a whole is to protect those who have suffered a constitutional tort. It naturally follows that if an early settlement is possible, the plaintiff, the protected party under the Act, should be compensated swiftly. However, a plaintiff's attorney, who during the early phase of the litigation has spent relatively few hours in preparation, may lack incentive to settle until compensable hours have reached a significant level. Thus, the overriding goal of the Civil Rights Act is thwarted and litigation is encouraged. The already crowded courts are further congested, so that the taxpayer suffers as well.¹²⁵

Justice Rehnquist was recently joined by Justice O'Connor in a dissent to a denial of certiorari that raised some important issues about the "prevailing" requirement and its effect on settlement. The Justices commented on the case of *Young v. Kenley*,¹²⁶ where the plaintiff alleged discrimination had cost her a job for which she had applied. When she applied and passed the required examination, she was accepted for the position. At that point, the case was settled and the plaintiff claimed extensive legal fees. The Justices noted that fees should not be provided "if the discernible benefit was conferred gratuitously by the defendant or was taken simply to avoid further litigation expenses."¹²⁷ This commentary about settlement to avoid legal fees liability underscores the comment of the Attorney General of Arizona, Robert Corbin:

The potential burden of having to pay attorneys' fees often affects the states' or defendants' ability to litigate or defend a case fully in trial or on appeal. Therefore, it is not uncommon, in a close case, for the defendant to capitulate early in order to minimize that attorneys' fees liability."¹²⁸

Although a settlement is a voluntary act of the defendant, its direct relation to the lawsuit generally removes any question about the source of the defendant's motivation for conferring some benefit on the plaintiff. A more complex issue arises when the defendant takes some voluntary act apparently unrelated to the suit which moots the cause of action. In such a case, the court must ascertain if there is a causal relationship between the lawsuit and the defendant's extrajudicial action. In the words of the Fifth Circuit, "a civil rights plaintiff may not collect

124. Fioretti & Convery, *Attorney's Fees Under the Civil Rights Act—A Time for Change*, 16 J. MAR. L. REV. 261, 276-77 (1983).

125. *Id.* at 278.

126. 445 U.S. 961 (1980).

127. *Id.* at 967.

128. 129 CONG. REC. S.632 (daily ed. Jan. 26, 1983) (statement of Senator Hatch).

attorney's fees for demanding what the defendant would have done anyway."¹²⁹ In *Williams v. Miller*,¹³⁰ the Eighth Circuit stated the rule governing intervening voluntary acts of the defendant concisely. The court in *Williams* determined "[w]hen defendants moot the suit by voluntary compliance the question becomes whether the suit was the 'catalyst' that brought about compliance . . . if it was, the plaintiffs are prevailing parties for attorney's fees award purposes."¹³¹

The Fifth Circuit, in *Robinson v. Kimbrough*,¹³² emphasized three facts for deciding when a lawsuit was the catalyst for the defendant's action. The three factors to consider are the relief obtained, the chronology of events, and the role of litigation in spurring the defendant to action. Several cases demonstrate how this test is applied.

In *Stewart v. Hannon*,¹³³ a school board expeditiously withdrew test scores when it independently ascertained that they were discriminatory; no fees were awarded for the suit mooted by that withdrawal. In this instance, the defendants had undertaken a review of the test scores for civil rights sufficiency before the suit was filed. This chronology suggested that the adjudication had not been the catalyst. In the unusual case of *Coen v. Harrison County School Board*,¹³⁴ the Ku Klux Klan sued to receive permission to use school facilities for a meeting. At trial, the judge recommended that the Ku Klux Klan reapply for permission after assuring the school officials that no anti-social behavior would take place. The Klan took his advice, posted a bond to cover any potential property damage, and was granted use of the building for an uneventful rally. This chain of events did not make the Klan a prevailing party, however, because "it was the plaintiffs, not the defendants, who acceded to the other party's terms."¹³⁵

The catalyst doctrine has been harshly criticized. For example, Senator Orrin G. Hatch, Chairman of the Senate Constitution Subcommittee and author of legislation to reform section 1988 noted:

[S]ome courts' strong emphasis on chronology—that is, the fact that the plaintiff's case was pending when the Government changed the policy which mooted the litigation—for establishing that the suit was a catalyst for the Government's action has led many local governments to fear making changes and improvements

129. *William v. Leatherbury*, 672 F.2d 549 (5th Cir. 1982).

130. 620 F.2d 199 (8th Cir. 1980).

131. *Id.* at 202.

132. 540 F.2d 1264 (5th Cir. 1976), *rev'd*, 620 F.2d 468 (5th Cir. 1980).

133. 675 F.2d 846 (7th Cir. 1982).

134. 638 F.2d 24 (5th Cir. 1981), *cert. denied*, 455 U.S. 938 (1982).

135. *Id.* at 26.

in its policy lest it become liable for fees in a pending suit.¹³⁶ Accordingly, a provision in S. 141, one of Senator Hatch's reform bills would deny fees "where the court finds that the pendency of litigation was not a material factor for such change."¹³⁷

Some cases dealing with intervening legislative action which moots a case present a particularly difficult causal determination. Since a legislature's motives are as varied as the many members that comprise such bodies, settling on a single catalyst for an enactment is at best difficult. Nonetheless, some courts have awarded fees on the basis of an intervening legislative act.¹³⁸ For example, in *DeMeir v. Gondles*,¹³⁹ the plaintiffs voluntarily dismissed their claim after the state legislature enacted a statute that solved the problems that had precipitated the suit, yet they were awarded fees. The same circuit suggested, in another case, however, that reading a desire to resolve court cases into legislative actions "might constitute an impermissible inquiry into legislative motive."¹⁴⁰ Commenting on this problem and the leniency of the *Nadeau* "some benefits" standard, the National Association of Attorneys General concluded that even though section 1988 was intended only for prevailing parties, subsequent court decisions have undercut this goal.¹⁴¹ According to the Association, these decisions included situations "where the party awarded fees has actually lost the case on the merits or failed to succeed in any meaningful sense."¹⁴²

