Cornell Law Review

Volume 69
Issue 2 *January 1984*

Article 1

From Here to Attorney's Fees: Certainty Efficiency and Fairness in the Journey to the Appellate Courts

Michael D. Green

FROM HERE TO ATTORNEY'S FEES: CERTAINTY, EFFICIENCY, AND FAIRNESS IN THE JOURNEY TO THE APPELLATE COURTS

*Michael D. Green**

TABLE OF CONTENTS

* Associate Professor of Law, University of Iowa. B.S. 1972, Tufts University; J.D. 1975, University of Pennsylvania. I would like to express my gratitude to Bonnie Brier, Robert Clinton, Richard Matasar, and Barry Matsumoto for sharing their time and thoughts about this article with me. I would also like to thank Robin Lewis for her assistance in fashioning the title. Finally, Mark McGrory and Carol Wendl provided invaluable research assistance.

> If there is any area of the law which should be crystal-clear, it is the jurisdiction of courts.
>
> Wolfson & Kurland[1]

The prescription of Professor Kurland and Mr. Wolfson notwithstanding, the jurisdiction of the federal appellate courts[2] has been anything but clear.[3] Much of the confusion centers on the appropriate timing for appellate review. This confusion is particularly evident in cases involving requests for attorney's fees.

The Supreme Court's interpretations of section 1291 of the Judicial Code,[4] the statute providing for appeals from the district courts to the courts of appeals, have a long and tortuous history. Since the Court stated, in an early case[5] involving the predecessor to section 1291, that a final decision is one that "terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined,"[6] and then proceeded to ignore

---

1 *Certificates by State Courts of the Existence of a Federal Question,* 63 HARV. L. REV. 111, 111 (1950). *See generally* Z. CHAFEE, SOME PROBLEMS OF EQUITY 311-14 (1950) (describing importance of bright line tests for distinguishing between justiciable and nonjusticiable issues); Currie, *The Federal Courts and the American Law Institute* (pts. 1 & 2), 36 U. CHI. L. REV. 1, 268 (1968-1969) (evaluating American Law Institute Study of federal jurisdiction).

2 Throughout this article, I use the term "federal appellate courts" to refer only to the United States Courts of Appeals. The appellate jurisdiction of the Supreme Court is governed by provisions different from those governing the jurisdiction of the courts of appeals. *See infra* note 38. *Compare* 28 U.S.C. §§ 1252-58 (1976) (Supreme Court) *with* 28 U.S.C.A. § 1291 (West Supp. 1983) (courts of appeals). For a general discussion of the Supreme Court's jurisdiction, see R. ROBERTSON & F. KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES 1-456 (R. Wolfson & P. Kurland 2d ed. 1951); R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 52-253 (5th ed. 1978).

3 *See, e.g.,* Gillespie v. United States Steel Corp., 379 U.S. 148, 152 (1964) (referring to "twilight zone" of finality); Pabellon v. Grace Line, Inc., 191 F.2d 169, 179 (2d Cir.) (Frank, J., concurring) (final decision rule has caused more problems than it has solved), *cert. denied,* 342 U.S. 893 (1951); Holdsworth v. United States, 179 F.2d 933, 934 (1st Cir. 1950) ("A glance at the annotations to this section of the code will show how difficult the application of a superficially simple rule may become."); *see also infra* notes 57-59, 261-63, 346-53 and accompanying text.

4 The statute provides: "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court." 28 U.S.C.A. 1291 (West Supp. 1983). Section 1291 was first enacted as part of the Judiciary Act of 1789, ch. 20, 1 Stat. 73.

Extraordinary writs provide an additional but limited device for permitting appellate review of trial court decisions. *See* 28 U.S.C. § 1651 (1976). Additionally, the federal appellate courts have jurisdiction for appeals of certain interlocutory orders pursuant to 28 U.S.C. § 1292 (1976).

In addition to the above statutes, several others authorize jurisdiction in the courts of appeals, but do not bear on the problem at hand. *See, e.g.,* 15 U.S.C. § 2051 (1982) (review of safety standards promulgated by Consumer Product Safety Commission); 18 U.S.C. § 3731 (1976) (appeals from dismissal of indictment or information in criminal cases).

5 St. Louis, I.M. & S.R.R. v. Southern Express Co., 108 U.S. 24 (1883).

6 *Id.* at 28-29. For some of the very early constructions of the finality requirement, see Crick, *The Final Judgment as a Basis for Appeal,* 41 YALE L.J. 539, 548-51 (1932); Frank, *Requiem for the Final Judgment Rule,* 45 TEX. L. REV. 292, 292 n.3 (1966).

its own definition,[7] there has been substantial confusion over the appropriate point at which a disappointed party may seek appellate review.

The costs of this uncertainty are substantial. As with any area of law, uncertainty breeds increased litigation, with attendant expenses and unfairness, or at least perceptions of unfairness. Moreover, when appellate jurisdiction is involved, the short "appellate statute of limitations"[8] may cause a party to forfeit appellate review because of a nominal procedural lapse engendered by lack of clarity in the law.[9] To a large extent, the uncertainty in the final decision requirement historically has been resolved ad hoc by the Supreme Court (or the courts of appeals) deciding in a specific situation whether a district court decision is sufficiently final to permit an appeal.[10]

This article examines the issue of appellate jurisdiction in cases in which attorney's fees are sought in addition to any other relief that may be awarded. The "traditional American rule," requires that each party to a lawsuit bear her own attorney's fees.[11] There are, however, several exceptions to this general rule, some venerable and some of more recent origin. Although rationales for these exceptions vary widely, each permits a party (or her attorney)[12] to recover attorney's fees from another party, attorney,[13] or fund established as a result of the litigation. The currently recognized exceptions include fee shifting pursuant to contrac-

---

7 The suit in *St. Louis R.R.* was brought to compel the railroad to carry the Southern Express Company's business. In its decree, the trial court enjoined the railroad from interfering with the business of the express company. The decree also provided that the express company could seek an investigation of alleged discriminatory pricing and recover any overcharges. The railroad appealed the decree. The express company applied to the trial court for the appointment of a master to investigate and report on the alleged discriminatory pricing, and a master was appointed. The express company then moved to dismiss the appeal on the ground that the decree was not final. The Supreme Court held that the decree was final and that matters pertaining to compensation for discriminatory pricing were "incidents of the main litigation, but not necessarily a part of it." 108 U.S. at 29.

8 I use this term in a different fashion than the common understanding of statutes of limitations. The congruity, however, is substantial: the appellant's failure to take the requisite steps within a prescribed period will bar a resolution on the merits. Indeed, in one sense the appellate statute of limitations is harsher than ordinary statutes of limitations, in that the requirement of filing a timely notice of appeal cannot be waived because it is jurisdictional. FED. R. APP. P. 4(a); *see also* United States v. Isabella, 251 F.2d 223, 225 (2d Cir. 1958). *But cf.* Bankers Trnst Co. v. Mallis, 435 U.S. 381 (1978) (per curiam) (court of appeals had jurisdiction where parties waived separate judgment requirement of rule 58 of Federal Rules of Civil Procedure). The statute of limitations, however, an affirmative defense, can be waived. Moore v. Tangipahoa Parish School Bd., 594 F.2d 489, 495 (5th Cir. 1979).

9 Dickinson v. Petroleum Conversion Corp., 338 U.S. 507 (1950); Swanson v. American Consumer Indus., 517 F.2d 555 (7th Cir. 1975).

10 For example, the Court recently resolved the finality of an order refusing to disqualify counsel from further representation of a party, Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981), and of an order refusing to certify a class action, Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978).

11 *E.g.*, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975).

