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# Attorney's Fees under the Civil Rights Act - A Time for Change, 16 J. Marshall L. Rev. 261 (1983)

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# ATTORNEY'S FEES UNDER THE CIVIL RIGHTS ACT—A TIME FOR CHANGE

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## INTRODUCTION

The Civil Rights Act[1] provides a private cause of action for an individual whose constitutional rights have been violated by either a governmental body[2] or a private party. The remedies

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1. 42 U.S.C. §§ 1981—1983, 1985—1986 (1976 & Supp. IV 1980). The section that is currently the subject of increased litigation is § 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1976 & Supp. IV 1980).

Section 1983 was enacted pursuant to the fourteenth amendment, the fifth section of which vests Congress with the "power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. The fourteenth amendment was ratified in 1868 and the enforcement provision known as § 1983 began as part of the Ku Klux Klan Act of April 20, 1871, ch. 22, 17 Stat. 13 (codified as amended at 10 U.S.C. § 333, 18 U.S.C. §§ 371-372, 2384; 28 U.S.C. §§ 1343, 1861; 42 U.S.C. §§ 1983, 1985-1986 (1976 & Supp. IV 1980)). Section 1983 was rarely invoked until 1961, when the Supreme Court broadened its scope to encompass official conduct, which was previously believed exempt. *See infra* note 2.

2. Until recently, it was settled law that a municipality could not be sued for damages under 42 U.S.C. § 1983, since it could not properly be considered a "person" within the meaning of the Act. Monroe v. Pape, 365 U.S. 167 (1961). *Monroe* was expressly overruled in Monell v. New York Dep't of Social Serv's, 436 U.S. 658 (1978), in which the Court stated:

> Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. . . . On the other hand . . . Congress did not intend municipalities to be held liable unless action pur-

for a party seeking redress include both injunctive and monetary relief.[3] In 1976, the relief available to a civil rights litigant was expanded to include an award of attorney's fees. The Attorney's Fees Awards Act, an amendment to 42 U.S.C. § 1988, provides in part: "[i]n any action or proceeding to enforce a provision of [section 1983 and other statutes], 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."[4]

This provision was enacted to remedy the situation created by *Alyeska Pipeline Service Co. v. Wilderness Society*,[5] in which the Supreme Court held that federal courts may not award fees to a successful civil rights litigant absent express statutory authorization or a special exception.[6]

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suant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.

*Id.* at 690-92 (emphasis in original).

3. 42 U.S.C. §§ 1983, 1985-1986 (1976 & Supp. IV 1980). The district courts are vested with original jurisdiction to hear claims arising under the Civil Rights Act pursuant to 28 U.S.C. §§ 1331, 1343(a)(3)-(4) (Supp. V 1981).

4. 42 U.S.C. § 1988 (1976) (emphasis added) [hereinafter referred to as § 1988 or Attorney's Fees Act]. Section 1988 also permits court-awarded attorney's fees in actions brought under §§ 1981-1982, 1985-1986. These provisions were originally enacted at a critical time in United States history following the Civil War. Section 1981 was intended to confer equality in civil rights. Section 1982 seeks to guarantee equality in property rights to all persons within the jurisdiction of the United States. Conspiracy to interfere with another's civil rights is prohibited by § 1985. This section also provides a remedy against conspiracies undertaken to obstruct justice. Section 1986 provides a remedy against persons who, having knowledge of a conspiracy violative of § 1985, fail or refuse to prevent the object of the conspiracy although they have the power to do so.

5. 421 U.S. 240 (1975). *See infra* notes 11-16 and accompanying text. Congress passed § 1988 "to remedy anomalous gaps in our civil rights laws created by . . . *Alyeska* and to achieve consistency in our civil rights laws." S. REP. NO. 1011, 94th Cong., 2d Sess. 1, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5908, 5909 [hereinafter cited as S. REP. NO. 1011]. For a detailed history of the Attorney's Fees Awards Act, see SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 94TH CONG., 2D SESS., CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS AND OTHER ENACTMENTS (1976) [hereinafter cited as SOURCE BOOK].

6. For a discussion of what may constitute a special exception, see *infra* notes 8-10 and accompanying text.

In *Alyeska*, the plaintiffs were a coalition of environmental interest groups seeking to enjoin the Secretary of the Interior from issuing permits for the construction of the Alaska oil pipeline. The plaintiffs claimed the issuance of the permits would violate the Mineral Leasing Act of 1920, ch. 85, 41 Stat. 437 (codified as amended at 30 U.S.C. § 185 (1976)) and the National Environmental Policy Act, ch. 55, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321, 4331-4335, 4341-4347 (1976)). The district court granted the plaintiffs a preliminary injunction. Wilderness Soc'y v. Hickel, 325 F. Supp. 422 (D.D.C. 1970). Later, the preliminary injunction was dissolved, the per-

In the United States, the general rule is that a successful litigant is not permitted to recover attorney's fees from his opponent unless a statute or enforceable contract so provides.[7] This so-called "American Rule," however, is subject to limited exceptions. For example, a federal court will grant attorney's fees to a successful party when his opponent has acted in bad faith.[8] An-

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manent injunction denied and the complaint dismissed in an unreported decision. *See* Wilderness Soc'y v. Morton, 479 F.2d 842, 851 (D.C. Cir. 1973) (en banc), *cert. denied*, 411 U.S. 917 (1973). On appeal, the district court was reversed. *Id.*

Once the merits of the litigation were effectively terminated by new legislation, the appellate court turned to the plaintiffs' request for an award of attorney's fees. Wilderness Soc'y v. Morton, 495 F.2d 1026 (D.C. Cir. 1974) (en banc). The court granted the petition for attorney's fees based on the "private attorney general" theory, discussed *infra* notes 11-12 and accompanying text. In this regard, the appellate court stated that the plaintiffs:

> [a]cting as private attorneys general, not only have ensured the proper functioning of our system of government, but they have advanced and protected in a very concrete manner substantial public interests. An award of fees would not have unjustly discouraged appellee Alyeska from defending its case in court. And denying fees might well have deterred appellants from undertaking the heavy burden of this litigation.

*Id.* at 1036.

7. The American Rule differs from the approach of many other nations. For example, in Great Britain fees are automatically awarded to the prevailing litigant in all lawsuits. *See* Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 639 (1974).

For additional support for the American Rule, see Fleischman Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967); Stewart v. Sonnebon, 98 U.S. 189, 197 (1878); Oelrichs v. Spain, 82 U.S. 211, 230-31 (1872). *See also* McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN. L. REV. 619, 639-42 (1931). *But see* Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966); Kuenzel, *The Attorney's Fees: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75 (1963).

8. A federal court will award fees to the successful party when his opponent has "acted in bad faith, vexatiously, wantonly or for oppressive reasons." F.D. Rich Co. v. United States *ex rel.* Indus-Lumber Co., 417 U.S. 116, 129 (1974). For example, in Rolax v. Atlantic Coast Line Ry. Co., 186 F.2d 473 (4th Cir. 1951), attorney's fees were assessed against a defendant-labor organization which had entered into a contract depriving the plaintiffs, nonmember Negro firemen, of seniority and other employment rights. The bad faith was evident where the plaintiffs were subjected to discrimination and oppressive conduct by the powerful labor organization, which was required as bargaining agent to protect the plaintiffs' interests. Further, in Bell v. School Bd., 321 F.2d 494 (4th Cir. 1963), the court awarded fees to successful plaintiffs where the defendant-school officials conducted a long and continued pattern of evasion and obstruction, thereby thwarting plaintiffs' wishes for a desegregated education. Plaintiffs had sought transfers from a predominantly black school to a predominantly white school. Defendants imposed rules on black students that did not apply to white students. *Id.* As these cases illustrate, the rationale for the shifting of the fees is punitive. Hall v. Cole, 412 U.S. 1, 5 (1973).

However, in Runyon v. McCrary, 427 U.S. 160 (1975), a case antedating the *Alyeska* opinion and § 1988, the Court refused to award fees to the parents of Negro children who had successfully asserted a § 1981 action against private schools. The schools were found to have followed a racially discrim-

other established exception applies when, as a result of the suit, a common fund is created which benefits an ascertainable class. The costs are spread proportionately among the class members.[9] Finally, court-awarded fees may be proper when assessed

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inatory admissions policy. *Id.* at 172-73. The plaintiffs were granted both compensatory and equitable relief, and, at the district court level, attorney's fees were assessed against the defendant schools. 363 F. Supp. 1200 (E.D. Va. 1973). The court of appeals reversed this portion of the district court's judgment. 515 F.2d 1082 (4th Cir. 1975). Anticipating the outcome of *Alyeska*, the court refused to adopt the private attorney general theory. *Id.* at 1090-91. Further, the court could find no evidence of bad faith on the part of the defendants. *Id.* at 1089-90. The Supreme Court affirmed. 427 U.S. 160 (1975).