Potential Legislative Reform of the Concept of Prevailing Parties

The standard for determining when a party is "prevailing" would profit from clarification. The current discrepancy between the *Nadeau* and *Taylor* standards should be resolved more definitively than attempted by the Supreme Court. A middle ground between the two standards would require a party to prevail on any significant issue in litigation. This is the first part of the *Nadeau* test. It is less demanding than requiring victory on a "central issue," but more demanding than the "some benefit" part of *Nadeau*. This would be in line with other fee shifting statutes, such as the Freedom of Information Act, where the

136. See *supra* note 128.

137. S. 141, 98th Cong., 1st Sess. (1983).

138. See *Armstrong v. Reed*, 462 F. Supp. 496 (N.D. Miss. 1978) (Emergency School Aid Act, 20 U.S.C. § 1617, gave court discretion to award attorney's fees).

139. 676 F.2d 92 (4th Cir. 1982).

140. *Bly v. McLeod*, 605 F.2d 134, 138 n. 6 (4th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980).

141. NAAG REP., *supra* note 48, at 17-18.

142. *Id.*

courts have required plaintiffs to "substantially" prevail.¹⁴³ A more definitive test for prevailing is necessary in light of the Act's legislative history. The prevailing requirement was included to deter meritless suits. As this requirement erodes, the disincentive to pursue meritless claims also evaporates.

With regard to the "catalyst" doctrine, the "material factor" test contained in the Hatch bill is derived from the Third Circuit case of *Morrison v. Ayoob*.¹⁴⁴ In that case, a challenge to district justices' practice of sending petty offenders to jail without access to counsel was rendered moot by the voluntary cessation of such practice. The court determined that the plaintiff "is a prevailing party if the action was a material factor in bringing about the defendant's action."¹⁴⁵ This test provides a measuring rod for determining when one motivation, namely the lawsuit, out of many potential motivations for a change in defendant's policy, is sufficiently important to warrant the award of attorney's fees. Such a legislative codification would ensure that the chronology test does not become the sole criterion for applying the catalyst doctrine.

S. 141 also contains a provision denying fees "for that part of litigation subsequent to a declined offer of settlement when such offer was as substantially favorable to the prevailing party as the relief ultimately awarded by the court."¹⁴⁶ This provision obviously serves to encourage reasonable settlements. After accepting a settlement under this provision, the plaintiff would have prevailed and counsel fees for work up to that point would be granted by the court. Defendants would have a clear incentive to offer a fair settlement because they could thus protect themselves against fee judgments. In his introductory statement for S. 141, Senator Hatch dealt with some of the contentions against this concept:

It has been argued that his proposal would place the entire risk upon the plaintiff's attorney and would "place the attorney and his client in a conflict—the attorney may feel compelled to encourage the plaintiff to accept a less than adequate settlement, rather than risk denial of fees for litigating to a judgment." But this argument ignores the fact that there presently exists a substantial risk and a conflict of interest for the plaintiff's attorney—presently the attorney can settle and receive his fees up to that point or he can go ahead with the suit and risk not winning and thus recover no fees. . . . While this amendment may increase the risk upon the attorney and the conflict with his client, the increase is a matter of

143. 5 U.S.C. § 552(a)(4)(E) (1982) ("court may assess against the United States reasonable attorneys fees . . . in any case . . . in which the complainant has substantially prevailed.").

144. 627 F.2d 669 (3d Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981).

145. *Id.* at 671.

146. *See supra* note 137.

degree and not of kind. Consideration by the attorney of his potential fee is currently injected throughout the litigation by the Fees Act itself. I feel that the benefits of the proposed settlement provision far outweigh the costs: First, the plaintiffs, often the forgotten figure in this issue, will get a quick resolution of their claim rather than having to possibly wait years; second, court congestion from these cases will be reduced and the notion that each of these disputes must go through the grossly inefficient process of full litigation will be lessened; third, local governments will be able to protect themselves from costly fee judgments; and fourth, the attorney will recover his fees for his efforts up to the settlement and can still recover fees for the entire suit should the defendant's offer not be reasonable and he later prevails.¹⁴⁷

FEE COMPUTATION

The legislative history of the Fee Awards Act provides some guidance about the computation methods preferred by Congress. The Senate Report provides "that the amount of the fees awarded . . . be governed by the same standards which prevail in other types of equally complex federal litigation, such as antitrust. . . ."¹⁴⁸ This language endorses two fee computation methods: the *Johnson* factors and the lodestar method used in antitrust cases. Every Circuit has utilized one of these two approaches or a combination of both, but the trend toward exclusive use of some variant of the lodestar method has been recently endorsed by the Supreme Court.¹⁴⁹

The *Johnson* approach to fee computation is less a method than it is a listing of factors to be weighed and applied according to the discretion of the judge. The Fifth Circuit derived the twelve factors of the *Johnson* approach from the eight guidelines for client billing established by the American Bar Association Code of Professional Responsibility, Disciplinary Rule 2-106.¹⁵⁰ The *Johnson* factors include time and labor required, difficulty of the case, experience and skill of the attorney, the attorney's customary fees, the amount of the claim and degree of success, and awards in similar cases.

As indicated by its Senate Report, Congress seems to have anticipated that these factors would not provide methodological guidance for the application of the numerous factors. It there-

147. See *supra* note 127.

148. S. REP., *supra* note 27, at 6. For the appropriate standards, see *Johnson v. Georgia Highway Express*, 488 F.2d 714, 717 (5th Cir. 1974). They are correctly applied in such cases as *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); *Davis v. County of Los Angeles*, 8 E.P.D. 9444 (C.D. Cal. 1974); and *Swann v. Mecklenburg Bd. of Educ.*, 66 F.R.D. 483 (W.D. N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys.