12 *See infra* notes 232-33 and accompanying text.

13 *See, e.g.*, 28 U.S.C. § 1927 (Supp. V 1981).

tual agreement,[14] as a sanction for bad faith conduct,[15] for willful violation of a court order,[16] when authorized by statute[17] and the common fund and common benefit exceptions.[18]

The escalating costs of litigation[19] and the evolution and growth of private class actions[20] and public interest litigation have contributed to a dramatic increase in the frequency and significance of attempts to shift attorney's fees.[21] In the public interest arena, reliance on the pri-

---

14 The parties to a contract may agree in advance on the allocation of attorney's fees that may arise in litigation over performance of the contract.

15 Perhaps the most amorphous of the exceptions, the notion that a court has the inherent and equitable power to punish an "obstreperous" party is unquestioned. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59 (1975). An award of attorney's fees as a sanction, *e.g.,* FED. R. CIV. P. 37, is more closely related to the bad faith theory than statutory fee shifting. *See infra* text accompanying notes 400-02.

16 *See, e.g.,* Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 (1923).

17 Although federal statutes have authorized fee shifting for over 90 years, *see* Sherman Act, ch. 647, § 7, 26 Stat. 209, 210 (1890) (current version at 15 U.S.C. § 15 (1982)), a substantial increase in congressional sanctioning of fee shifting has occurred since the Supreme Court's decision in Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975). *See infra* text accompanying notes 22-26. Since *Alyeska,* Congress has enacted dozens of attorney's fees statutes. *See* 6 FED. ATTORNEY FEE AWARDS REP. (Harcourt Brace Jovanich) No. 5, at 2-3 (Aug. 1983).

A number of states also have statutes authorizing a party to recover attorney's fees. *See, e.g.,* ALASKA STAT. §§ 09.60.010, 09.60.015 (1973); COLO. REV. STAT. § 13-17-101 (Supp. 1982); IOWA CODE § 625.22 (1983). When a diversity case involves a state claim for which state law authorizes a recovery of attorney's fees, some of the same issues of finality may be raised. *See infra* note 285. For a discussion of the interplay between state and federal law in a diversity case, see Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?,* 20 VAND. L. REV. 1216, 1233-41 (1976).

18 The common fund exception allows a plaintiff who has established a fund that will benefit others who are similarly situated to recover attorney's fees from that fund. The common benefit exception is similar but does not require creation of a fund, only the conferral of a benefit. *See, e.g.,* Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); Sprague v. Ticonic Nat'l Bank, 307 U.S. 777 (1939); Dawson, *Lawyers and Involuntary Clients: Attorney Fees From Funds,* 87 HARV. L. REV. 1597 (1974); *see also infra* text accompanying notes 412-512.

An offshoot of the common fund exception permits a disinterested stakeholder in an interpleader action to recover attorney's fees from the fund deposited in court. *E.g.,* Massachusetts Mut. Life Ins. Co. v. Central Pa. Nat'l Bank, 372 F. Supp. 1027, 1044 (E.D. Pa. 1974), *aff'd without opinion,* 510 F.2d 970 (3d Cir. 1975).

19 Justice Powell, dissenting from the adoption of the 1980 amendments to the Federal Rules of Civil Procedure, stated: "Litigation costs have become intolerable, and they cast a lengthening shadow over the basic fairness of our legal system." 85 F.R.D. 521, 523 (1980).

20 *See generally* Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review,* 71 COLUM. L. REV. 1, 6 (1971); Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem",* 92 HARV. L. REV. 664 (1979).

21 Judge Tamm began a recent attorney's fee opinion by noting:

> To the old adage that death and taxes share a certain inevitable character, federal judges may be excused for adding attorneys' fees cases. The years that have elapsed since the Supreme Court confirmed the prevalence of the so-called "American Rule" that requires each party to bear its own counsel fees absent a contrary statutory provision or common law exception . . . have witnessed no abatement in the number of cases involving attempts to shift the incidence of the costs of lawyers.

vate attorney general exception and an expanded version of the common benefit rationale led to substantial success in recovering attorney's fees. The Supreme Court put a temporary halt to this development in 1975 with its decision in *Alyeska Pipeline Service Co. v. Wilderness Society,*[22] in which it held that, in the absence of congressional authorization, attorney's fees were not recoverable on a private attorney general theory.[23] The Court also expressed its disapproval of expansion of the common benefit exception to justify recovery of attorney's fees.[24] Congress, however, which had included fee shifting provisions in every major piece of civil rights legislation since 1964,[25] picked up the slack and enacted the Civil Rights Attorney's Fees Awards Act of 1976 (the Fees Awards Act).[26]

With the increasing frequency and significance of fee shifting has come substantial confusion over when, during a given case, the issue of attorney's fees must be decided, the appropriate procedural devices for raising and deciding a fee request, and the extent to which resolution of the fee issue is a predicate for appellate jurisdiction. Where an individual[27] has asserted a claim for attorney's fees, this confusion has resulted in the loss of the right[28] to appellate review of the merits of the case[29] or appellate review of an award of attorney's fees.[30] Parties have lost the

---

Kennedy v. Whitehurst, 690 F.2d 951, 952 (D.C. Cir. 1982) (citations omitted).

22 421 U.S. 240 (1975).

23 *Id.* at 269. The lower federal courts have nibbled away at the restrictions placed on recovery of attorney's fees from an adversary by *Alyeska. See, e.g.,* Grinnell Bros., Inc. v. Touche Ross & Co., 655 F.2d 725 (6th Cir. 1981).

24 Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 264 n.39 (1975). The Court was responding to Justice Marshall's dissent, which advocated reliance on a broadened common benefit theory to affirm the award of attorney's fees. *Id.* at 282-88 (Marshall, J., dissenting).

25 S. REP. NO. 1011, 94th Cong., 2d Sess. 3, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5908, 5909.

26 Pub. L. No. 94-559, § 2, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988 (Supp. V 1981)).

For a description of the passage of the Fees Awards Act in Congress, see Malson, *In Response to* Alyeska—*The Civil Rights Attorney's Fees Awards Act of 1976,* 21 ST. LOUIS U.L.J. 430, 432-36 (1977).

27 Normally a party to the action seeks attorney's fees but this is not always the case. Where fees are sought on the basis of the common fund exception, frequently the attorneys are the ones seeking fees. *See, e.g., In re* Penn Cent. Sec. Litig., 416 F. Supp. 907 (E.D. Pa. 1976), *rev'd on other grounds,* 560 F.2d 1138 (3d Cir. 1977). In the statutory fee context, usually the award is made to the client. *See, e.g.,* Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980). Under certain circumstances, however, attorneys may intervene to assert their claim for fees, *see* Lipscomb v. Wise, 643 F.2d 319 (5th Cir. 1981), may appeal an adverse decision, *id.,* or may be given the right to recover fees by the statute, *see* Longshoremen's and Harbor Workers' Compensation Act, § 28, 33 U.S.C. § 928 (1976). *See also infra* note 233.

28 All litigants in federal court have the right to one appellate review. *See* 28 U.S.C.A. § 1291 (West Supp. 1983).

29 *See, e.g.,* Crowder v. Telemedia, Inc., 659 F.2d 787 (7th Cir. 1981); Swanson v. American Consumer Indus., 517 F.2d 555 (7th Cir. 1975).

30 *See* Terket v. Lund, 623 F.2d 29 (7th Cir. 1980).

opportunity to obtain attorney's fees despite the existence of a statute permitting recovery of such fees,[31] and cases have bounced between the court of appeals and the district court like a yo-yo.[32] The scope of the problem is probably more extensive than the reported decisions indicate because the courts of appeals rarely publish opinions dealing strictly with procedural aspects of an appeal.[33] The uncertainty and confusion has predictably led to intercircuit[34] conflict as to when a judgment is final for purposes of appeal.