In rejecting the plaintiff's claim of bad faith, the *Runyon* Court provided some useful guidelines on this exception. The plaintiffs argued that the schools exhibited bad faith, not by litigating the legal merits of the claim, but by denying that they had in fact discriminated. At trial, the defendants' testimony conflicted with the plaintiffs' and their credibility was open to some question. Based on the ground that the defendants contested the facts, the plaintiffs claimed the defendants acted in bad faith, attempting to deceive the court and prolong the litigation. Although the Supreme Court acknowledged the bad faith exception, it found:

> [s]imply because the facts were found against the schools does not by itself prove that threshold of irresponsible conduct for which a penalty assessment would be justified. Whenever the facts in a case are disputed, a court perforce must decide that one party's version is inaccurate. Yet it would be untenable to conclude *ipso facto* that that party had acted in bad faith.

427 U.S. at 183-84. *See also* Newman v. Piggie Park Enter's, Inc., 390 U.S. 400, 402 (1968) (per curiam); Vaughn v. Atkinson, 369 U.S. 527 (1962). *Cf.* FED. R. APP. P. 38 (frivolous appeal); FED. R. CIV. P. 41(d) (vexatious suits).

9. The "common fund" exception applies when a suit benefits persons other than the successful litigant. In Trustees v. Greenough, 105 U.S. 527 (1882), the Court relied on its traditional equitable power to permit the trustee of a fund or property, or one who preserves or recovers a fund for the benefit of others, to recover attorney's fees either from the fund or property itself or directly from those other persons enjoying the benefit. This finding resulted despite a statute which limited fees awards to specified circumstances. *See* Act of February 26, 1853, ch. 80, 10 Stat. 161 (current version at 28 U.S.C. § 1923(a) (Supp. III 1979)). The Court construed this statute to regulate only fees and costs as chargeable between the litigants, not those between the attorney and client or "the power of a court of equity, in cases of administration of funds under its control, to make such allowance to the parties out of the fund as justice and equity may require." 105 U.S. at 535. In Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939), the Court expanded this rationale to allow a fees award to a plaintiff suing on his own behalf rather than as representative of a class.

In Central R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885), unsecured creditors of a railroad corporation brought suit to establish a lien on the railroad's property which was under new ownership. After success on the merits, the creditors sold their claims to the new owner. The plaintiffs' attorneys then filed suit against the owners for all legal expenses. The Court held that the attorneys were entitled to reasonable compensation for establishing the lien on behalf of the creditors, and that such fees should be recovered with reference to the amount of all claims filed against the railroad's property.

More recently, in Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), stockholders successfully asserted a claim against the defendant corpora-

as a fine against a defendant who has willfully disobeyed a court order.[10]

In *Alyeska*,[11] the Court was faced with a fourth exception to the American Rule known as the "private attorney general" doctrine. Under this concept, lower federal courts had granted attorney's fees to successful plaintiffs in actions which advanced the public interest or effectuated important public policies.[12] The "private attorney general" cases were brought under the Reconstruction-era Civil Rights Act, which did not specifically provide for awards of attorney's fees.[13] However, recovery was permitted by analogy to modern civil rights statutes which expressly authorize such awards.[14] Lower courts reasoned that

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tion for violation of federal securities laws. The stockholders were awarded attorney's fees at the corporation's expense. The Court reasoned that the plaintiffs, by having brought suit, benefitted all stockholders. Further, the absence of a monetary recovery from which the fees could be paid did not preclude a fees award. *See also* Alyeska Pipeline Co. v. Wilderness Soc'y, 420 U.S. 240, 257-58 n.30 (1975).

10. In such cases, the payment of fees is considered a penalty levied on the defendant. In Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 426-28 (1923), an unsuccessful party in a patent infringement suit, acting in contempt of court, brought an action to enjoin the enforcement of the prior decree. The costs of the successful party in defending the suit were assessed against the defendant as a penalty.

When a federal court sits in a diversity case, the issue of a fees award is altogether different. If the state law granting or denying fees is not in conflict with a federal statute or court rule, the state rule will be followed. 6 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 54.77 (2d ed. 1974). *See also* Alyeska Pipeline Co. v. Wilderness Soc'y, 421 U.S. 240, 259 n.31 (1975).

11. 421 U.S. 240 (1975). In *Alyeska*, the appellate court enunciated the rationale for the "private attorney general" exception. The court stated that in bringing the action, the plaintiffs had acted to vindicate statutory rights of all citizens, thereby ensuring the proper functioning of government. The court reasoned that the plaintiffs were entitled to fees because to deny them in a case such as this, involving great expense against well-financed defendants, would discourage private parties from enforcing environmental legislation. Wilderness Soc'y v. Morton, 495 F.2d 1026, 1032 (D.C. Cir. 1974).

12. In Newman v. Piggie Park Enter's, 390 U.S. 400, 402 (1967), a case predating *Alyeska*, the court stated that if plaintiffs were forced to bear their own attorney's fees, "few aggrieved parties would be in a position to advance the public interest." *See also* Fowler v. Schwarzwalder, 498 F.2d 143 (8th Cir. 1974) (successful plaintiff, having vindicated strong congressional policy in favor of private enforcement of civil rights, is entitled to fees award); Cornist v. Richland Parish School Bd., 495 F.2d 189 (5th Cir. 1974) (plaintiff-teachers who successfully brought employment discrimination suit were entitled to fees because they acted as private attorneys general in advancing rights of other teachers); Knight v. Auciello, 453 F.2d 852 (1st Cir. 1952) (plaintiff, after successfully bringing racial discrimination case at a very high cost, may recover attorney's fees). *See generally* Comment, *Awarding Attorney's Fees to the Private Attorney General, Judicial Green Light to Private Litigation in the Public Interest*, 24 HASTINGS L.J. 733 (1973).

13. *See* 42 U.S.C. §§ 1981-1983, 1985-1986 (1970).

14. *See, e.g.*, 42 U.S.C. § 3612(c) (1976) (attorney's fees in fair housing cases); 42 U.S.C. § 2000a-3(b) (1976) (attorney's fees to successful litigants

granting fees was both equitable and consistent with the modern statutes.[15] In *Alyeska*, however, the Supreme Court refused to acknowledge the "private attorney general" theory on the ground it was an invasion of the province of the legislature.[16]

Congress responded immediately to *Alyeska* by amending section 1988 to allow the award of attorney's fees to prevailing parties in specified suits.[17] The aim was to provide the specific authorization required by *Alyeska* and to make the Civil Rights Act consistent with similar legislation.[18] In authorizing the grant of attorney's fees, Congress did not specifically detail the standards governing the propriety or amount of such awards. These matters are left to the discretion of the district court, the only guidance being that such awards be "reasonable" and

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in suits involving discrimination in places of public accommodation); 42 U.S.C. § 2000b-1 (1976) (discrimination in public facilities); 42 U.S.C. § 1973 2(l)(e) (1976) (voting rights cases).

15. In Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971), the court awarded attorney's fees to the successful party despite the fact that, at that time, the statute at issue (42 U.S.C. § 1982 (1970) (housing discrimination)), had no express fees provision. The court reasoned that since Congress provided for attorney's fees in Title II cases involving racial discrimination in places of public accommodation, (42 U.S.C. § 2000e-5(k) (1976)), Congress also intended to extend this policy to housing discrimination cases brought under § 1982. The rule of statutory construction was that "[i]n fashioning an effective remedy for the rights declared by Congress one hundred years ago, courts should look not only to the policy of the enacting Congress but also to the policy embodied in closely related legislation." 444 F.2d at 146. *See also* Fowler v. Schwartzwalder, 498 F.2d 143 (8th Cir. 1974) (attorney's fees available in employment discrimination case brought under §§ 1981—1982, absent express provision, by analogy to Title II cases).

16. 421 U.S. 240, 271 (1975). The Court admitted that it was desirable to encourage the private enforcement of environmental legislation to implement the public policy expressed therein, but nonetheless held that the longstanding American Rule took priority over this consideration.

17. *See supra* text accompanying note 4.

18. *See* S. REP. NO. 1011, *supra* note 5, at 1.

Congress recognized the need for the private enforcement of civil rights as well:

> The effective enforcement of federal civil rights statutes depends largely on the efforts of private citizens. Although some agencies of the United States have civil responsibilities, their authority and resources are limited. In many instances, where these laws are violated it is necessary for the citizen to initiate court action to correct the illegality. Unless the judicial remedy is full and complete, it will remain a meaningless right. Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees H.R. 15460 is designed to give such persons effective access to the judicial process where their grievances can be resolved according to law.