149. *Hensley v. Eckerhart*, 103 S. Ct. 1933, 1939 (1983).

150. *Id.* at 1937 n. 3.

fore recommended that these factors be "properly applied" by reliance on the lodestar method. Two of the three cases mentioned by the Senate report—*Stanford Daily v. Zurcher*¹⁵¹ and *David v. County of Los Angeles*,¹⁵²—applied the lodestar method. Under the lodestar method, a court simply multiplies the number of hours worked on a case by the counsel's customary hourly rate to obtain a lodestar sum. This essentially acknowledges two of the primary *Johnson* factors. The court then adjusts the fee after consideration of some of the other factors in *Johnson*. This second step of the lodestar approach has recently been sharply circumscribed by the Supreme Court.¹⁵³ Prior to these recent clarifications, these additional factors were known in some circuits as contingency or quality factors. A contingency factor took into account the likelihood of success at the outset of the suit and rewarded the attorney with a higher award for achieving success with a risky case. A quality factor recognized the quality of the attorney's performance in relation to the difficulty of the case and was invoked to either increase or diminish the fee.

Prior to the recent guidance of the Supreme Court, most of the circuits generally employed the lodestar approach, but even among those that had adopted this method, the variations from circuit to circuit were often substantial.¹⁵⁴ Other circuits ad-

151. 64 F.R.D. 680 (N.D. Cal. 1974).

152. 8 E.P.D. 9444 (C.D. Cal. 1974).

153. *Blum v. Stenson*, 104 S. Ct. 1541, 1547 (1984).

154. The First Circuit initially instructed its district courts to apply the *Johnson* factors in *Souza v. Southworth*, 564 F.2d 609 (1st Cir. 1977), but later adopted the lodestar approach in *Furtado v. Bishop*, 635 F.2d 915 (1st Cir. 1980). The Second Circuit adopted the lodestar method early in *Detroit v. Grinnell*, 495 F.2d 448 (2d Cir. 1974), which was recently modified into a "cost plus" formulation for fees requested by public interest organizations in *New York State Ass'n. for Retarded Children v. Carey*, 711 F.2d 1136 (2d Cir. 1983). *Carey* was recently questioned by the Supreme Court in *Blum v. Stenson*, No. 81-1374 (S. Ct. Mar. 21, 1984). The Third Circuit first formulated the lodestar approach in *Lindy Bros. Builders, Inc. v. American Radiator Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973). The Fourth Circuit recently adopted the lodestar method in *Anderson v. Morris*, 658 F.2d 246 (4th Cir. 1981). The Fifth Circuit originally fashioned the *Johnson* factors, but has urged that they be applied flexibly according to a lodestar-like approach. See *Cooper Liquor, Inc. v. Adolf Coors*, 624 F.2d 575 (5th Cir. 1980). The Sixth Circuit favors a modified lodestar approach. *Northcross v. Board of Educ. of Memphis*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980). The Seventh Circuit prefers the *Johnson* approach as determined in *Muscare v. Quinn*, 614 F.2d 577 (7th Cir. 1980). The Eighth Circuit permits use of either the lodestar, *Cleverly v. Western Elec. Co.*, 594 F.2d 638 (8th Cir. 1979), or the *Johnson* factors, *Grunin v. International House of Pancakes*, 513 F.2d 114 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975). The Ninth Circuit in the past has permitted use of a variety of fee computation methods, but recently has given at least some consideration to the *Johnson* factors in *Kerr v. Screen Extras Guild*, 526 F.2d 67 (9th Cir.), *cert. denied*, 425 U.S. 951 (1975). The Tenth Circuit apparently favors the *Johnson* factors. *Francia v. White*, 594 F.2d 778 (10th Cir. 1979). The Eleventh Circuit has

hered to the basic *Johnson* approach. The lack of a single test prompted considerable unease.¹⁵⁵ A survey about attorney's fees in class action suits performed by the Federal Judicial Center found that judges were overwhelmingly convinced that "fee abuses are a serious problem."¹⁵⁶ Professor Arthur Miller, who performed that survey, noted that "[t]he feeling that attorneys reap exorbitant fees appears to run deep" and concluded that "reform of the fee awards standards may be a logical response to a problem widely thought to exist."¹⁵⁷ One possible reason for this widespread sentiment is that "the high degree of subjectivity involved in most fee decisions is unhealthy for both the legal profession and for the conduct of litigation."¹⁵⁸ The City Attorney from Milwaukee, Wisconsin, on behalf of the National Institute of Municipal Law Officers noted one final frustration in that "[t]he liberal award of fees . . . increased by the use of multipliers, and having no relation to the amount of damages, if any, recovered encourages protracted litigation because there is no penalty for litigating claims unless they are clearly vexatious or frivolous."¹⁵⁹ To substantiate the claims that litigants often receive awards disproportionate to the degree of success, critics of the Fees Act have cited cases like *Skoda v. Fontani*,¹⁶⁰ in which the plaintiff won one dollar in damages and was awarded over six thousand in fees. In *Rivera v. City of Riverside*,¹⁶¹ the plaintiff won \$33,350 in damages and received nearly \$250,000 in fees. Another example is *Grendel's Den, Inc. v. Good-*

deferred to the Fifth Circuit's rulings in *Bonner v. City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981). The District of Columbia Circuit after following the *Johnson* approach for years, switched recently to the lodestar approach in *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980).

155. For instance, the National Association of Attorneys General study stated:

With different approaches being applied by the different circuits and even by various courts within each circuit, parties . . . are subject to different approaches and hence different results. Courts disagree on what factors should be applied, how they should be applied, and even what they mean. . . . As a result, in cases decided between 1974 and 1979, hourly rates awarded to civil rights attorneys varied by 685 percent.