Part I of this article examines what is at stake in the determination of when to permit an appeal. Competing considerations of judicial administration along with efficiency and fairness to litigants create a dynamic tension that can never be perfectly resolved.

Part II of this article addresses an issue that has recently received a great deal of attention: when a federal statute authorizes fee shifting, may a decision that resolves all issues in the case other than attorney's fees be immediately appealed? Although courts typically face attorney's fees issues after resolution of the merits, the chronology is sometimes reversed when interim fees are awarded. The Supreme Court recently resolved one narrow aspect of this question in *White v. New Hampshire Department of Employment Security,*[35] a case in which attorney's fees were sought pursuant to the Fees Awards Act. Although the Court did not address directly the appellate jurisdiction issue, the necessary implication of its decision is to permit consideration of attorney's fees to be delayed until after the remainder of the case is appealed. Although *White* provides some certainty to the area, the analysis in Part I of this article suggests that the case was wrongly decided. A requirement that appeals be delayed until all issues, including attorney's fees, are decided would better serve both efficiency and fairness. Part II also considers many of the issues involving the intersection of statutory fees and appeals unaddressed by the *White* Court, including interim fees, defendants seeking fees, and whether fees should be treated like costs for the purpose of appeals. Part II also examines a number of derivative proce-

---

31 *See, e.g.,* White v. New Hampshire Dep't of Employment Sec., 629 F.2d 697 (1st Cir. 1980), *rev'd,* 455 U.S. 445 (1982); Hirschkop v. Snead, 475 F. Supp. 59 (E.D. Va. 1979), *aff'd on other grounds,* 646 F.2d 149 (4th Cir. 1981).

32 *See, e.g.,* Memphis Sheraton Corp. v. Kirkley, 640 F.2d 14 (6th Cir. 1981) (district court initially entered judgment in suit against guarantor of note, court of appeals dismissed appeal because amount of interest was left unresolved; on remand district court awarded interest and attorney's fees, and court of appeals modified award on appeal).

33 Johnson v. University of Bridgeport, 629 F.2d 828 (2d Cir. 1980) (per curiam); *see* Fulbright v. Brown Group, Inc., No. 80-1234, slip op. (8th Cir. May 20, 1980); Yellow Bird v. Barnes, No. 79-1958, slip op. (8th Cir. May 20, 1980).

34 *See infra* text accompanying notes 91-109. Somewhat more surprising is the intracircuit conflict that has developed. *See infra* note 97.

35 455 U.S. 445 (1982).

dural questions intertwined with appealability.[36]

Parts III through V consider appealability in the other major contexts in which fees are sought: bad faith, common fund, and common benefit. Despite venerable precedent in the common fund and common benefit contexts, the article concludes that tying attorney's fees to the merits, with the availability of discretion in the trial courts to permit exceptions, would better serve the courts and the parties before them.

I
THE FINALITY CALCULUS

The common law requirement of a final decision to invoke appellate jurisdiction[37] was incorporated in the first Judiciary Act[38] and re-

---

36 For example, because "judgment" is defined in terms of which orders can be appealed and because entry of judgment places certain limitations on the district court's jurisdiction over the case, issues concerning post-trial motions and appealability become intertwined. *See infra* notes 86-95 and accompanying text.

37 *See* Metcalfe's Case, 11 Coke 38, 40 (1614). For a comprehensive history of the development of the finality prerequisite for appellate review both at common law and equity in England, see Crick, *supra* note 6, at 540-48.

38 The Judiciary Act of 1789 required a final decree or judgment for appeals of civil actions in the district court to a circuit court and for appeals of cases in the circuit courts to the Supreme Court. Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 84. The Act also required a final decree or judgment for appeals of admiralty or maritime cases to the circuit court and for appeal from the highest court of a state to the United States Supreme Court. *Id.* §§ 21, 25, 1 Stat. 73, 83, 85-86. The restructuring of the lower federal courts, whereby the circuit courts were transformed from courts of limited appellate jurisdiction that operated primarily as trial courts in diversity cases into courts of mandatory appellate review is described in J. HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS 4-6 (1981); *see also* H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 32-45 (2d ed. 1973). When Congress first created the courts of appeals in 1891, their appellate jurisdiction was limited to "final decisions." Judiciary Act of 1891, ch. 517, § 6, 26 Stat. 826, 828. The term "final decision" is equivalent to "final judgment or decree." *Ex parte* Tiffany, 252 U.S. 32, 36 (1920); Harrington v. Holler, 111 U.S. 796, 797 (1884).

The Supreme Court has jurisdiction of appeals from state courts pursuant to 28 U.S.C. § 1257 (1976), which provides: "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court."

Although the "final decision" requirement of § 1291 has, at times, been cited as if fungible with the "final judgment or decree" requirement of § 1257, Frank, *supra* note 6, at 295 & n.27, recent Supreme Court cases have not done so. *Compare, e.g.,* O'Dell v. Espinoza, 456 U.S. 430 (1982) (per curiam) *and* American Export Lines, Inc. v. Alvez, 446 U.S. 274 (1980) *with* Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978). Some have argued that a stricter interpretation of § 1257 is justified on the grounds that this provision implicates federalism concerns, as well as the efficiency notions that underlie § 1291. *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 502-05 (1975) (Rehnquist, J., dissenting); Boskey, *Finality of State Court Judgments Under the Federal Judicial Code,* 43 COLUM. L. REV. 1002, 1002-03 (1943). In addition, the statutory exceptions to the final decision requirement contained in 28 U.S.C. § 1292 (1976) are not available for Supreme Court review of state court decisions.

In any event, the question of Supreme Court jurisdiction over a state case in which all issues except statutory attorney's fees have been decided has not yet been addressed. The issue is likely to arise, however, because state courts have concurrent jurisdiction over a number of federal statutory claims for which attorney's fees are authorized. Also, a number

mains today. Although both the courts and Congress have carved out exceptions, it justifiably remains largely intact.[39] The strongest rationale underlying this allocation of jurisdiction between the federal district and appellate courts is that it promotes efficient judicial administration. This comprehensive rubric encompasses a variety of interests and circumstances that deserve greater explication.

One way that the final decision requirement promotes efficiency is by minimizing the time required for the ultimate resolution of a case. If a party could obtain appellate review of nonfinal decisions by the trial judge at will, conclusion of the dispute could be substantially delayed.[40] This problem is exacerbated by the time required for disposition of an appeal.[41] Less restrictive provisions for appeal would also allow contentious or malicious litigants to expand the extent of the proceedings at the expense of their opponents.[42]

From the perspective of the courts of appeals, where concerns about clogged dockets have been increasingly expressed,[43] the final decision rule reduces the number of appeals for several reasons. Interlocutory orders that would have been appealed, if permitted, become moot when the aggrieved party is the victor. Other orders that may seem crucial at the time of entry may later be corrected by the trial judge, fade in significance by the time the case is resolved,[44] constitute harmless error,[45] or at least, be reviewed more efficiently[46] when viewed from the perspective of a final resolution of the entire dispute. Moreover, there is sub-

---

of states have statutes that sanction fee shifting in cases where a federal question might arise. *See, e.g., supra* note 17.

39 For a discussion of the judicial and legislative incursions on the final decision rule, see *infra* notes 58, 346-49 and accompanying text. Among the commentators who have argued for relaxation of the requirement are Crick, *supra* note 6, at 557-65; Redish, *The Pragmatic Approach to Appealability in the Federal Courts,* 75 COLUM. L. REV. 89 (1975); Note, *The Writ of Mandamus: A Possible Answer to the Final Judgment Rule,* 50 COLUM. L. REV. 1102 (1950). *But see* Frank, *supra* note 6.