H.R. REP. NO. 1558, 94th Cong., 2d Sess. 1 (1976) [hereinafter cited as H.R. REP. NO. 1558]. *See also* SOURCE BOOK, *supra* note 5.

granted to the "prevailing party."[19] Despite the fact that a court is not required to award fees,[20] in most cases a prevailing plaintiff will recover his costs of representation absent "special circumstances."[21]

Since its inception, there has been a great difference of opinion among the federal courts as to the proper application of section 1988. This article will examine the judicial interpretations of the Attorney's Fees Act with special emphasis on the meaning of the term "prevailing party" in various contexts. The question of whether the purpose of section 1988—to encourage the private enforcement of individual liberties—is furthered when substantial fees are awarded will also be discussed. The authors will conclude with suggestions to limit the grant of excessive fee awards, while still allowing those whose civil rights have truly been violated to have meaningful access to the courts.

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19. *See supra* text accompanying note 4. The lack of legislative guidance was intentional:

> 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, guided of course by the case law interpreting similar attorney's fees provisions. . . . The committee intends that, at a minimum, existing judicial standards, to which ample reference is made in this report, should guide the courts in construing H.R. 15460.

H.R. REP. NO. 1558, *supra* note 18, at 8.

For cases construing § 1988, see, e.g., Perez v. Rodriguez Bou, 575 F.2d 21 (1st Cir. 1978) (successful party enforcing civil rights protected by statute should ordinarily recover attorney's fees); EEOC v. Bailey Co., 563 F.2d 439 (6th Cir.) (district court in its discretion may award attorney's fees to prevailing employer in suit brought by Equal Employment Opportunity Commission), *reh'g denied*, 561 F.2d 439 (6th Cir. 1977), *cert. denied*, 435 U.S. 915 (1978); Wharton v. Kenfel, 562 F.2d 550 (8th Cir. 1977) (statute awarding attorneys' fees in actions brought under civil rights statute applies retroactively to cases pending on appeal; prevailing tenant receives reasonable attorney's fees); Beazer v. New York Transit Auth., 558 F.2d 97 (2d Cir. 1977) (prevailing party in an employment discrimination action properly received attorney's fees; Act applies to pending cases); Panitch v. Wisconsin, 451 F. Supp. 132 (E.D. Wis. 1978) (prevailing plaintiff in civil rights action awarded appropriate attorney's fees); Croker v. Boeing Co. Vertrol Div., 444 F. Supp. 890 (E.D. Pa. 1977) (plaintiffs establishing employment discrimination as to themselves but failing to establish class action may be awarded attorney's fees; defendant employer may only recover attorney's fees with respect to its defense of the class action issues); Wilson v. Chancellor, 425 F. Supp. 1227 (D. Or. 1977) (discretion in awarding attorney's fees should be liberally exercised in favor of prevailing plaintiff).

20. *See supra* text accompanying note 4.

21. *See* Newman v. Piggie Park Enter's, Inc., 390 U.S. 400, 402 (1968). *Accord* Christianburg Garment Co. v. EEOC, 434 U.S. 412, 416-17 (1978).

## THE PREVAILING PARTY REQUIREMENT

### *In General*

The first question a court must address when presented with a petition for attorney's fees is whether the petitioner has prevailed within the meaning of the Attorney's Fees Act. The statute's language[22] and legislative history[23] indicate that a prevailing party may be either the plaintiff or defendant; therefore, both may be eligible for a fees award. However, the standards that guide the court when considering the propriety of a fees award for a prevailing plaintiff differ from those applied to a prevailing defendant.

A prevailing plaintiff is generally awarded fees under the standard announced in *Newman v. Piggie Park Enterprises*,[24] a Title II case involving racial discrimination in a place of public accommodation.[25] In *Newman*, the Supreme Court held that a victorious plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."[26] In adopting a liberal interpretation of the Title II fee provision,[27] the Court noted that the congressional intent to encourage the private enforcement of civil rights would be frustrated if fees were awarded only when the defendant acted in bad faith.[28]

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22. *See supra* text accompanying note 4.

23. S. REP. NO. 1011, *supra* note 5, at 7; H.R. REP. NO. 1558, *supra* note 18, at 2-3.

24. 390 U.S. 400 (1968).

25. *See* 42 U.S.C. § 2000a (1976). In *Newman*, the plaintiffs brought a class action to enjoin racial discrimination against the owner of five drive-in restaurants and a sandwich shop in South Carolina. The district court found that blacks had been discriminated against in all six of the restaurants, but granted the injunction only as to the sandwich shop on the ground that Title II did not cover drive-in restaurants. 256 F. Supp. 941, 951-53 (D.S.C. 1966). The appellate court reversed the denial of the injunction and remanded the case with instructions that attorney's fees be assessed against the defendants only to the extent their defenses were advanced "for purposes of delay and not in good faith." 377 F.2d 433, 437 (4th Cir. 1967). It was this subjective standard that was at issue before the Supreme Court.

26. 390 U.S. at 402.

27. The Title II fee provision at issue in *Newman* reads: "[i]n any action commenced pursuant to this subchapter, 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, and the United States shall be liable for costs the same as a private person." 42 U.S.C. § 2000a-3(b) (1976).

28. The Court reasoned that, under Title II, money damages are not available. When a plaintiff obtains an injunction, he is acting as a "private attorney general," and is protecting matters of the highest public interest. The Court concluded that "if successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position

Five years later, in *Northcross v. Board of Education*,[29] the Supreme Court applied the same standard in a suit brought to enjoin school segregation under the Emergency School Aid Act of 1972.[30] This act provided for attorney's fees much like the provision in Title II.[31] The Court reasoned that the similarity between the two statutes justified a similar construction.[32]

The *Newman-Northcross* standard was adopted by the drafters of the 1976 Attorney's Fees Act. The language of the Act is almost identical to that used in the statutes at issue in both *Newman* and *Northcross*.[33] This standard should further the overall intent of Congress by giving prevailing litigants some assurance that if they are successful on the merits their costs will be refunded. As the *Newman* Court recognized, the fear of bearing the cost of attorney's services would prevent many aggrieved parties from seeking judicial redress. Such a result could only frustrate the public interest in protecting civil rights.[34]

In contrast, it is more difficult for a prevailing defendant to recover attorney's fees under section 1988. The rationale for this distinction is that prevailing defendants do not "appear before the court cloaked in a mantle of public interest."[35] Further, to permit defendants to recover under the liberal *Newman-Northcross* standard would thwart the legislative intent that civil

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to advance the public interest by invoking the injunctive powers of the federal courts." 390 U.S. at 402.

On the bad faith issue, the Court noted that if this was to be the standard Congress intended to authorize for the award of fees, no statutory provision would have been necessary. Courts have long awarded fees to a successful plaintiff when the defendant has acted in bad faith, even in the absence of a statute. *Id.* at 402 n.4. *See supra* note 8 and accompanying text.

29. 412 U.S. 427 (1973) (per curiam).

30. *See* 20 U.S.C. §§ 1601-1619 (1976) (repealed 1978).

31. The fees provision of the Emergency School Aid Act provided:

> [U]pon entry of a final order by a court [for racial discrimination in education], the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost.

20 U.S.C. § 1617 (1976). *Cf.* 42 U.S.C. § 2000a-3(b) (1976) (Title II fees provision).

32. 412 U.S. at 428.

33. *See supra* notes 27, 31 and text accompanying note 4.

34. *See* Newman v. Piggie Park Enter's, Inc., 390 U.S. 400, 402 (1968).

35. United States Steel Corp. v. United States, 519 F.2d 360 (3d Cir. 1975). This was a Title VII case filed by the EEOC against United States Steel. The defendant's request for attorney's fees was denied on the ground the suit had not been filed for harassment purposes. The court noted that, while the public benefits when a plaintiff successfully attacks discrimination, "one cannot say as a general rule that substantial public policies are furthered by a successful defense against a charge of discrimination." *Id.* at 364.

rights be privately enforced in that impecunious plaintiffs would hesitate to seek judicial redress unless their claims were highly likely to succeed.[36] Recognizing these concerns, Congress indicated that a prevailing defendant may recover fees "only if the action is vexatious or frivolous, or if the plaintiff has instituted it solely to 'harass or embarrass the defendant.' "[37] This standard was eventually adopted by the Supreme Court in *Christianburg Garment Co. v. EEOC*.[38]

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36. H.R. REP. NO. 1558, *supra* note 18, at 7.

37. *Id.* at 6-7. *See also* S. REP. NO. 1011, *supra* note 5, at 5.