NAAG REP., *supra* note 48, at 28. See also Comment, *Calculation of a Reasonable Award of Attorneys' Fees Under the Attorneys' Fees Awards Act of 1976*, 13 J. MAR. L. REV. 331, 378 (1980).

156. A. MILLER, ATTORNEYS' FEES IN CLASS ACTIONS 306 (Federal Judicial Center 1980).

157. *Id.* at 307.

158. Berger, *Court Awarded Attorney's Fees: What is Reasonable?* 126 U. PA. L. REV. 281, 293 (1977).

159. *Hearings*, *supra* note 55, at 94-95.

160. 646 F.2d 1193 (7th Cir. 1981).

161. 679 F.2d 795 (9th Cir. 1982).

win¹⁶² where a Massachusetts zoning law was declared unconstitutional and the attorney requested \$331,441 in fees at an effective hourly rate of \$412.50 an hour for his services.

Perhaps due to its awareness of some of these dislocations in the application of section 1988, the Supreme Court recently delivered two significant opinions providing more definition for the computation of fees. As mentioned above, nine of the circuits were employing some variation of the lodestar method.¹⁶³ In *Hensley v. Eckerhart*,¹⁶⁴ this trend was clearly commended to the rest of the circuits when the Court noted that "[t]he 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."¹⁶⁵ Less than a year later the Court made this direction even more obligatory by holding that "[t]he initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate."¹⁶⁶ This guidance has sufficiently clarified the intent of the Fees Act to ensure nationwide application of a lodestar method. This alone will not reduce the subjectivity involved in discerning "hours reasonably expended" or "reasonable hourly rates," but it will replace an inconsistent process for fee computation with a uniform methodology.

Bonuses and Multipliers

Awarding of bonuses for contingency or quality on top of the lodestar sum was inaugurated by the original lodestar case, *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*¹⁶⁷ This part of the lodestar formulation has grown dramatically.¹⁶⁸ For example, the \$2,204,534 award mentioned earlier was the result of a 3.5 multiplier.¹⁶⁹ In another case, a fee award of over \$88,000 was increased by fifty percent to over \$132,000 on the basis of quality service provided on issues the court agreed were not especially novel.¹⁷⁰ Other cases have

162. 495 F. Supp. 761 (D. Mass.), *rev'd*, 662 F.2d 88, *aff'd on reh'g*, 662 F.2d 102 (1st Cir. 1981). For some of the public commentary surrounding this case, see *New York Times*, Dec. 14, 1983 at A 22 and *Washington Post*, Dec. 16, 1983 at A 22.

163. *See supra* note 151.

164. 103 S. Ct. 1933 (1983).

165. *Id.* at 1939.

166. *Blum v. Stenson*, 104 S. Ct. 1541, 1544 (1984).

167. 487 F.2d 161 (3d Cir. 1973).

168. *See Leusdorf, The Contingency Factor in Attorney Fee Awards*, 90 *YALE L.J.* 473 (1981).

169. *See supra* note 18 and accompanying text.

170. *Bolden v. Pennsylvania State Police*, 491 F. Supp. 958, 965-66 (E.D. Pa. 1980).

multiplied the lodestar amount by 2,¹⁷¹ by 1.75,¹⁷² or otherwise significantly enhanced what is supposed to constitute "reasonable rates times reasonable hours" in the first place.¹⁷³

In *Blum v. Stenson*,¹⁷⁴ the Supreme Court questioned the justification for such upward adjustments. Stenson had requested \$118,968 in fees, figured by compensating his 809 hours of work at a rate of from \$95 to \$105 per hour and then adding a fifty percent bonus (\$39,656) to reward him for the "quality of representation, the complexity of the issues, the riskiness of success, and the great benefit . . . achieved."¹⁷⁵ Before turning to these specific reasons for the bonus, the Court examined the legislative history of the Fees Act and concluded that the basic lodestar sum "normally provides a 'reasonable' attorney's fee within the meaning of the statute."¹⁷⁶ Turning next to the specific reasons for Stenson's upward adjustment, the Court found that they "do not withstand examination."¹⁷⁷ With respect to the complexity and novelty of the case, the Court found that these factors "presumably were fully reflected in the number of billable hours recorded by counsel and thus do not warrant an upward adjustment."¹⁷⁸ Since it is axiomatic that a complex case will take more time to prepare than an easy one, the attorney time expended should adequately compensate a lawyer for this factor. In regard to the quality factor, the Court opined that there are instances where the experience and special skills of the attorney should be a factor in the fees awarded. Accordingly, "this expertise should be reflected in the reasonableness of the hourly rates."¹⁷⁹ The excellence of the benefits achieved, "generally will be subsumed within other factors used to calculate a reasonable fee, it normally should not provide an independent basis for increasing the fee award."¹⁸⁰

This leaves only one further basis for a bonus, contingency or the riskiness of success. In *Blum*, the plaintiff never identi-

171. *Graves v. Barnes*, 700 F.2d 220 (5th Cir. 1983); *Wells v. Hutchinson*, 499 F. Supp. 174 (E.D. Tex. 1980); *Vecchione v. Wohlgemuth*, 481 F. Supp. 776 (E.D. Pa. 1979).

172. *West v. Redman*, 530 F. Supp. 546 (D. Del. 1982).

173. For a well articulated criticism of this aspect of the lodestar methodology, see Circuit Judge M. Wilkey's dissent in *Copeland v. Marshall*, 641 F.2d 880, 908 (D.C. Cir. 1980) (Wilkey, J., dissenting) ("In our colleagues lodestar opinion, the path of attorney's fees in Title VII litigation is easy to discern. It is Up, Up, and Away! It is *Per Calculos As Astra*.").

174. *Blum v. Stenson*, 104 S. Ct. 154 (1984).

175. *Id.* at 1545.

176. *Id.* at 1548.

177. *Id.*

178. *Id.* at 1548-49.

179. *Id.* at 1549.