40 The problem is illustrated by the history of English equity practice where there were no limitations placed on appeals of orders or interlocutory decrees that preceded the final decree. Crick, *supra* note 6, at 545-48. The resulting disarray was one of the factors that led to reform. *See* Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law,* 82 HARV. L. REV. 542, 549 (1969).

41 The median time for disposition of an appeal of a civil case in the courts of appeals was 11.3 months for the 12 months ending June 30, 1980. The median ranged from a low of 6.6 months in the Second Circuit to a high of 14.6 in the Ninth Circuit. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1983 ANNUAL REPORT OF THE DIRECTOR 234-36.

42 Cobbledick v. United States, 309 U.S. 323, 325 (1940).

43 *See, e.g.,* Levin, *Research in Judicial Administration: The Federal Experience,* 26 N.Y.L. SCH. L. REV. 237, 239 (1981); PROCEEDINGS OF THE FORTY-FIRST ANNUAL JUDICIAL CONFERENCE FOR THE DISTRICT OF COLUMBIA CIRCUIT, 89 F.R.D. 169, 174 (1980). *See generally* Carrington, *supra* note 40 (discussing congestion in courts of appeals and ways to deal with problem).

44 C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 101 (3d ed. 1976).

45 *See* FED. R. CIV. P. 61.

46 Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981).

stantial advantage in simply consolidating all claims of error in one appellate proceeding. For the appellate court it means only one panel of judges need educate itself about the case. For the parties it means reducing the costs of appellate review by decreasing the amount of papers needed and limiting the amount of attorney time required to administer procedural aspects of the case.[47] Limitations on brief length and time for oral argument for each appeal[48] also force an appellant to assess realistically the validity of each potential ground for reversal asserted on appeal.[49]

While these grounds are compelling, other rationales for the final decision requirement have received less than unanimous support. One such policy is that repeated "looking over the shoulder" by appellate courts during the course of the lawsuit undermines respect for and the independence of, the trial judge.[50] The "common sense basis" that "[o]ne [is] not really aggrieved until the final judgment"[51] is belied by the several exceptions that have been carved out of the final decision requirement.[52]

The policies supporting the final decision requirement are not, however, without competing considerations. The potential delay in appellate review engendered by strict application of the final decision rule may impose a number of burdens that cause a wide spectrum of harm to the party denied immediate review. Thus, a litigant who claims a dispute is arbitrable may be required to engage in an empty but expensive exercise if a district court's refusal to stay the case pending arbitration is not immediately appealable.[53] A similar burden may be suffered by a party whose motion for summary judgment is incorrectly denied in the trial court. More serious hardships[54] resulting from the final decision

---

47 *See generally* FED. R. APP. P. 4, 10-11, 25-28, 30-34; Willcox, Karlen & Roemer, *Justice Lost—By What Appellate Papers Cost,* 33 N.Y.U. L. REV. 934 (1958).

48 FED. R. APP. P. 28(g), 34.

49 U.C.L.A. MOOT COURT HONORS PROGRAM, HANDBOOK OF APPELLATE ADVOCACY 26-28 (1980).

50 Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981); Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978).

Given their views on the importance of appellate review, it is not surprising that Professor Wright subscribes to this argument, while Professor Carrington does not. *Compare* Wright, *The Doubtful Omniscience of Appellate Courts,* 41 MINN. L. REV. 751, 779-82 (1957) (broadening scope of appellate review impairs public confidence in trial courts) *with* Carrington, *The Power of District Judges and the Responsibility of Courts of Appeals,* 3 GA. L. REV. 507 (1969) *and* Carrington, *supra* note 40, at 550-51 (appellate review prevents abuse of authority and increases objectivity).

51 M. GREEN, BASIC CIVIL PROCEDURE 260-61 (2d ed. 1979).

52 *See infra* text accompanying notes 346-53.

53 For a discussion of the appealability of orders that have the effect of either granting or denying arbitration, see Note, *Interlocutory Appeal of Orders Granting or Denying Stays of Arbitration,* 80 MICH. L. REV. 153, 170 n.88 (1981).

54 Professor Redish divides these hardships into "internal consequences," which include those burdens and expenses incurred in the litigation itself, and "external consequences,"

requirement may include losing a unique piece of property without any opportunity to recover it after a successful appeal,[55] or suffering "irreparable injury" when injunctive relief is incorrectly denied. The final decision requirement also consumes additional judicial resources in those cases where reversal of a nonfinal decision would have ended the litigation.[56]

These conflicting tensions have prompted Congress[57] and the courts[58] to create exceptions to the final decision rule. The classic tension between the efficiency of a relatively certain rule and the fairness of a more flexible ad hoc approach is illustrated in microcosm by the debate over the final decision rule.[59]

Another factor that has had an impact on the development of the doctrine is that the balance between competing policies in any specific case may well be struck by the context in which the issue arises: a decision on whether appellate jurisdiction exists occurs only after an appeal has been perfected, and frequently after the merits have been briefed and presented to the appellate court. The inefficiencies in not deciding the merits at that time, along with the natural tendency to avoid a pointless exercise, may tend to skew the result toward permitting appeal in close cases.[60] This is particularly true when, as is often the case, all

---

which include those hardships incurred outside the litigation, such as revelation of a trade secret caused by a refusal to permit interlocutory review. *See* Redish, *supra* note 39, at 98-99; *see also* Frank, *supra* note 6, at 301-02.

55 *See, e.g.,* Forgay v. Conrad, 47 U.S. (6 How.) 201 (1848).

56 The hardship may also be less drastic, such as loss of interest or reduced interest on a monetary recovery for a period of time. *Cf.* Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1 (1980) (permitting rule 54(b) direction to enter final judgment on resolution of less than all claims because of difference in statutory prejudgment interest rate and market rate).

57 Congressional exceptions include: 28 U.S.C. § 1292(a)(1) (1976) permitting appeals of "[i]nterlocutory orders of the district courts . . . granting, continuing, modifying, refusing, or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court"; 28 U.S.C. § 1292(b) (1976) providing for appeal of a nonfinal order where the district court determines that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation" and the court of appeals agrees; and the All Writs Act, 28 U.S.C. § 1651(a) (1976) discussed *supra* note 4. Federal Rule of Civil Procedure 54(b), which permits the trial court to sever for appeal final decisions of less than all claims or parties in a case, also serves as a de facto exception. *See infra* notes 261-63 and accompanying text.

58 The judicial exceptions have centered around two Supreme Court decisions, Forgay v. Conrad, 47 U.S. (6 How.) 201 (1848) (granting appellate review of decree on merits before final disposition where decree ordered defendant to turn over *property* to plaintiff), and Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). The "collateral order" doctrine created in *Cohen* has very limited applicability to the attorney's fees problem. *See infra* text accompanying notes 484-91.

59 A number of commentators have noted that the final decision rule is an imperfect device for distinguishing between those trial decisions that should be reviewed immediately and those that should be deferred. *See* Crick, *supra* note 6; Redish, *supra* note 39.