38. 434 U.S. 412, 421 (1978). *Christianburg* was a Title VII case in which the plaintiff alleged that the defendant-employer had engaged in racially discriminatory practices. The Court cited two reasons for awarding fees to a prevailing plaintiff in Title VII actions which do not exist in the case of a prevailing defendant. First, the plaintiff is the "chosen instrument" to advance policies of the highest Congressional priority. Second, the award of counsel fees to a prevailing plaintiff is an award against one who has violated federal law. *Id.* at 418-19. The Court also noted that when the plaintiff has acted in bad faith, no statutory provision is needed to award counsel fees to the prevailing defendant. This is so because of the bad faith exception to the American Rule. *See supra* note 8 and accompanying text. *See also* Harris v. Group Health Ass'n, Inc., 662 F.2d 869 (D.C. Cir. 1981) (in an employment discrimination suit, prevailing defendant is entitled to recover appellate attorney's fees if it is obvious suit was not justified in the first place and never should have reached the appellate level); Gresham Park Community Org. v. Howell, 642 F.2d 1227 (5th Cir. 1981) (in federal proceeding to enjoin enforcement of state court injunction, issues were not so clear-cut that plaintiff's appeal could be considered frivolous; therefore, the prevailing defendant may not recover fees); EEOC v. First Alabama Bank of Montgomery, N.A., 595 F.2d 1050 (5th Cir. 1979) (EEOC as unsuccessful plaintiff held liable for defendant's fees when there was no evidence to sustain claim of employment discrimination); Moss v. ITT Continental Baking Co., 468 F. Supp. 420 (E.D. Va. 1979) (defendant may recover fees when plaintiff's deposition indicated the claim was groundless yet plaintiff continued to litigate the matter); Copeland v. Martinez, 435 F. Supp. 1178 (D.D.C. 1977) (because plaintiff's employment discrimination action was initiated solely to harass her employers, prevailing defendants were entitled to recover fees); Robinson v. KMOX-TV, CBS Television Station, 407 F. Supp. 1272 (E.D. Mo. 1975) (plaintiff's vexatious conduct, including failure to pursue discovery after defendant complied, resulted in fees award to successful defendant). A noteworthy case is Reed v. Sisters of Charity, 447 F. Supp. 309 (W.D. La. 1978), in which the court, in addition to assessing fees against the plaintiff, also held the plaintiff's counsel liable for fees. The attorney had made a highly inflammatory speech before the employment discrimination suit was filed. The court found that this speech encouraged the plaintiff's suit, which was frivolous and vexatious. *Id.*

In determining whether the defendant is entitled to fees, the court may look to the relative positions of the parties. In Hughes v. Rowe, 449 U.S. 5 (1980), the Court refused to award fees to the defendant-corrections officers in a § 1983 suit brought by an inmate. The Court stressed that, notwithstanding the fact that the action was not vexatious or frivolous, the *Christianburg* standard applied with special force when the plaintiff is an uncounseled prisoner. Similarly, in Lee v. Chesapeake & Ohio Ry. Co., 389 F. Supp. 84 (D. Md. 1975), the district court looked to the plaintiff's earnings and savings to determine his liability for fees. *See also* Carrion v. Yeshiva Univ., 397 F. Supp. 852 (S.D.N.Y. 1975) (court looked to plaintiff's salary, fact that she paid no attorney's fees of her own, and had no dependents).

While *Christianburg* is consistent with legislative history, its application in damages actions challenges the integrity of the judicial system. In addition to seeking an injunction, a plaintiff may freely add claims for damages with the notion that if successful, damages and fees will be assessed against the defendant. However, even if the damages claims are found to be without merit, the plaintiff can be confident that no fee liability will occur unless his behavior violates the high standard of *Christianburg*. In addition, the plaintiff has no incentive to limit the issues, but instead is encouraged to develop novel theories of liability of questionable merit. The result is wide-open discovery of claims that later must be dropped. Ironically, the defendant may still be wholly liable for attorney's fees should the plaintiff prevail on other grounds.[39]

There is no question that Congress intended the prevailing party requirement to encompass the completely successful litigant who receives a final judgment on his civil rights claim.[40] However, the propriety of a fees award raises troublesome questions when the litigation has been resolved by settlement or consent decree, or has been dismissed as moot. Equally problematic are cases in which a plaintiff has been awarded only nominal damages or has prevailed on some, but not all, of his claims.

### *Settlement or Consent Decree*

When the parties have entered into a settlement or consent decree, both the Act's legislative history and the Supreme Court favor an award of attorney's fees to the plaintiff. In *Gagne v. Maher*,[41] the plaintiff brought an action challenging state social welfare regulations. The parties entered into a consent decree which provided for increased benefits to the plaintiff and other welfare recipients.[42] The district court granted the plaintiff's petition for fees,[43] and the Second Circuit[44] and Supreme Court

39. *See infra* notes 52-55 and accompanying text.

40. A prevailing party is one who succeeds on any significant issue in the litigation. Nadeau v. Helgemoe, 581 F.2d 275, 278 (1st Cir. 1978).

41. 448 U.S. 122 (1980).

42. The plaintiff had instituted a § 1983 class action wherein she alleged that the Connecticut Department of Social Services was calculating benefits for certain recipients in a manner contrary to federal statutes and the Constitution. After discovery and negotiations, the parties entered into a consent decree with the district court's approval. The consent decree gave the plaintiff, as well as the class she represented, virtually all the relief sought in the complaint. Gagne v. Maher, 455 F. Supp. 1344, 1346 (D. Conn. 1978).

43. *Id.*

44. 594 F.2d 336 (2d Cir. 1979).

affirmed.[45] The Supreme Court stated:

> The fact that respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees. Nothing in the language of § 1988 conditions the District Court's powers to award fees of full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated. Moreover, the Senate report expressly stated 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."[46]

The failure of parties to a settlement or consent decree to provide for attorney's fees clearly invites the application of section 1988.[47] Therefore, it is advisable for the decree or settlement to expressly address the liability incurred for attorney's fees; otherwise the court may award fees in its own discretion.[48]

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45. 448 U.S. 122 (1980).

46. *Id.* at 129 (citing S. REP. NO. 1011, *supra* note 5, at 5).

47. Harrington v. De Vito, 656 F.2d 264 (7th Cir. 1981), *cert. denied*, 455 U.S. 993 (1982). Moreover, a fees award under § 1988 is still possible despite a provision in the consent decree expressly prohibiting such recovery. To hold otherwise would dilute the fees award and run contrary to the purpose of § 1988. Jones v. MacMillan Bloedel Containers, Inc., 685 F.2d 236 (8th Cir. 1982).

48. While it has been argued that prejudgment fee negotiation could raise an inherent conflict of interest between the attorney and client, the Supreme Court has implicitly rejected this notion. White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445, 453-54 n.15 (1982). In *White*, the plaintiff brought a class action alleging that the state department of employment security failed to make timely determinations of eligibility for unemployment compensation, thus violating § 1983, the Social Security Act, 42 U.S.C. § 503(a)(1) (1970), and the due process clause of the Constitution. The plaintiff prevailed on the Social Security claim, but while the case was pending on appeal, the parties entered into a settlement agreement which was silent on the matter of fees. The defendant argued that this silence constituted a waiver of a fees award, but the district court held otherwise and awarded fees in the plaintiff's favor. White v. New Hampshire Dep't of Employment Sec., Civ. No. 76-71 (D.N.H. Nov. 15, 1977), *as amended*, Civ. No. 76-1 (D.N.H. Dec. 16, 1977). On appeal, the First Circuit held that the plaintiff's postjudgment motion for fees was a motion to alter or amend a judgment under Rule 59(e) of the Federal Rules of Civil Procedure and therefore untimely because it was not made within ten days after entry of the consent decree. White v. New Hampshire Dep't of Employment Sec., 629 F.2d 697, 699 (1st Cir. 1980). The Supreme Court reversed on the ground that the ten-day time limit, if applied to § 1988 petitions, would yield unjust consequences. The Court reasoned that many final orders may issue during the course of a litigation, especially in civil rights actions where an injunction is sought. Often, it is difficult for counsel to discern whether an order is a final judgment within the meaning of Rule 59(e). Therefore, counsel would either lose the opportunity for a § 1988 fees award, or flood the court with fee petitions at every stage of the litigation. 455 U.S. at 453.