180. *Id.*

fied any risks associated with the litigation, nor "claim[ed] that the risk of nonpayment required an upward adjustment to provide a reasonable fee."¹⁸¹ The record did not support such a finding. The Court raised a further question, however, of "whether the risk of not being the prevailing party . . . may ever justify an upward adjustment."¹⁸²

This question is perceptive; it focuses attention on the intent of the Fees Act. Only "prevailing parties" are to qualify for a "reasonable fee" in the first place. This "prevailing" threshold was the mechanism chosen by Congress to deter meritless litigation. Supplying a bonus for accepting marginal or risky cases would certainly be at odds with this policy. In fact, a contingency bonus could attract competent counsel away from prosecuting clear violations of rights in favor of cases with a higher potential award. If the contingency argument is based on the notion that fees in this risky case may offset expenses of other unsuccessful suits, the problem of encouraging marginal litigation is compounded by the reasonable question of "why the subsidy [for unsuccessful litigation] should come from the defendant in another case."¹⁸³ The summation of these points on contingency or quality bonuses was emphasized repeatedly by the Court in *Blum*.¹⁸⁴

Blum and *Hensley* have certainly clarified some of the most important issues that led to the widespread dissatisfaction with the computation of section 1988 fees. Each of these clarifications, however, left some questions unanswered. Those unanswered questions are not the product of the Court's irresolution, but of Congress's failure to provide discernible standards. In fact, Congress has not adequately defined the limits of judicial discretion in making awards under section 1988. In the context of another fee shifting statute, Congress was careful to provide a mechanism defining the maximum hourly rate for compensating counsel. The Equal Access to Justice Act contains a \$75 hourly rate cap on all awards provided under its terms.¹⁸⁵ This supplies adequate compensation to attract competent counsel, which is

181. *Id.* at 1550.

182. *Id.* at 1550 n. 17.

183. Leubsdorf, *supra* note 168, at 488-89.

184. "[W]e reiterate what was said in *Hensley*: 'where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhancement award may be justified.'" *Blum*, 104 S. Ct. at 1550 (quoting *Hensley v. Eckhart*, 103 S. Ct. 1933, 1940 (1983)). What the Court means by "exceptional success" justifying an "enhancement" after undermining each of the foundations for a bonus is uncertain, but something more than "excellent results" is clearly required.

185. 5 U.S.C. § 504(b)(1)(A) (1980) (repealed Oct. 1, 1984).

the stated purpose of the Fees Act, without providing windfalls for attorneys. Consistency might dictate a similar provision for other fee shifting statutes. The Equal Access to Justice Act subjects the federal government to liability, while section 1988 generally subjects the state and local governments to liability for fees. Since Congress has provided a cap to protect its own treasury, consistency might dictate a similar regard for other governmental entities.

Compensation for Unsuccessful Claims: Issue Splitting

The Supreme Court's recent ruling in the case of *Hensley v. Eckerhart*¹⁸⁶ has resolved major issues regarding the partial success problem or the question of issue splitting in fee computation. As discussed earlier, failing to prevail on all causes of action does not make a plaintiff ineligible for attorney's fees.¹⁸⁷ Prior to *Hensley*, there was some confusion about whether a plaintiff should be compensated for issues on which he did not prevail.

Basing their reasoning on the eligibility rule for a partially successful plaintiff, some courts have held that prevailing on any single issue guarantees a recovery for time spent on all issues in the case.¹⁸⁸ *Northcross v. Board of Education*¹⁸⁹ exemplifies this line of cases:

The fact that some of the time was spent in pursuing research on issues which was ultimately unproductive, rejected by the court, or mooted . . . is wholly irrelevant. So long as the party has prevailed on the case as a whole the district courts are to allow compensation for hours expended on unsuccessful research . . . [otherwise we would] discourage innovative and vigorous lawyering in a changing area of the law.¹⁹⁰

This rule, however, could produce unanticipated results. For instance, it could "encourage civil rights plaintiffs to pad their complaints with multiple, meritless claims."¹⁹¹ It also could discourage early settlements because attorneys are likely to be compensated for all time spent on a case if they prevail on any single claim.

Another line of cases, however, stated that plaintiffs should not recover fees for pursuing unsuccessful claims. In *Hughes v.*

186. 103 S. Ct. 1933 (1983).

187. See *supra* notes 96-120 and accompanying text.

188. *Busche v. Burkee*, 649 F.2d 509 (7th Cir.), *cert. denied*, 454 U.S. 897 (1981); *Reproductive Servs. v. Freeman*, 614 F.2d 585 (8th Cir.), *vacated*, 449 U.S. 809, *on remand*, 634 F.2d 1134 (1980); *Lamphere v. Brown Univ.*, 610 F.2d 46 (1st Cir. 1979); E. LARSON, *supra* note 14, at 177-87.

189. 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).

190. *Id.* at 636.

191. NAAG REP., *supra* note 48, at 20.

Repko,¹⁹² the Third Circuit opined that "the fee-petitioner cannot be treated as the prevailing party to the extent he has been unsuccessful in asserting a claim. . . . Any other interpretation would run counter to the spirit of the Award Act provision that attorney's fees should be awarded to the 'prevailing' party."¹⁹³ Nor was the Third Circuit alone in reaching this conclusion.¹⁹⁴

Between the extremes of allowing and disallowing fees for unsuccessful claims, other circuit court opinions had suggested basing the fee determination on the nature of those claims or on the likelihood that work on unsuccessful claims contributed to any success achieved.¹⁹⁵ Thus the stage was set for some resolution of this major fees question.