60 *See* American Export Lines, Inc. v. Alvez, 446 U.S. 274, 289 (1980) (Marshall, J., dissenting) (arguing that "[j]urisdictional prerequisites cannot be disregarded simply because

parties take the position that appellate jurisdiction exists.[61] This phenomenon encourages appeal in marginally final cases, and exacerbates transaction costs by increasing the amount of litigation over appealability.[62]

II

APPEALABILITY WHERE ATTORNEY'S FEES ARE AWARDED ON THE BASIS OF STATUTORY AUTHORIZATION

A. Plaintiffs Seeking Recovery of Fees at the Conclusion of the Case

Over one hundred federal statutes[63] provide for recovery of attor-

---

it seems more economical"); Boeing Co. v. Van Gemert, 444 U.S. 472, 488 (1980) (Rehnquist, J., dissenting) (arguing that Court "us[ed] a dubious technique to gloss over a lack of finality"); Moore & Vestal, *Present and Potential Role of Certification in Federal Appellate Procedure,* 35 VA. L. REV. 1, 6 (1949).

61 *See, e.g.,* Gillespie v. United States Steel Corp., 379 U.S. 148, 152 (1964); DeLong Corp. v. Raymond Int'l, 622 F.2d 1135, 1138 n.3 (3d Cir. 1980). In *Gillespie,* both parties urged the Court to decide the merits despite a question about the court of appeals' jurisdiction. After citing a number of inapplicable exceptions to the final decision rule and remarking on the imprecision of any formula to deal with the "twilight zone" of finality, Justice Black engaged in an ad hoc balancing process from the perspective of an appeal already having been taken. *Gillespie,* 379 U.S. at 152-53.

After *Gillespie,* the courts of appeals spent considerable effort attempting to divine the precise scope of the "twilight zone" of finality. Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b),* 88 HARV. L. REV. 607, 608 n.7 (1975); *see, e.g.,* Herbst v. International Tel. & Tel. Corp., 495 F.2d 1308, 1311-13 (2d Cir. 1974). Subsequently, in Coopers & Lybrand v. Livesay, 437 U.S. 463, 477 n.30 (1978), the Court largely eviscerated *Gillespie,* stating that if it were extended beyond "the unique facts of that case," which included "an unsettled issue of national significance" and in which the "finality issue had not been presented . . . until argument on the merits," the final decision rule "would be stripped of all significance." Contrary to the Court's statement of the circumstances in *Gillespie,* however, the respondent in that case had raised the jurisdictional issue in response to the petition for a writ of certiorari. *Gillespie,* 379 U.S. at 170 n.6 (1964) (Harlan, J., dissenting). Furthermore, it is irrelevant to the court of appeals' jurisdiction. The former assertion regarding the national significance of the underlying issue is nowhere relied on in the *Gillespie* Court's discussion of the jurisdiction of the court of appeals.

62 Over half a century ago, Professor Sunderland made this critical assessment of the final decision requirement:

> There is one thing to be said in favor of no restrictions at all,—it will save an immense amount of useless litigation over the question whether parties may or may not appeal particular cases. Every restriction to ward off appeals creates litigation over the force and effect of the restriction itself. Machinery to save labor may become so complex as to waste more labor than it saves.

Sunderland, *The Problem of Appellate Review,* 5 TEX. L. REV. 126, 127 (1927). Professor Sunderland is correct that inefficiency can be generated by litigation over when an appeal may be taken, but he is incorrect in placing the blame on the restrictive nature of the rule. It is the uncertainty about the rule that has generated inefficiency, not its restrictive nature. Surely there would be no more litigation over a flat prohibition on any appeal before a well-defined conclusion to the case than there would be over an equally unrestrictive standard.

63 6 FED. ATTORNEY FEE AWARDS REP. (Harcourt Brace Jovanich) No. 5, at 2-3 (Aug. 1983); *see also Public Participation in Federal Agency Proceedings Act of 1977: Hearings on S. 270 Before the Subcomm. on Administrative Practice and Procedures of the Senate Comm. on the Judiciary,* 95th

ney's fees, typically, although not exclusively, by a "prevailing party."[64] Many of these statutes are of recent vintage, products of congressional action in the civil rights and public interest areas.[65] Several older statutes, such as the Clayton Act,[66] the Securities Act of 1933,[67] and the Copyright Act[68] authorize fee shifting as well. Given the existence of these statutes, it is surprising that, until the mid-1970s, little attention was paid to the interrelationship between a potential or actual claim for attorney's fees authorized by federal statute and the existence of a final decision that would permit appeal of the case to the courts of appeals.[69] The breaks in the dam began in 1976 with an unenlightening footnote in *Baughman v. Cooper-Jarrett, Inc.*[70] In *Baughman,* the Third Circuit, sua sponte, raised the issue of its jurisdiction over an appeal from a judgment in an antitrust case in which the trial judge had not decided the

---

Cong., 1st Sess. 707-19, 726-27 (1977) (reprinting COHEN, FEDERAL COURTS: AWARDS OF ATTORNEYS' FEES (Congressional Research Service 1977) and COHEN, AWARDS OF ATTORNEYS' FEES IN FEDERAL COURTS AND BY FEDERAL AGENCIES (Congressional Research Service 1977)).

In addition to federal statutes providing for a shifting of attorney's fees in civil litigation, a number of statutes provide for recovery of attorney's fees in administrative proceedings. *E.g.,* Commodity Futures Trading Commission Act of 1974, § 106, 7 U.S.C. § 18(f) (1982). In the criminal area, the Criminal Justice Act § 2, 18 U.S.C. § 3006A(d) (1982) provides for government payment of fees to attorneys appointed to represent indigents. Analogous questions about the relationship among the underlying criminal case, awards of attorney's fees, and appealability have arisen. *See In re* Derickson, 640 F.2d 946 (9th Cir. 1981). Attorney's fees awards in both the criminal and administrative context are beyond the scope of this article.

64 *See, e.g.,* Civil Rights Attorney's Fees Awards Act of 1976, § 2, 42 U.S.C. § 1988 (Supp. V 1981); Civil Rights Act of 1964, § 706, 42 U.S.C. § 2000e-5(k) (1976).

65 *See, e.g.,* Civil Rights Attorney's Fees Awards Act of 1976, § 2, 42 U.S.C. § 1988 (Supp. V 1981); Civil Rights Act of 1964, § 706, 42 U.S.C. § 2000e-5(k) (1976).

66 Ch. 323, § 4, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 15(a) (1982)). Congress first enacted the provision authorizing fee shifting in 1890 as part of the Sherman Antitrust Act, ch. 647, § 7, 26 Stat. 209, 210 (1890), but later superseded it with § 4 of the Clayton Act.

67 Ch. 38, § 11(e), 48 Stat. 74, 83 (1933) (current version at 15 U.S.C. § 77k(e) (1982)). As originally enacted § 11(e) of the 1933 Act did not authorize attorney's fees. Recovery of attorney's fees in cases involving a false registration statement under the Securities Act was first authorized in 1934. Securities Exchange Act of 1934, § 206(d), 48 Stat. 881, 908 (amending Securities Act of 1933, § 11(e)).

68 Ch. 320, § 40, 34 Stat. 1075, 1084 (1909) (current version at 17 U.S.C. § 505 (Supp. V 1981)).

69 *E.g.,* Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 221 (9th Cir.), *cert. denied,* 379 U.S. 880 (1964); Signal Mfg. Co. v. Kilgore Mfg. Co., 198 F.2d 667 (9th Cir. 1952). *But see* Lunn v. F.W. Woolworth Co., 207 F.2d 174 (9th Cir. 1953), *cert. denied,* 346 U.S. 928 (1954); Laufenberg, Inc. v. Goldblatt Bros., 187 F.2d 823 (7th Cir. 1951); Davis Harvester Co. v. Long Mfg. Co., 283 F. Supp. 536 (E.D.N.C. 1967); Darlington v. Studebaker-Packard Corp., 191 F. Supp. 438 (N.D. Ind. 1961); Philadelphia Brief Case Co. v. Specialty Leather Prods. Co., 160 F. Supp. 153 (D.N.J. 1958); *cf.* Newton v. Consolidated Gas Co., 265 U.S. 78 (1924).