The plaintiffs also claimed that the application of Rule 59(e) to § 1988 would necessitate prejudgment fee negotiations which could create a conflict of interest between the attorney and client. Because unsuccessful defendants tend to offer "lump-sum" settlements, it is up to the prevailing plaintiff and his attorney to allocate this sum between recovery and fees. Thus, the attorney may have a personal stake in the litigation adverse to

### *Mootness*

A "prevailing party" determination assumes greater complexity when the litigation is rendered moot by some action of the defendant, without court order. The inquiry must focus on whether the defendant altered his behavior in response to the plaintiff having brought suit.[49] As the Eighth Circuit stated, "[w]hen defendants moot the suit by voluntary compliance the question becomes whether the suit was the 'catalyst' that brought about compliance by the defendants; if it was, the plaintiffs are prevailing parties for attorney's fees award purposes, despite the fact that judicial relief may no longer be necessary."[50] The court will look to the relief obtained and the chronology of events to ascertain whether the litigation was the "catalyst" that brought about compliance.[51]

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that of his client. To avoid this potential conflict, the plaintiffs argued that fee negotiations be deferred till after entry of the final judgment, a result that the ten-day time limit of Rule 59(e) would not permit. The Court recognized this concern, but it was not considered a viable ground for the ultimate decision. 455 U.S. at 453-54 n.15.

49. Ross v. Horn, 598 F.2d 1312 (3d Cir. 1979), *cert. denied*, 448 U.S. 906 (1980). In *Ross*, the suit was rendered moot because certain state regulations were amended after the suit was filed. Judgment was entered for the defendant. The appellate court remanded the case for further evidentiary hearing on the prevailing party issue with the following instructions:

> In assessing who is a prevailing party, we look to the substance of the litigation's outcome. If the new procedures, which provided much of the relief appellants had initially sought, were implemented as a result of this lawsuit, the appellants were prevailing parties with respect to a portion of their claims (which claims were thereby effectively mooted) irrespective of the judgment entered against them on the balance of their claims.

598 F.2d at 1322. In Coen v. Harrison County School Bd., 638 F.2d 24 (5th Cir. 1981), *cert. denied*, 455 U.S. 938 (1982), the plaintiff Ku Klux Klan members were found not to be prevailing parties. The court determined that the suit was rendered moot because of a change in the plaintiffs' behavior and the suit was not a major factor in achieving this result.

50. Williams v. Miller, 620 F.2d 199, 202 (8th Cir. 1980). The plaintiffs brought a class action alleging sexual discrimination on the part of the school board and the superintendent with respect to school-sponsored athletic opportunities for female students and faculty members. The defendant Board subsequently expanded the athletic program. The plaintiffs then moved for dismissal without prejudice, subject to the allowance of attorney's fees. The district court denied the request for fees on the grounds that the plaintiffs failed to prove they were the prevailing parties. The court of appeals remanded the case, noting that the facts suggested that the filing of the suit may very well have served as the catalyst for the Board's decision to expand the program. *Id.*

51. *See, e.g.*, Stewart v. Hannon, 675 F.2d 846 (7th Cir. 1982) (school systems abandoned use of allegedly discriminatory promotion standards for reasons independent of suit); Pomerantz v. County of Los Angeles, 674 F.2d 1288 (9th Cir. 1982) (when suit is moot as to all but one issue because of action unrelated to suit, the prevailing plaintiff may still be entitled to fees on the remaining issue); Sullivan v. Pennsylvania Dep't of Labor & Indus., 663 F.2d 443 (3d Cir. 1981) (where employment discrimination suit is settled

*Plaintiff Prevails On Less Than All of the Issues*

Another area of increasing fees litigation involves cases in which the plaintiff prevails on less than all of the issues. The general rule is that a plaintiff is not required to succeed on every issue advanced in order to obtain reimbursement for fees. It is sufficient if the "heart" of the relief sought is obtained, even though other claims may be denied. For example, in *Jones v. Diamond*,[52] the court indicated that although a plaintiff's damages may amount to an insignificant sum, or even be denied altogether, the fact that injunctive relief has been granted is enough to support an award of fees in the plaintiff's behalf.[53]

Where, however, the plaintiff has prevailed on a preliminary issue but has not received a final judgment, the rule has been that the plaintiff is not a prevailing party.[54] However, the legislative history of section 1988 indicates that fee awards may be granted *pendente lite* for interim successes, such as interlocutory awards[55] and success on appeal.[56]

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by arbitration after filing of Title VII action, the Title VII action was the catalyst for the successful resolution of the dispute), *cert. denied*, 455 U.S. 1020 (1982); Robinson v. Kimbrough, 652 F.2d 458 (5th Cir. 1981) (attorney's fees available when state legislature amends statutes at issue, thereby rendering the suit moot); Williams v. Alioto, 625 F.2d 845 (9th Cir. 1980) (where only appeal, rather than entire action, is dismissed as moot, prevailing plaintiffs may recover fees incurred in obtaining preliminary injunction), *cert. denied*, 450 U.S. 1012 (1981).

52. 594 F.2d 997 (5th Cir. 1979).

53. *Id.* at 1026. However, in some courts the prevailing party may recover fees only for those issues on which he succeeded. In Busche v. Burkee, 649 F.2d 509 (7th Cir. 1981), *cert. denied*, 454 U.S. 897 (1981), the plaintiff did not succeed on all the issues or against all the defendants, although he did prevail on the major issues. The district court, in reliance on Northcross v. Board of Education, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980), held that the plaintiff was entitled to recover fees for all expenses incurred, even though some of these expenses were related to unsuccessful issues. Busche v. Bosman, 474 F. Supp. 484 (E.D. Wis. 1979). The appellate court reversed and remanded on this issue, stating that "[a]ttorney's fees should be awarded under § 1988 only for preparation and presentation of the claims on which a plaintiff is determined to have prevailed." Busche v. Burkee, 649 F.2d at 522 (citing Muscare v. Quinn, 614 F.2d 577 (7th Cir. 1980)).

54. Plaintiffs are not entitled to attorney's fees upon obtaining a temporary restraining order or preliminary injunction. Yakowicz v. Pennsylvania, 683 F.2d 778 (3d Cir. 1982); Hastings v. Maine-Endwell Cent. School Dist., 676 F.2d 893 (2d Cir. 1982).

55. Bradley v. School Board, 416 U.S. 696 (1974). *Bradley* was a class action brought under § 1983 to desegregate the public schools of Richmond, Virginia. At the time the suit was filed, there was no express fees provision, but while the case was pending appeal, 20 U.S.C. § 1617 (Supp. III 1970) was enacted which permits a fees award in school desegregation cases. The Supreme Court agreed with the appellate court that § 1617 applied to the case, and also found that it permitted an award of fees for services rendered prior to its effective date. 416 U.S. at 721. The Court was then faced with the issue of when the plaintiffs had become the prevailing party within the

### *The Award of Nominal Damages*

The Attorney's Fees Act, on its face, indicates that a court may either award or deny fees, and determine the appropriate

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meaning of § 1617. The School Board had submitted three different desegregation plans to the district court over a period of nine months. The Court held that the fees award could not be made until the final plan was approved by the district court, because it was not until then that the plaintiffs were prevailing parties. *Id.* at 724. However, the Court also found that the fees award need not be made simultaneously with the entry of a desegregation order. School desegregation cases may involve injunctive relief subject to later modification, the court reasoned, and may involve many final orders. Therefore, a district court may award fees before the entire litigation is concluded for costs incurred on the final disposition of interim matters. *Id.* at 733.

Similarly, in Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), a stockholders' suit brought under § 14(a) of the Securities Exchange Act of 1934, 48 Stat. 895 (codified as amended at 15 U.S.C. § 78n(a) (1981)), the Court held that the stockholders should recover fees upon receiving partial summary judgment on the issue of liability, even though the determination of the appropriate relief to which they may be entitled was still pending.

The Senate Report in support of § 1988 cited both *Bradley* and *Mills* with approval, stating that "[such] awards are appropriate where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues." S. REP. NO. 1011, *supra* note 5, at 5. Similarly, the House Report, also citing *Bradley* and *Mills*, states that "prevailing" does not require the entry of a final judgment to support a fees award. Interim awards may be especially important in cases of protracted litigation. H.R. REP. NO. 1558, *supra* note 18, at 8 (remarks of Congressman Drinan).

56. Hutto v. Finney, 437 U.S. 678 (1978). However, success on appeal must involve a favorable determination on the merits. Hanrahan v. Hampton, 446 U.S. 754 (1980). In *Hanrahan*, nine members of the Black Panther Party alleged that their constitutional rights were violated during the execution of a search warrant for illegal weapons. The trial lasted for 18 months. At the close of plaintiffs' case, the district court directed verdicts for some of the defendants. After a 4-2 deadlocked jury in favor of the other defendants, the court directed verdicts on their behalf. The Seventh Circuit reversed and remanded the case for a new trial and awarded the plaintiffs attorney's fees for the appeal. Hanrahan v. Hampton 600 F.2d 600 (7th Cir. 1979). The court of appeals held the plaintiffs prevailed on their appeal but did not prevail in the district court, and therefore were not entitled to attorney's fees at that level. *Id.* at 643. However, the Supreme Court held the plaintiffs were not "prevailing" parties at the appellate level in the sense intended by the Attorney's Fees Act:

> The Court of Appeals held only that [plaintiffs] were entitled to trial of their cause. As a practical matter they are in a position no different from that they would have occupied if they had simply defeated the defendants' motion for directed verdict in the trial court. The jury may or may not decide some or all of the issues in favor of the respondents. If the jury should not do so on remand in these cases, it could not seriously be contended that the respondents had prevailed. . . . Nor may they fairly be said to have "prevailed" by reason of the Court of Appeals' other interlocutory dispositions, which affected only the extent of discovery. As is true of other procedural or evidentiary rulings, these determinations may affect the disposition on the merits, but were themselves not matters on which a party could "prevail" for purposes of shifting his counsel fees to the opposing party under § 1988.