The fees sought in *Hensley* sprang from a constitutional challenge to the conditions in a Missouri State Mental Hospital. The plaintiffs requested a total fee award of "somewhere between \$195,000 and \$225,000" for work done on all counts of the lawsuit, some of which they had voluntarily dismissed and others of which they did not win.¹⁹⁶ The Supreme Court clarified first that the issue with respect to "prevailing" was properly addressed by the standard articulated by the First Circuit in *Nadeau v. Helgemoe*.¹⁹⁷ The Court then clarified that claim-splitting was a fee computation issue and determined that the *Nadeau* rule "is a generous formulation that brings the plaintiff only across the statutory threshold. It remains for the district court to determine what fee is reasonable."¹⁹⁸

After discussing several factors to be considered in making a determination of "reasonableness," the Court noted that "[t]here remain other considerations that may lead the district court to adjust the fee upward or downward, including the 'results obtained.'"¹⁹⁹ Noting that distinct claims in the same suit may be entirely unrelated to one another, the Court determined that work on an unsuccessful claim cannot be deemed to have been expended in pursuit of the ultimate result achieved. The Court concluded that the congressional intent required treating these claims as if they had been asserted in different lawsuits.²⁰⁰ When a litigant succeeds on some claims that are sufficiently re-

192. 578 F.2d 483 (3d Cir. 1978).

193. *Id.* at 487.

194. *Bartholomew v. Watson*, 665 F.2d 910, 914 (9th Cir. 1982); *Muscare v. Quinn*, 614 F.2d 577, 579-81 (7th Cir. 1980).

195. See *Hensley v. Eckerhart*, 103 S. Ct. 1933, 1938-39 n. 5 (1983), for a listing of cases with different approaches to unsuccessful claims.

196. *Id.* at 1936-37.

197. 581 F.2d 275 (1st Cir. 1978).

198. *Hensley* at 1938-39.

199. *Id.* at 1939.

200. *Id.*

lated to unsuccessful claims to make it difficult to consider them separately, however, "the court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation."²⁰¹ The basic principle is that fees may be reduced on the basis of claim-by-claim success unless the claims are not severable.

Some new questions are created by the answer to the old. Litigation will undoubtedly arise over what relationship between claims is necessary to escape the severance requirement. Another aspect of the *Hensley* case likely to lead to more litigation is the Court's comment that "[w]here a plaintiff has obtained excellent results . . . the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit."²⁰² On one level, this excellence principle is in harmony with the Court's objective in the *Hensley* case, namely "clarify[ing] the proper relationship of the results obtained to an award."²⁰³ Excellence is a qualitative "result" which a judge is uniquely qualified to discern within the discretion granted by the Act to set "reasonable" fees. On the other hand, rewarding excellence is not related to the principle of "prevailing" which underlies the quantitative results method suggested by the claim-by-claim severance language of the opinion. What is a district court required to do when a litigant does excellent work on an unsuccessful claim? The district court will undoubtedly be divided over encouraging excellence in bringing innovative causes on the one hand and discouraging mere experimentation and frivolous claims on the other. In the absence of clarifying legislation, Justice Brennan's warning will undoubtedly prove correct: "appellate scrutiny of issues like those in this case also generates a steady stream of opinions, each requiring yet another to harmonize it with the one before or the one after."²⁰⁴

Duplication of Effort

The duplication of effort issue has its genesis in language from *Johnson v. Georgia Highway Express*.²⁰⁵ In *Johnson* the Court determined "[i]f more than one attorney is involved, the possibility of duplication of effort along with the proper utilization of time should be scrutinized. The time of two or three lawyers in a courtroom when one would do, may obviously be

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 1951 (Brennen, Marshall, Blackmun, and Stevens JJ., concurring in part and dissenting in part).

205. 488 F.2d 714 (5th Cir. 1974).

discounted."²⁰⁶ Thus, a district court enjoys the discretion to reduce the number of compensable hours in a fee request to account for duplicative efforts.²⁰⁷ On the other hand, complex litigation will often justify more than one attorney's expenditure of effort.²⁰⁸

Potential Legislative Reform of Fee Computation

As mentioned earlier, the Equal Access to Justice Act sets a \$75 cap on attorney fee awards. A maximum rate of compensation for civil fee shifting statutes would not only be consistent with the Equal Access Act, but would also reasonably attract competent counsel without providing windfalls for attorneys. Mr. Jonathan Rose, former Assistant Attorney General in charge of the Office of Legal Policy, has stated that such a cap for federal fee shifting statutes would make awards "fairer and more predictable."²⁰⁹ He added that "[a] fixed \$75 per hour rate is well above what the federal government pays its own attorneys, and should be sufficient to attract competent counsel."²¹⁰ Additionally, he noted that a cap would relieve the courts of continually attempting to determine a reasonable rate and would also eliminate the windfall awards.²¹¹ This comment about the comparative rate of compensation for government lawyers and civil rights advocates recalls the dicta in the *Johnson* case that Congress did not intend to make "the private attorney general's position so lucrative as to ridicule the public attorney general."²¹² Mr. Rose's remark about predictability supports the likelihood that a cap would narrow the issues with respect to compensation of prevailing plaintiffs' counsel and result in prompt settlements of fee request issues.

A maximum hourly rate for counsel fee awards would not preclude a court from making specific findings that warrant a reduction in fees. For instance, if the attorney in question generally earns a lower rate, this would certainly argue for a reduction from the cap. In addition, other circumstances might warrant a downward adjustment. In this vein, the Equal Access to Justice Act contains language permitting reduction where the plaintiff is found to have unreasonably prolonged the outcome of the

206. *Id.* at 717.

207. *Miles v. Sampson*, 675 F.2d 5 (1st Cir. 1982).

208. *Planned Parenthood Assoc. of Kansas City v. Ashcroft*, 655 F.2d 848 (8th Cir. 1981); *Tasby v. Estes*, 651 F.2d 287 (5th Cir. 1981).

209. Rose, *supra* note 14, at 16.

210. *Id.* at 16-17.