By contrast, in 1882 the Supreme Court held that an award of attorney's fees to a plaintiff from a common fund under the control of the court was an appealable order. Trustees v. Greenough, 105 U.S. 527 (1882). *See infra* text accompanying notes 418-21.

70 530 F.2d 529, 531 n.2 (3d Cir.), *cert. denied,* 429 U.S. 825 (1976).

magnitude of the attorney's fees award.[71] Since *Baughman,* courts have provided various solutions to the appealability question and the related procedural problems that arise when statutory attorney's fees awards are at issue.[72]

1. *The Scope of Federal Fee Shifting Statutes*

Despite the variety of language used in the many federal fee shifting statutes and the glosses in interpretation superimposed by the courts, most attorney's fees provisions fall into a limited number of categories. Those categories are delineated by two parameters: the threshold of success that a party must attain to be entitled to recover fees[73] and the extent of discretion afforded to the court in deciding whether to award fees to a party who has met the threshold.[74] The success threshold runs in a stepped hierarchy that permits, in the least restrictive statutes, a party who has attained some minimal success on the merits to recover attorney's fees.[75] At the other end of the spectrum, a number of statutes sanction fee shifting only when the opposing party has litigated in bad faith, vexatiously, or for oppressive reasons.[76] Similarly, the trial court's discretion ranges from the mandatory provision for awarding fees to a successful plaintiff under the Clayton Act[77] to the largely unbounded

---

71 The court relied on the statutory characterization of an attorney's fee as part of the costs in holding that its jurisdiction was unaffected by the undecided issue of the amount of attorney's fees to be awarded. *Id.; see infra* text accompanying notes 99-100.

72 *See infra* text accompanying notes 96-109.

73 Or similarly, a threshold that would entitle a party to recover fees could be the meritlessness of the opposing party's claims or defenses. *See infra* note 76.

74 In addition to the threshold and discretion parameters, the statutes may vary in other ways that are relevant to the procedural questions addressed in this section. For example, although some statutes characterize attorney's fees as part of the "costs" to be awarded, others do not. *See infra* note 293.

75 *E.g.,* Endangered Species Act § 11, 16 U.S.C. § 1540(g)(4) (1976); Clean Air Act § 304(d), 42 U.S.C. § 7604(d) (Supp. V 1981); Outer Continental Shelf Lands Act § 23, 43 U.S.C. § 1349(a)(5) (Supp. V 1981); *see* Ruckelshaus v. Sierra Club, 103 S. Ct. 3274 (1983).

At least one federal statute permits recovery of attorney's fees by a person who does not prevail at all, but that statute governs agency rulemaking rather than court proceedings. *See* Toxic Substances Control Act § 6, 15 U.S.C. § 2605(c)(4)(A) (1982); *see also* Ruckelshaus v. Sierra Club, 103 S. Ct. 3274, 3277 n.7 (1983).

76 *See, e.g.,* Securities Act of 1933, § 206, 15 U.S.C. § 77k(e) (1982). The statute provides for recovery of attorney's fees when the opponent's suit or defense is "without merit." A number of courts have interpreted this standard to be essentially coextensive with the equitable "bad faith" standard. *See, e.g.,* Johnson v. Yerger, 612 F.2d 953, 959 (5th Cir. 1980); Driscoll v. Oppenheimer & Co., 500 F. Supp. 174, 175 (N.D. Ill. 1980).

Between the two extremes in thresholds, there is the "prevailing party" standard contained in the Civil Rights Attorney's Fees Awards Act of 1976, § 2, 42 U.S.C. § 1988 (Supp. V 1981), and in the Civil Rights Act of 1964, § 706, 42 U.S.C. § 2000e-5(k) (1976), the "finally prevails" standard, *see, e.g.,* Packers and Stockyard Act § 509, 7 U.S.C. § 210(f) (1982), and the requirement that a prevailing party demonstrate "exceptional circumstances" before recovering fees, *see, e.g.,* Lanham Act § 3, 15 U.S.C. § 1117 (1982); *see also* Ruckelshaus v. Sierra Club, 103 S. Ct. 3274, 3276-77 (1983).

77 15 U.S.C. § 15(a) (1982).

"whenever . . . appropriate" standard for fee awards contained in a number of environmental statutes.[78]

The analysis that follows is generally applicable to the vast majority of federal fee shifting statutes, regardless of their threshold and discretion provisions. For reasons of convenience, however, the focus of this section is on the Fees Awards Act[79] and the attorney's fees provisions of Title VII of the Civil Rights Act of 1964,[80] two statutes that recently have caused considerable litigation and uncertainty. The fee award

---

78 *See supra* note 75.

In addition to the variety of standards for awarding fees, the language of one fee shifting statute, the Equal Access to Justice Act, 28 U.S.C. § 2412 (Supp. V 1981), appears specific enough to resolve the appealability question that arises from attempts to recover fees. The directive that "[a] party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees," 28 U.S.C. § 2412(d)(1)(B) (Supp. V 1981), should be dispositive in determining when a request to recover attorney's fees must be made and the impact of an unresolved attorney's fee issue on an otherwise final judgment.

The relevant language in the Equal Access to Justice Act first surfaced during hearings in the House in 1978. Previously most bills had treated an award of attorney's fees as part of the costs of the action. *See The Awarding of Attorneys' Fees in Federal Courts: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary,* 95th Cong., 1st & 2d Sess. 160-256 (1978). On April 26, 1978, the United States Department of Justice submitted a proposed bill that contained, in § 103(a), the provision that "[a] party seeking payment of reasonable fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application which provides evidence of such party's eligibility for the award and the amount sought . . . ." However, the two Department of Justice attorneys who drafted the bill and used the term "final judgment" had no intention of addressing or affecting the stage at which any appeal could be taken or the relationship between attorney's fees and the merits. They have described the choice of language as "pure accident"; the provision was intended to address the more mechanical concern of the time limits within which a party might seek fees. Telephone interview with Hon. Warren King, Attorney-Advisor, Office for Improvements in the Administration of Justice, United States Department of Justice (Nov. 23, 1982); Telephone interview with Karen Siegel, Deputy Legislative Counsel, United States Department of Justice (Nov. 22, 1982). That language was carried forward in the legislative process and ultimately ensconced in the Equal Access to Justice Act § 204(a), 94 Stat. 2325 (1980). Nowhere in the legislative history is there any explanation of the "within thirty days of final judgment" language.

The United States has taken the position that the reference to "final judgment" in the Equal Access to Justice Act means the point at which the parties have exhausted all appeals, not the final appealable decision of the district court. OFFICE OF LEGAL POLICY, UNITED STATES DEPARTMENT OF JUSTICE, AWARD OF ATTORNEY FEES AND OTHER EXPENSES IN JUDICIAL PROCEEDINGS UNDER THE EQUAL ACCESS TO JUSTICE ACT 30-31 (1981). *But see* McDonald v. Schweiker, 551 F. Supp. 327 (N.D. Ind. 1982) (government's argument that plaintiff was foreclosed from recovering fees because of failure to file application within 30 days of district court's judgment rejected because application was filed within 30 days of termination of appeal).

79 The statute provides:

> 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 [20 U.S.C. 1681 et seq.] [sic], or title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.] [sic], 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.

Civil Rights Attorney's Fees Awards Act of 1976, § 2, 42 U.S.C. § 1988 (Supp. V 1981).