446 U.S. at 758-59 (citations omitted).

amount thereof, within a broad range of discretion.[57] Although the Act itself fails to provide judicial guidance, the history of section 1988 supports a presumptive fee award when the prevailing party is a civil rights plaintiff.[58] As previously discussed, the Senate Report in favor of passage of the Act indicates that a party who successfully asserts any of the rights protected by the Civil Rights Act should ordinarily recover attorney's fees absent "special circumstances."[59] By incorporating the liberal *Newman-Northcross*[60] standard, the Senate Report created potential conflict: the "special circumstances" standard clashes directly with the express language of the Act by leaving little, if any, discretion to the trial court.[61] This conflict is most clearly illustrated in actions where the plaintiff is awarded only nominal damages. On the one hand, the jury has decided that the plaintiff is entitled to virtually no compensation, yet under *Newman-Northcross*, the attorney is permitted his full fee.

In *Skoda v. Fontani*,[62] the district court denied attorney's

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57. *See supra* text accompanying note 4. Of course, an attorney seeking a fees award may be somewhat limited by the MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1979), which provides that an attorney may not agree to or charge a "clearly excessive fee." The Code lists the following factors as relevant in determining what constitutes a reasonable fee:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
3. The fees customarily charged in the locality for similar legal services.
4. The amount involved and the results obtained.
5. The time limitations imposed by the client or by the circumstances.
6. The nature and length of the professional relationship with the client.
7. The experience, reputation, and ability of the lawyer or lawyers performing the services.
8. Whether the fee is fixed or contingent.

*Id.* at DR 2-106. *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 (1980).

58. S. REP. NO. 1011, *supra* note 5, at 4. See also Davis v. Murphy, 587 F.2d 362, 364 (7th Cir. 1978), in which the court stated that a prevailing plaintiff in a § 1983 action "should receive fees almost as a matter of course."

59. S. REP. NO. 1011, *supra* note 5, at 4.

60. *See supra* notes 24-34 and accompanying text.

61. Where the Act states that a court *may* award attorney's fees to a prevailing *party*, the *Newman-Northcross* standard in effect amends the statute to provide that a court *should* award attorney's fees to a prevailing plaintiff in almost all cases. Although Congress chose not to use the *Newman-Northcross* language in § 1988, the majority of jurisdictions, in reliance on the Senate Report, continue to interpret § 1988 in a manner contrary to its express language.

62. 646 F.2d 1193 (7th Cir. 1981).

fees to plaintiffs who were awarded a mere one dollar in damages by the jury. Using a common sense approach, the trial court reasoned that the defendant was the real "prevailing party" in that the plaintiffs had sought $200,000 in their complaint for false arrest and could have settled for $3,000.[63] The Seventh Circuit reversed, however, holding that the plaintiffs were the prevailing party, and absent a finding of "special circumstances," were entitled to attorney's fees.[64]

In an action such as *Skoda*, a question arises as to what goals of the Attorney's Fees Act, if any, are being furthered. The $200,000 sought in the plaintiffs' complaint was incentive enough to attract competent counsel, without the necessity of a fees award. As the jury's verdict indicates, the suit had little effect in vindicating civil rights. The long-range effects of *Skoda* are even more disturbing. By refusing to permit a realistic interpretation of "prevailing party," the Seventh Circuit all but eliminated the discretion accorded the trial court under section 1988. Consequently, the award of fees to a so-called "prevailing" plaintiff is mandatory, although the only true victor may be the plaintiff's attorney, who recovers a substantial fee for gaining his client one dollar.

Aside from the "prevailing party" issue, the present application of section 1988 results in a lack of incentive for the plaintiff's attorney to enter into pretrial settlements. 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 rates are even higher. Further, the billable hours may bear little relation to the merits or complexity of the case. The injury to a civil rights plaintiff, as with common law tort plaintiffs, can be determined relatively early in the litiga-

63. Skoda v. Fontani, No. 79-2932, slip op. at 1 (N.D. Ill. Sept. 10, 1980).

64. 646 F.2d 1193 (7th Cir. 1981). On remand, the district court noted that the major reason the case was not settled before trial was because the plaintiffs' attorney felt he would not be adequately compensated if the case were settled for only $1500. The district court reluctantly awarded fees of $6,086.12 noting that the plaintiffs were "as a practical matter, unsuccessful in achieving much of what they sought." 519 F. Supp. 309, 310-11 (N.D. Ill. 1981). The court noted that any attempt to define the award of nominal damages as a "special circumstance" so as to deny the award of fees was likely to be fruitless. However, the court reduced the claimed fees and costs by fifty percent, noting that it is within the reasonable range of a trial court's discretion to bring the attorney's total compensation into a more reasonable relation to the plaintiffs' monetary recovery. *Id.*

See also Milwe v. Cavuoto, 653 F.2d 80 (2d Cir. 1981), in which the plaintiff sought damages against various police officers for civil rights violations and pendent state law claims. The court concluded that the award of attorney's fees may be appropriate, although the plaintiff was awarded substantial damages only on the pendent state law claim of assault ($1,320.00) and just nominal damages on the constitutional violation ($1.00). *Id.* at 84.

tion. Thus, the only variable factor is the time spent in preparing and presenting the case. Because the attorney in a tort action is usually compensated on a contingent fee basis, his time-investment strategy is governed by the amount of damages he expects his client to recover. The civil rights attorney is under no comparable restraint; in fact, he is encouraged to pursue all theories of recovery, secure in the knowledge that any tactic reasonably related to his cause will be compensable. The effect is that the defendant is held responsible for costs that bear little relationship to the injury inflicted.

Nor is such a result in the plaintiff's best interests. 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.

## ACTIONS FOR DAMAGES

The Attorney's Fees Awards Act seeks to encourage the private enforcement of the civil rights laws in order to fully vindicate the fundamental rights involved.[65] This goal is largely fulfilled when a party who has suffered a constitutional tort is able to attract competent counsel to advance his claim. A question arises in damages actions as to whether the goal of section 1988 is being furthered when potential recovery is large enough to attract able counsel without the added incentive of a fees award. While most courts have continued to apply the *Newman-Northcross* doctrine in such circumstances, other jurisdictions have developed a different test.[66] This divergence of viewpoints was inevitable in light of the broad discretion conferred by section 1988.

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65. S. REP. NO. 1011, *supra* note 5, at 5.

66. In both *Newman* and *Northcross*, the relief sought was of an injunctive nature, where no money damages were available to attract competent counsel. The objections raised in this article deal primarily with situations where what is essentially a tort claim for private monetary damages is clothed as a civil rights action so as to support the claim of attorney's fees. The only purpose the Act serves in such cases is to provide a means for paying the fees of a plaintiff's attorney for noncivil rights actions, a result Congress could not have intended.

In *Zarcone v. Perry*,[67] the Second Circuit affirmed the denial of attorney's fees to a plaintiff who was awarded $80,000 in compensatory damages and $61,000 in punitive damages. The court reasoned that, due to the defendant's clearly wrongful conduct, it was obvious from the outset of the litigation that the plaintiff's prospects for a substantial monetary recovery were good enough to attract competent counsel on a contingent fee basis.[68] Thus, counsel fees would not present a significant financial bar to the plaintiff in instituting suit. In fact, the plaintiff had no apparent difficulty in securing able representation. The court concluded that when the prospects of recovery are bright, the rationale underlying *Newman-Northcross* simply does not apply. In other words, there is no financial deterrent to the enforcement of civil rights.[69]

Similarly, in *Buxton v. Patel*,[70] the Ninth Circuit upheld the denial of attorney's fees in a damages action. The defendant's conduct, although reprehensible, had occurred in an isolated setting and was not indicative of the type of civil rights violation affecting the public in general. The plaintiffs' chances of success were deemed sufficient to attract competent counsel who were undeterred by the prospect of having to look to their clients for compensation.[71] Further, the damages recovered were well in excess of the fees due counsel.[72] The court also noted that there was no evidence of bad faith on the defendant's part in opposing

67. 581 F.2d 1039 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979). In *Zarcone*, the plaintiff, an operator of a mobile food-vending truck, had stopped in front of the courthouse where the defendant was sitting as a traffic court judge. The defendant dispatched a deputy to obtain coffee from the plaintiff. Dissatisfied with the coffee, the defendant had the plaintiff brought in handcuffs through the crowded courthouse to his chambers, where he tongue-lashed the plaintiff and threatened him with loss of livelihood. A similar scene was repeated about one hour later. The plaintiff retained counsel on a contingent fee basis.