211. *Id.*

212. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 716 (5th Cir. 1974).

case.²¹³ The Alaska Native Claims Settlement Act allows reductions where no bona fide attorney-client relationship is evident and where the efforts expended on the case are excessive with regard to the nature of the adjudication.²¹⁴ A fee request wholly disproportionate to the monetary or injunctive results of the case could also justify reduction.²¹⁵ Finally, it should be clear that any listing of reduction factors is not exclusive; judicial discretion on a case by case basis may dictate reductions for a variety of reasons, including, for example, some of the issues raised in the current context of "special circumstances."²¹⁶

S. 141, although introduced months prior to the *Hensley* case, adopts the conclusion that fees should be awarded on the basis of a "reasonable market rate for time reasonably spent on the claims in which the plaintiff prevailed."²¹⁷ This codifies the *Hensley* conclusion that the lodestar methodology was intended by Congress to effect the *Johnson* standards. It also codifies the claim splitting concept. Senator Hatch justified his claim splitting provision in advance of *Hensley* in the following manner:

[T]he majority of the circuits hold that if, for example, a plaintiff alleges five separate claims and the court finds that he only prevailed on one of those claims, attorney's fees will be awarded for the entire litigation despite the fact that the Government won the vast majority of the claims. This result is anomalous since if the plaintiff only alleged the four claims that failed, he would have received no recovery at all.²¹⁸

A further refinement of the Hatch bill might include the concept that the plaintiff would need to demonstrate that his attorney's compensable work was *necessary* effort expended on prevailing issues. The inclusion of the necessity concept would preclude award for redundant or duplicative work and, at the same time, codify the rule that intervenors should not be compensated for work which contributes no new understanding to the case.

Senator Hatch's bill also bans the use of "bonuses or multipliers" to compute an attorney's fee award. As mentioned earlier, this proposal seems to be in harmony with the Supreme Court's *Blum v. Stenson*²¹⁹ ruling. In that case, the Court could find no "reasons offered by the District Court to support . . . up-

213. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(C) (1982) (repealed Oct. 1, 1984); 5 U.S.C. § 504(a)(3) (1982) (repealed Oct. 1, 1984).

214. Alaska Native Claims Settlement Act, 43 U.S.C. § 1601(d)(2) (1981).

215. *Hensley v. Eckerhart*, 103 S. Ct. 1933, 1941 (1983). (The lodestar formulation in cases of "partial or limited success" may result in an "excessive" fee).

216. See *supra* notes 56-80 and accompanying text.

217. See *supra* note 137.

218. See *supra* note 128.

219. 104 S. Ct. 1541 (1984).

ward adjustment[s]."²²⁰ The Court left the question of whether contingency justifies a bonus only partially answered, but this remaining issue would be resolved by the Hatch bill. Essentially the bill decides that the formula of reasonable hours times reasonable rates should be sufficient to produce a reasonable attorney's fee award without additional bonuses.

As provided in the case of *Buxton v. Pate*,²²¹ a judgment for substantial monetary damages could justify a percentage reduction, up to 25 percent, in the attorney fees award. This would be similar to the current provisions of the Federal Tort Claims Act²²² and the Social Security Act²²³ which provide for compensation of attorneys out of the plaintiff's monetary damages.

CONCLUSION

In the absence of comprehensive legislation that applies some uniform standards to all fee shifting statutes, such as the \$75 cap on hourly rates, the 197-year-old policy of the American rule may well continue to be undercut by the multiplication of statutory exceptions and broad judicial interpretation of the vague terms of such laws. In past consideration of fee shifting statutes, Congress has only sparingly deliberated about the overall policy of the American rule.²²⁴ Congress has yet to undertake a comprehensive review of fee shifting statutes. Such a review would acquire added significance if Congress were to give special attention to arresting the erosion of the American rule.

If Congress is to arrest this piecemeal erosion, it must give serious consideration to the adoption of limits and clarifications of fee shifting policy that will confine fee awards to the purpose of reducing financial barriers to meritorious lawsuits. Too often this purpose has been obscured in the rush to compensate lawyers for quality work or contingency or other factors irrelevant to the plaintiff's ability to bring his case to court.

Equity also commends attending to fee shifting policy.

220. *Id.* at 1548.

221. 595 F.2d 1182 (9th Cir. 1979).

222. Fed. Tort Claims Act, 28 U.S.C. § 2678 (1966).

223. Social Security Act, 42 U.S.C. § 406 (1968).

224. The only apparent reference to the American rule during the debate over the Civil Rights Attorney's Fees Awards Act of 1976 amounted to a debating point, rather than a probing analysis of the overall effect of fee shifting statutes on the policies of the rule. 122 CONG. REC. S.16431-16432 (daily ed. Sept. 22, 1976) (statement of Senator Helms) ("The American judicial tradition in general disapproves the allowance of attorney's fees to the prevailing party in civil legal actions. The Federal judiciary has been exceedingly cautious in carving out even limited exceptions to this rule.").

Under the Criminal Justice Act,²²⁵ attorneys who represent indigent criminal defendants have received the same rates, \$20 per hour for out-of-court time and \$30 per hour for in-court time, since 1970. At the same time, attorneys seeking awards under fee shifting statutes are claiming over \$400 per hour.²²⁶ Moreover, the Criminal Justice Act limits attorneys to \$1,000 total for a felony trial, \$1,000 for an appeal, and \$440 for a misdemeanor. These compensation limits apply regardless of the complexity or demands of a particular trial. Congress needs to consider attorney fee policies with an eye to reducing the discrepancy between hourly rates of private attorneys who sue the government in civil litigation and rates of private attorneys who represent indigent criminal defendants.

The fee shifting statutes themselves, such as section 1988, in the sparsity of their guidance for resolving the myriad issues posed by creating exceptions to the American rule, argue for their own reform. Legislation is indicated to establish uniform standards for setting fees at levels sufficient to attract competent counsel without granting windfalls for lawyers.