80 The statute provides:

provisions in both statutes are virtually identical and have been treated as such by the courts.[81] Both contain a threshold requiring a "prevailing party" as a predicate for a fee award and provide the trial court with "discretion" in whether to award fees.[82] A substantial number of other federal fee shifting statutes contain comparable provisions.[83]

Distinctions in procedural treatment of attorney's fees based on the exception that permits their recovery are common.[84] Nevertheless, uniform treatment of all requests for attorney's fees based on federal statutory authority, regardless of the particular statute involved, would seem salutary,[85] at least to provide certainty to litigants and to minimize the instances where noncompliance with procedural requirements results in a loss of rights.

2. *The Congruence of Judgment and Final Decision*

The nominal issue before the Supreme Court in *White v. New Hampshire Department of Employment Security*[86] was whether the ten-day time limitation for making a motion to alter or amend a judgment in rule 59(e) of the Federal Rules of Civil Procedure[87] was applicable to a

---

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Civil Rights Act of 1964, § 706, 42 U.S.C. § 2000e-5(k) (1976).

81 Hughes v. Rowe, 449 U.S. 5, 14 (1980); Obin v. District No. 9 of the Int'l Ass'n of Machinists, 651 F.2d 574, 578 n.5 (8th Cir. 1981). *But cf.* Derheim v. Hennepin County Bureau of Social Serv., 524 F. Supp. 1321, 1324 (D. Minn. 1981) (noting that title VII entitles prevailing parties to fee awards for efforts in exhausting administrative remedies, but that Fees Awards Act only applies to actions in state or federal court based on violations of laws enumerated in Fees Awards Act), *aff'd,* 688 F.2d 66 (8th Cir. 1982); Blow v. Lascaris, 523 F. Supp. 913, 916 (N.D.N.Y. 1981) (same), *aff'd per curiam,* 688 F.2d 670 (2d Cir.), *cert. denied,* 103 S. Ct. 225 (1982).

82 Both the "prevailing party" and "discretion" provisions of the Fees Awards Act and title VII have been substantially affected by recent Supreme Court interpretation. *See infra* notes 158-59, 161.

83 *See* Note, *Awards of Attorney's Fees in the Federal Courts,* 56 ST. JOHN'S L. REV. 277, 286-87 & n.34 (1982).

This article also addresses variances among statutes that affect the considerations bearing on the appealability determination. For example, differences in the specific threshold and the extent of discretion may have a marginal impact on the analysis. *See, e.g., infra* note 163. In addition, a unique or unusual aspect of a particular fee shifting statute may have an effect on procedural questions. *See, e.g., infra* note 262.

84 *Compare, e.g.,* Stacy v. Williams, 446 F.2d 1366, 1367 (5th Cir. 1971) (rule 59(e) applicable to request for fees based on bad faith exception) *with, e.g.,* Knighton v. Watkins, 616 F.2d 795, 798 (5th Cir. 1980) (request for fees based on Fees Awards Act is governed by "costs" provision of rule 54(d)).

85 *See infra* note 163.

86 455 U.S. 445 (1982).

87 Federal Rule of Civil Procedure 59(e) provides: "A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment." The 10-day period cannot be extended, even with approval of the court. FED. R. CIV. P. 6(b).

postjudgment request for attorney's fees pursuant to the Fees Awards Act. On its face, this appears to be a very different matter from the issue of what constitutes a final appealable decision in the district court. Despite this facial dissimilarity, the two issues are closely connected because "judgment" is defined in rule 54(a) solely in terms of what may be appealed: " 'Judgment' as used in these rules includes a decree and any order from which an appeal lies."[88] Thus, to determine whether a judgment exists and whether rule 59(e) and its time limits are therefore applicable requires reference to the provisions for appellate jurisdiction.[89] Most significant in this regard is the final decision requirement in section 1291 of the Judicial Code.[90] Indeed, many courts have used the term "judgment" interchangeably with the term "final decision."[91] In addition to appeals of final decisions, section 1292[92] authorizes appeals

---

88 FED. R. CIV. P. 54(a). The term "includes" suggests that a judgment may encompass more than all appealable orders and decrees, but that is not the case. *See In re* Manufacturers Trading Corp., 194 F.2d 948 (6th Cir. 1952); *In re* Long Island Properties, 42 F. Supp. 323 (S.D.N.Y. 1941).

In Stack v. Boyle, 342 U.S. 1, 12 (1951), Justice Jackson pointed out that every final judgment is an appealable final decision, but that not every final decision is a final judgment. He was referring to the collateral order doctrine, which permits an appeal despite the fact that the merits of the case remain unresolved. *See infra* text accompanying notes 346-50.

89 *See* Banker's Trust Co. v. Mallis, 435 U.S. 381 (1978).

Rules 58 and 79(a) of the Federal Rules of Civil Procedure contain other, ministerial requirements for a judgment and its entry, most notably that the judgment be set forth in a separate document.

90 The statute provides: "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court." 28 U.S.C.A. § 1291 (West Supp. 1983).

91 *See, e.g., In re* Underwriter's at Lloyd's, 666 F.2d 55, 58 (4th Cir. 1981); Young v. Ethyl Corp., 635 F.2d 681, 683 (8th Cir. 1980) (per curiam); *see also* Frank, *supra* note 6, at 294-95.

92 The statute provides in relevant part:

> (a) [T]he courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;
>
> (2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;
>
> (3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.
>
> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

from several classes of nonfinal or interlocutory orders. Rule 54(a) also defines these appealable interlocutory orders as judgments; they have been characterized as "interlocutory judgments," as opposed to "final judgments," which is used to denote orders that are appealable as final decisions pursuant to section 1291.[93]

Once the district court resolves all of the issues in a case necessary for a final decision and enters final judgment, its authority to modify the decision on those aspects of the case included or includible in the judgment is circumscribed by rule 59(e) and its strict time limitations.[94] Because of its potential impact on the judgment, a timely rule 59(e) motion suspends the running of the time in which to take an appeal from the final judgment until after a decision is rendered on the motion.[95] Thus, the relationship among a request for attorney's fees, a decision resolving all other matters in a case (which, for want of a better characterization, I will refer to as the merits), and a final decision for purposes of section 1291, must be addressed in order to resolve the issue before the Court in *White.* The courts of appeals had provided a number of different approaches to this issue prior to *White.*

---

28 U.S.C.A. § 1292 (1976 & West Supp. 1983) (emphasis in original).

93 Rule 54(a) of the Federal Rules of Civil Procedure makes no distinction between judgments.

Although the term "final judgment" has been used in other contexts to refer to a judgment for which all available appeals have been exhausted or for which the time to appeal has expired, *see* Linkletter v. Walker, 381 U.S. 618, 622 n.5 (1965), I will use it to signify a judgment that is appealable under § 1291. By contrast, I will use "judgment" generically to apply to all judgments regardless of the basis for appealability, and "interlocutory judgment" to apply to all judgments that are not final judgments.

94 *See, e.g.,* United States v. One Hundred Nineteen Thousand Nine Hundred Eighty Dollars, 680 F.2d 106, 107 (11th Cir. 1982).

Among the other postjudgment devices a party may use to seek some change in the judgment are a motion for new trial, FED. R. CIV. P. 59(a), a motion to amend or make additional findings in a nonjury case, FED. R. CIV. P. 52(b), a motion for judgment n.o.v., Fed. R. CIV. P. 50(b), and a motion for relief from judgment, FED. R. CIV. P. 60. In addition, an independent action attacking the judgment may be sustainable. *See* FED. R. CIV. P. 60(b); *cf.* FED. R. CIV. P. 54(b). Of these provisions, only rule 60(b) has any arguable relevance to a postjudgment request for attorney's fees, and its scope is substantially limited to six specified grounds, none of which would be applicable in a routine case involving statutory attorney's fees. *See* Ackermann v. United States, 340 U.S. 193, 202 (1950) (failure to appeal because of prohibitive costs is not justifiable within meaning of rule 60(b)(6)).