68. *Id.* at 1044.

69. *Id.* In addition, the Second Circuit indicated that in damage actions where the Attorney's Fees Act applies, a court's discretion should be guided by factors related to the purpose of the Act, such as the size of the class benefitted, the significance of the rights at stake, and the presence of bad faith on the part of either party. *Id. Accord* Aho v. Clark, 608 F.2d 365, 367 (9th Cir. 1979).

70. 595 F.2d 1182 (9th Cir. 1979). In this case, three plaintiffs filed an action alleging violation of their rights to lease real property under 42 U.S.C. § 1982. Plaintiffs sought actual damages for loss of profits, compensatory damages of $10,000, punitive damages of $10,000, litigation costs and attorney's fees. A jury returned a verdict for each plaintiff of $7,500 in compensatory damages and $7,500 in punitive damages. After a hearing on the issue of attorney's fees, the district court denied the plaintiffs' request of $11,574. 595 F.2d at 1183.

71. *Id.* at 1185.

72. *Id.*

the suit.[73]

The First and Seventh Circuits have rejected the "bright prospects" standard of *Zarcone* and *Buxton* in damages actions. In *Sargeant v. Sharp*,[74] the First Circuit chose to adhere to the *Newman-Northcross* test which requires the finding of "special circumstances" to deny attorney's fees. The court held that a contingent fee agreement is irrelevant in the determination of what constitutes a reasonable fee.[75] In addition, the court found that the existence of a private fee arrangement in and of itself does not amount to a "special circumstance" that would render a fees award unjust.

In *Sanchez v. Schwartz*,[76] the Seventh Circuit held that the "bright prospects" standard was not the intent of Congress in enacting section 1988. The court identified what in its opinion are the three aims of the Attorney Fees Act: opening the courts to civil rights plaintiffs, penalizing obstructive defense tactics; and generally deterring violations of fundamental rights.[77] The court intimated that although the "bright prospects" standard may not prevent civil rights plaintiffs from seeking judicial redress, it failed to further the latter two goals of the Act.

The *Sanchez* decision is open to substantial criticism. Although the court recognized that a damages action may in fact attract competent counsel, the holding exemplifies how far a court must strain to protect an attorney's fees. The court was apparently concerned with protecting civil rights plaintiffs from fending off bad faith defenses or troublesome trial tactics, yet no

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73. *Id.*

74. 579 F.2d 645 (1st Cir. 1978). In *Sargeant*, the plaintiff sought attorney's fees growing out of a suit for welfare benefits. The district court denied the petition because the plaintiff's attorney had already received a fee on a contingency basis (the plaintiff recovered $88,816.58). *Id.* at 646. On appeal, the court held that the trial court's summary disposition of the fees petition was improper. The case was remanded for an evidentiary hearing to determine whether a fee award was proper, and if so, in what amount. *Id.* at 649.

75. *Id.*

76. 688 F.2d 503 (7th Cir. 1982). In *Sanchez*, the plaintiff brought suit against thirteen Chicago police officers for damages incurred while the officers were executing simultaneous search warrants. The plaintiff suffered a broken bone beneath his eye, a 5% loss of vision, medical expenses of $2,000, and a month's lost wages. The plaintiff was awarded $47,000 in compensatory damages and $5,050 in punitive damages against two of the defendant officers. The district court awarded attorney's fees of $46,406.25 after plaintiff's attorney requested $59,815. *Id.* at 504-05. The only issue on appeal was the fee award. The court of appeals affirmed the plaintiff's entitlement to attorney's fees but remanded the case with instructions to reduce the award.

77. *Id.* at 505. *See also* Note, *Attorney's Fees in Damage Actions Under the Civil Rights Attorney's Fees Awards Act of 1976*, 47 U. CHI. L. REV. 332, 344-49 (1980).

such behavior was cited.[78] The second basis for the holding—that a fee award "generally deters civil rights violations"[79]—is also of questionable merit. At the time the activity giving rise to the litigation occurs, it is inconceivable that the defendant would consider the possibility of liability for his victim's attorney's fees.

Further, should a court or jury find it necessary to deter similar future conduct on the defendant's part, punitive damages are a more appropriate remedy than a fees award. Why should a "deterrence award" be granted to the plaintiff's attorney in the form of a fee, rather than to the plaintiff as an element of punitive damages? Any claim that liability for attorney's fees is an additional deterrent is simply an excuse to protect the fees award.

The end result of *Sanchez* is that fees may be awarded under circumstances which do little to promote the aims of the Act. A better approach in damages actions would be one similar to that in *Zarcone* or *Buxton*. Where the prospects of recovery are sufficiently bright, the incentive of a fees award is not necessary to attract counsel. In reality, counsel is attracted because its fee would not be limited to a percentage of the ultimate recovery, as is the case in most tort actions. Thus, the only interest advanced by the Act becomes the financial benefit to the attorney, rather than the constitutional rights of the client.

The purpose of section 1988 is to further the constitutional rights shielded by the Civil Rights Act; it was not intended to be used as a sword by civil rights attorneys to extract a fee from the defendant.[80] The problem was best expressed in *Scott v. Bradley*,[81] where the court stated:

> A further consideration is that when a lawyer is setting his hourly rate which he expects his own client to pay his client can simply reject the proferred contract as too expensive for his needs. The civil rights defendant can only "reject" the asked fee by paying

78. In fact, the plaintiff filed four amended complaints which resulted in unnecessary "wheel spinning". Therefore, the court reduced the number of office hours spent while the trial was in progress by fifty percent after the plaintiff had already spent a full week preparing for trial. Sanchez v. Schwartz, 688 F.2d 503, 507 (7th Cir. 1982).

79. *Id.* at 505-07.

80. This is indicative of the double standard resulting from the present interpretation of § 1988. Although the plaintiff's civil rights are protected, the defendant has little or no protection except for the stringent "frivolous or vexatious" standard the plaintiff must violate to be liable for the defendant's fees. *See supra* notes 38-39 and accompanying text. The plaintiff can exhaust a wide range of tactics to secure victory while his fee clock keeps ticking. The defendant must limit his strategies, however, knowing that the plaintiff will recover costs incurred in countering a defense.

81. 455 F. Supp. 672 (E.D. Va. 1978).

> a lawyer to convince the Court that it is "too expensive." . . . Moreover, when a lawyer is working for his own client he sensibly limits his research and preparation in proportion to the magnitude of the results sought by his client and his client's perceived ability and willingness to pay. No such constraints work on a civil rights plaintiff's counsel. Indeed, the temptation is just the opposite. Since "the enemy" will be paying anyway, counsel is induced to read *every* case, depose *every* witness, examine fully *every* tactic, leave no stone unturned; or, stated in terms of the instant case, spend 123.7 hours preparing for a 4.8 hour trial.
>
> Though civil rights attorneys should be encouraged to represent plaintiffs they should not be encouraged to overprepare the case. Since there are no built-in economic restraints as in billing one's own client, the Court must exercise the restraint itself by eschewing a straight hours-cum-fee formula.[82]

The end result in a case such as *Sanchez* is that we have two victors, the plaintiff and his attorney. Although an attorney is always the victor when his client prevails, a question of fairness arises when the attorney's fee is equal to or far in excess of the plaintiff's substantial verdict.[83] After all, the plaintiff is being redressed for an involuntary infringement of his civil rights, whereas the plaintiff's attorney is engaged in voluntary gainful employment.

Although the federal courts have put forth divergent viewpoints as to the propriety of attorney's fees awards in civil rights damage actions, the majority view is that virtually all prevailing civil rights plaintiffs are entitled to attorney's fees regardless of the nature of the relief sought. The courts apply the *Newman-Northcross* standard to damage actions, despite the fact that in both *Newman* and *Northcross* the relief sought was injunctive.[84] In an injunction action there is no source from which to pay the

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82. *Id.* at 675 (emphasis in original).

83. Such a result is often the case. For example, in Espinoza v. Hillwood Square Mut. Ass'n, 532 F. Supp. 440 (E.D. Va. 1982), the plaintiff received only $1,500 in damages. The court noted several factors that indicated a fee award would be inappropriate: the plaintiffs were not destitute, they prosecuted on their own behalf, and the damages sought ($300,000) indicated competent counsel was not difficult to obtain. Further, a large fee award would impose a hardship on the defendants. Despite these considerations, the court awarded attorney's fees in excess of $21,000. The court's reluctance to do so was evident in its remark that "[t]his result is dictated by the severe restrictions that the Fourth Circuit has placed on the court's power to deny an award." *Id.* at 445.