ADDENDUM

In the few months between submission of this article and its publication, there have been several important developments relevant to attorney's fee shifting. On October 9, 1984, the Supreme Court granted certiorari to a case likely to test the ability of a plaintiff to seek fees for state law cases which tangentially raise federal civil rights issues.²²⁷ In *Spencer v. South Carolina Tax Commission*,²²⁸ the plaintiff challenged as unconstitutional a state tax in state court. The 1937 Federal Tax Injunction Act barred the case from arising in federal court. On the basis of the same facts involved in the constitutional challenge, the plaintiff added a claim under 42 U.S.C. § 1983 and requested fees under 42 U.S.C. § 1988. The state courts provided substantive relief without reaching the federal cause of action. Thus, the South Carolina Supreme Court tersely rejected the fee request: "It may reasonably be inferred that the sole reason for alleging section 1983 was to justify the allowance of counsel fees. We do not believe this was contemplated by Congress

225. Criminal Justice Act, 18 U.S.C. § 3006(A)(d) (1982).

226. See, e.g., *Keith v. Volpe*, 501 F. Supp. 403 (C.D. Cal. 1980). (This enormous award amounted to hourly rates between \$87.50 and \$411.25); *Grendel's Den, Inc. v. Goodwin*, 495 F. Supp. 761 (D. Mass.), *rev'd*, 662 F.2d 102 (1st Cir. 1981).

227. See notes 42-49 and accompanying text.

228. 316 S.E. 2d 386 (S.C. 1984), *cert. granted*, 53 U.S.L.W. 3269 (October 9, 1984).

when it enacted Section 1983 and 1988."²²⁹ On appeal, the Supreme Court should decide whether a state court may be compelled to assume jurisdiction over a section 1983 suit when existing state law provides adequate remedies without federal attorney fee entanglements.

On June 27, 1984, Senators Strom Thurmond and Orrin Hatch, at the request of the Justice Department, introduced the Legal Fees Equity Act.²³⁰ In his introductory statement, Senator Hatch described this bill, S. 2802, in the following terms:

The overall purpose of this proposal is to provide the courts and Federal agencies with greater guidance in implementing Federal fee-shifting statutes. This bill would not deny fees to prevailing /parties/, but would set standards and procedures to ensure that such fees are 'reasonable.' An important element of the standards proposed by this legislation is a cap of \$75 per hour on attorney fees.²³¹

Besides enacting the same cap currently employed in the Equal Access to Justice Act, S. 2802 also would adopt the middle ground position advocated by this article on the question of what degree of success is sufficient to constitute "prevailing,"²³² employ the "material factor" test from S. 141 for determining whether a lawsuit has served as a catalyst for administrative or legislative reform;²³³ preclude fees for "services performed subsequent to the time of a written settlement offer" found by the court to have been as favorable as the relief ultimately granted. Unlike S. 141, S.2802 would not bar these fees if circumstances at the time of the settlement rejection made failure to accept the offer reasonable;²³⁴ codify, like S.141, the lodestar methodology for fee computation, while prohibiting any form of multiplier or bonus;²³⁵ endow judges with specific discretion to reduce fees on the basis of other equities in the case, such as some of the issues raised in the current context of "special circumstances,"²³⁶ stipulate that only "*necessary* effort expended on prevailing issues" is compensable;²³⁷ permit, in accord with the case of *Buxton v. Patel*, a judge to reduce an award of fees by up to twenty five percent when the plaintiff wins substantial monetary damages.²³⁸

229. *Id.* at 389.

230. S. 2802, 98th Cong., 2d Sess. (1984).

231. 130 CONG. REC. S. 8842, 8843 (daily ed. June 29, 1984) (statement of Senator Hatch).

232. See notes 109-16, 143 and accompanying text.

233. See notes 129-42, 144-45 and accompanying text.

234. See notes 121-28, 146-47 and accompanying text.

235. See notes 148-85, 217, 219-20 and accompanying text.

236. See notes 57-81, 213-16 and accompanying text.

237. See notes 186-208, 217-18 and accompanying text.

238. See notes 67-68, 221-23 and accompanying text.

On September 11, 1984, the Senate Constitution Subcommittee held a hearing on S. 2802. The testimony of Carol Dinkins, Deputy Attorney General, was typical of evidence presented:

Three different types of difficulties occur in the administration of the various fee-shifting statutes. The most obvious is the increasing incidence of inordinately high attorney fees or warrants through use of multipliers and other means. Second is the great disparity in awards that seems sometimes to border on the irrational. Third, and increasingly noticed by both judges and commentators, is the growing burden on the courts and litigants imposed by a system where the rules are unclear and where the parties are encouraged to engage in expensive litigation of attorney fee issues rather than to enter upon settlements on the amount of attorney fees.²³⁹

This hearing also featured testimony from the Attorneys General of the states of Massachusetts, Arkansas, and Utah. Each of these state officials as well as the Deputy Attorney General of the United States agreed that seventy-five dollars per hour would be sufficient to attract competent counsel to prosecute meritorious suits.²⁴⁰

Although the 98th Congress expired before S. 2802 could progress beyond committee consideration, it is certain to be re-introduced and reviewed in the 99th Congress.

239. S. 2802: *Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. (1984) (statement of Carol Dinkins).

240. *Id.* Ms. Dinkins: "Even with the \$75-an-hour limitation, there have been many lawsuits brought under the Equal Access to Justice Act. That number has not, I think, deterred litigation." Mr. Bellotti of Massachusetts: "We would have no difficulty at all in attracting competent counsel for \$75 an hour. Ours is an urban northeast state where fees are high generally . . . But the short answer is: I would have no problem with \$75 an hour." Mr. Clark of Arkansas: "In Arkansas, \$75 an hour would attract competent counsel without question." Mr. Wilkinson of Utah: "The figure of \$85 or \$95 a hour is for the best firm in town I could find. I think that in our state \$75 could attract competent counsel."