A similar result obtained in Kow v. New York City Hous. Auth., 539 F. Supp. 708 (S.D.N.Y. 1982). The court rejected the defendant's contention that the plaintiff be denied fees because the action was settled and provided only a private benefit to the plaintiff. However, the fee request of $11,021 was reduced to $5,625 in light of the plaintiff's modest recovery ($1,540). *Id.*

84. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975), the catalyst for § 1988, was also an action for an injunction.

attorney's fees, so that a liberal standard is appropriate.[85] However, in false arrest or simple damages cases such as excessive force actions, the verdict award may serve as a source for the fee, thus obviating the need for the incentive fee award. The major purpose of the Attorney's Fees Awards Act is to provide an avenue of access to the federal courts to those of limited financial means. The foregoing discussion indicates that an award of attorney's fees in a damages action does little to promote this aim.

It should also be noted that the possibility of a fees award encourages the filing of what are essentially tort actions clothed as civil rights violations.[86] In a typical tort action, the plaintiff's attorney's fee is normally limited to a percentage of the ultimate verdict or settlement; whereas in a civil rights action the attorney's fee has little limitation, if any. Congress did not intend, in enacting the civil rights laws, to create an additional forum in which to litigate tort claims, thus burdening the federal courts with litigation involving claims of dubious constitutional import.[87]

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85. In addition, a plaintiff who has obtained an injunction prohibiting behavior that violates fundamental rights "does so not for himself alone, but also as a 'private attorney general' vindicating a policy that Congress considered of the highest importance." Newman v. Piggie Park Enter's, 390 U.S. 400, 402 (1968).

86. This abuse of the Attorney's Fees Act has not gone unnoticed by the courts. For example, in Martin v. Hancock, 466 F. Supp. 454 (D. Minn. 1979), the plaintiff petitioned for attorney's fees after successfully asserting a civil rights claim against police officers for negligently failing to keep a police dog under control. The court denied fees, stating:

> [I]n the present case, the "private attorney general" concept has no application; plaintiff here is furthering no public interest beyond that furthered in most common law negligence cases. He has not by this action attempted to curtail deliberate violations of constitutional rights by Minneapolis police officers. He is not representing a distinct minority group . . . therefore, this is one of those rare cases where the court in its discretion should not award attorney's fees.

*Id.* at 456.

87. The magnitude of current civil rights litigation was pointed out recently in a survey conducted by the National Institute of Municipal Law Officers (NIMLO). With only 199 NIMLO members responding out of a total membership of over 1,600, the 199 reported a total of $4,210,459,158 pending in civil rights claims. This amount will no doubt increase upon completion of the nationwide survey. The NIMLO survey further pointed out that the aggregate amounts of civil rights claims against certain municipalities far exceed their total operating budget. BATES, AMENDMENTS TO THE CIVIL RIGHTS ACT OF 1871 AND THE CIVIL RIGHTS ATTORNEY'S FEES AWARD ACT OF 1976: A REPORT TO CONGRESS BY MUNICIPAL ATTORNEYS DEFENDING § 1983 CASES 7-12 (1981).

## RECOMMENDATIONS

As the foregoing analysis indicates, the discretion and subjectivity vested in the federal courts under section 1988 has resulted in considerable conflict; in deciding a petition for attorney's fees the court must balance the congressional intent to encourage the enforcement of civil rights against the common law American Rule requiring each party to bear its own expenses. Clear guidelines have not been developed or used in balancing these interests, so that there also exists a conflict between the circuits.

If any change is to occur in this area, important national policy considerations must be addressed. The financial strains placed on municipal defendants must be eased, for such pressures were not the results intended by Congress in enacting section 1988.

In injunction actions, clearly the need exists for payment of fees from some source. A fee award is especially appropriate when the defendant is a governmental unit and there will be no damages. Yet it is equally clear that the overriding congressional purpose is not fully served by an award of fees in each and every damage action. Some proposals have been advanced to aid local governments in this area. Among them is returning to the pre-award days,[88] or placing a ceiling on awards based upon what the highest paid government lawyer would be paid.[89]

A compromise between the diverse proposals is necessary to serve the national interest. One possibility is that a prevailing party receive the traditional percentage of the verdict awarded or amount settled as a fee.[90] This solution protects the plaintiff in that his attorney's fee does not come out of the proceeds of an award or settlement that belongs to him. His attorney is adequately compensated in an amount equivalent to a contingent fee agreement, an arrangement long accepted as just compensation for a prevailing attorney. However, the defendant does not escape entirely; he must still pay the ultimate award to the plaintiff, plus attorney's fees. On the other hand, the defend-

88. *Id.* at 15-18.

89. The Reagan Administration, through its Office of Management and Budget, has drafted legislation that would limit the hourly rates that lawyers could receive when requesting a fee award. The top hourly rate would be limited to the highest hourly rates paid to government attorneys involved in the litigation that prompts the fee request. Chicago Daily Law Bulletin, Nov. 15, 1982, at 3, col. 1.

90. In Sanchez v. Schwartz, 688 F.2d 503 (7th Cir. 1982), the court declined to find that a contingent fee agreement established the ceiling on a § 1988 award primarily because this argument was unsupported by legislative history.

ant is protected from having to pay potentially exorbitant attorney's fees. This seems especially fair in cases in which only nominal damages are awarded.

It has also been suggested that the "prevailing party" requirement be modified to that of a "clear and substantially prevailing" party.[91] Such a standard would protect civil rights defendants from fee awards in cases where only minor relief or nominal damages are obtained. Secondly, it would discourage plaintiffs from bringing frivolous civil rights actions. The public benefit in terms of reduced court calendars is obvious.

Regarding the question of the reasonableness of fees, the authors suggest that an award compensate only for the time spent on those issues which were successful. Effective judicial review of "billable" hours would limit civil rights attorneys from putting forth numerous theories of recovery that are unnecessary and asserted only to build up a fee request.[92] Moreover, in determining a reasonable fee, a court should be very hesitant in awarding a multiplier or "bonus" to a fee award.[93] Computation of the fee award should be based on the hourly rate times the number of hours spent on the issues on which the plaintiff prevailed. If multipliers were to be routinely applied to competent work, the unseemly result would be that normal rates would be charged for shoddy, incompetent work, while a bonus would be available whenever a capable job was performed.

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91. Chicago Daily Law Bulletin, Nov. 15, 1982, at 3, col. 1.

92. "[I]n computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.' " S. REP. NO. 1011, *supra* note 5, at 6 (citations omitted).

93. In determining a reasonable attorney's fee, the courts have not limited themselves to the "hours x billing rate" formula. This formula instead is considered as only a threshold determination. The court may then consider the eight factors set out in the MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (1979). *See supra* note 57. *See, e.g.*, Muscare v. Quinn, 614 F.2d 577, 579 (7th Cir. 1980); Waters v. Wisconsin Steelworks of Int'l Harvester Co., 502 F.2d 1309 (7th Cir. 1974). In most cases, the use of a multiplier results in an upward adjustment. In Donnell v. United States, 682 F.2d 240 (D.C. Cir. 1982), the appellate court vacated a district court's increase of an award by a 1.5 multiplier. The appellate court indicated that an adjustment to a fee ordinarily will not be warranted, because subjective factors will be reflected either in the amount of hours worked or in the attorney's billing rate. The court further rejected the district court's reasoning that a multiplier was appropriate for "unusually and consistently high quality representation", stating "[i]t is all too common for the district courts to adjust the lodestar upward to reflect what the courts view as a high level of quality of representation. This trend should stop." *Id.* at 254.

## CONCLUSION

The various proposals put forth are not intended to discourage or inhibit the rights of the truly aggrieved. Rather, the intent of this article is to return the focus of civil rights litigation to the aggrieved party, away from the fee considerations which have become the catalyst and incentive in bringing numerous and often frivolous claims. One who violates another's civil rights should properly be burdened with having to pay attorney's fees necessary to prove such a claim. However, the amounts of fees being awarded and the nature of the underlying claims must be viewed in light of the goals of the original legislation.

Congress clearly did not intend the extreme financial burdens now being placed on units of local government. Nor did Congress intend to water down the value of traditional civil rights by awarding attorney's fees in litigation involving what are, in essence, tort claims disguised in civil rights clothing. Both the courts and Congress must take a second look at the Attorney's Fees Awards Act of 1976, and its implementation, in order to more equitably protect those whose civil rights have been violated.