Although a few courts before the *White* decision relied on rule 60(b) and its more expansive time limitations to justify a postjudgment fee request, none even attempted to explain why any of the requisite circumstances contained in 60(b) were present. *See* Fox v. Parker, 626 F.2d 351, 353 n.2 (4th Cir. 1980); DuBuit v. Harwell Enters., 540 F.2d 690, 692 (4th Cir. 1976); *cf.* White v. New Hampshire Dep't of Employment Sec., 629 F.2d 697, 704 n.9 (1st Cir. 1980) (declining to address circumstances in which rules other than 59(e) might be used to seek postjudgment fee award), *rev'd,* 455 U.S. 445 (1982); Janicki v. Pizza, 501 F. Supp. 312, 313 (N.D. Ohio 1980) (intimating that rule 60(a) might sanction motion for statutory fees made more than 10 days after entry of judgment).

95 The time for taking an appeal begins to run on entry of the order disposing of the motion. FED. R. APP. P. 4(a)(4).

3. *The Variety of Solutions in the Courts of Appeals*

The first approach, suggested by the Third Circuit in *Baughman v. Cooper-Jarrett, Inc.,*[96] but later ignored and finally repudiated by that court,[97] treats attorney's fees as "costs" of the action.[98] Because rule 58 of the Federal Rules of Civil Procedure provides that "[e]ntry of the judgment shall not be delayed for the taxing of costs," the effect of this approach is to sever the merits from the issue of attorney's fees. A final decision of the merits would constitute a valid final judgment, appealable independent of the attorney's fees. Because the Federal Rules of Civil Procedure provide no time limitation for seeking costs, this approach preserves the right to seek fees despite a failure to comply with the ten-day time limit of rule 59(e). Thus, in *Knighton v. Watkins,*[99] the Fifth Circuit preserved the opportunity to obtain fees for a plaintiff who filed a request for fees more than ten days after entry of judgment, by holding that attorney's fees are part of the costs of the action appropriately sought after entry of judgment.[100]

---

96 530 F.2d 529, 531 n.2 (3d Cir.), *cert. denied,* 429 U.S. 825 (1976).

97 Croker v. Boeing Co., 662 F.2d 975 (3d Cir. 1981) (en banc). In *Baughman,* the Third Circuit held that it had jurisdiction of an appeal from a decision that left unresolved the amount of attorney's fees to be awarded. In Richerson v. Jones, 551 F.2d 918 (3d Cir. 1977), the court held that an otherwise final decision that had not addressed the plaintiff's request for fees in his complaint was not final for purposes of appeal. Addressing the question of appealability and resolution of attorney's fees again in DeLong Corp. v. Raymond Int'l, 622 F.2d 1135, 1138 n.3 (3d Cir. 1980), the Third Circuit attempted to distinguish *Baughman* from *Richerson* on the ground that the right to fees in *Richerson* was still undecided, whereas only the amount was left open in *Baughman.* However, because *Baughman* relied on the "costs" characterization of attorney's fees, this distinction is meaningless. Both the right to have certain expenses taxed as costs and the appropriate amount of those items are severed from the judgment, and it is appealable regardless of the unresolved question of costs. *See* FED. R. CIV. P. 58. In *Croker,* the court, en banc, did not even attempt to reconcile these decisions, characterizing them as providing "conflicting guidance." 662 F.2d at 982. The court cast its lot with the First Circuit's ruling in White v. New Hampshire Dep't of Employment Sec., 629 F.2d 697 (1st Cir. 1980), *rev'd,* 455 U.S. 445 (1982), that an award of attorney's fees is part of the relief sought and therefore integral to a judgment. *Croker,* 662 F.2d at 984.

The Third Circuit is not the only circuit that has failed to remain consistent in its rulings. *Compare* White v. New Hampshire Dep't of Employment Sec., 629 F.2d 697 (1st Cir. 1980), *rev'd,* 455 U.S. 445 (1982) *with* Lovell v. Snow, 637 F.2d 170 (1st Cir. 1981) (refusing to base its affirmance of district court's denial of § 1988 fees on plaintiff's failure to request fees until several months after entry of judgment, and instead relying on plaintiff's pro se status to deny recovery of attorney's fees, despite fact that request for fees, if untimely, was made to district court that lacked jurisdiction over request); *compare* Knighton v. Watkins, 616 F.2d 795 (5th Cir. 1980) *with* Taylor v. Sterret, 640 F.2d 663, 668 (5th Cir. 1981); *compare* Metcalf v. Borba, 681 F.2d 1183 (9th Cir. 1982) (request for fees not governed by provisions for costs) *with* Williams v. Alioto, 625 F.2d 845 (9th Cir. 1980) (request for fees governed by costs provisions), *cert. denied,* 450 U.S. 1012 (1981).

98 Attorney's fees are described in the Fees Awards Act and several other federal statutes as "costs" of the action. *See infra* text accompanying note 275.

99 616 F.2d 795 (5th Cir. 1980).

100 *Id.* at 797; *accord* Johnson v. Snyder, 639 F.2d 316, 317 (6th Cir. 1981); Bond v. Stanton, 630 F.2d 1231, 1234 (7th Cir. 1980), *cert. denied,* 454 U.S. 1063 (1981); Williams v. Alioto, 625 F.2d 845, 848 (9th Cir. 1980), *cert. denied,* 450 U.S. 1012 (1981). Two district courts have

A second approach, adopted by the Eighth Circuit in *Obin v. District No. 9 of the International Association of Machinists, (Obin II)*,[101] treats attorney's fees as an issue collateral to, and independent from, the merits. Under this approach, an award of attorney's fees is properly resolved by the district court at some point after judgment is entered, but is not subject to any of the time limitations contained in the Judicial Code or the Federal Rules of Civil Procedure.[102] Although the collateral and independent approach evolved from different doctrinal roots than the "costs" approach, functionally it is quite similar: it uncouples the determination of attorney's fees from resolution of the merits. A necessary corollary to this approach is that both the merits judgment and the award vel non of fees are independently appealable.[103] This approach derives from several older Supreme Court cases[104] in which a party or her attorney sought attorney's fees based on the equitable "common fund" exception, and in turn the collateral order doctrine established by the Court in *Cohen v. Beneficial Industrial Loan Corp.*[105]

The First Circuit's decision in *White v. New Hampshire Department of Employment Security,*[106] represents the third approach to the procedural

---

reached the same conclusion. *See* Janicki v. Pizza, 501 F. Supp. 312, 313 (N.D. Ohio 1980); Anderson v. Morris, 500 F. Supp. 1095, 1106 (D. Md. 1980), *vacated on other grounds,* 658 F.2d 246 (4th Cir. 1981). *But cf.* Terket v. Lund, 623 F.2d 29, 32-33 (7th Cir. 1980) (distinguishing attorney's fees and costs for purposes of appellate jurisdiction when appeal is taken only from the judgment on the merits).

101 651 F.2d 574 (8th Cir. 1981). Before this decision, a different Eighth Circuit panel had denied appellees' motion to dismiss the appeal of the merits on the grounds that the notice of appeal was untimely. Obin v. District No. 9 of the Int'l Ass'n of Machinists, 623 F.2d 521 (8th Cir. 1980) (*Obin I*). Arguably, the decision in *Obin II* overruled the *Obin I* decision. *See infra* note 135.

The Eighth Circuit, as of the time of the Supreme Court's decision in White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445 (1982), was the only circuit to have adopted the "collateral and independent" theory.

102 The *Obin II* court did suggest that the district courts promulgate local rules establishing time limits for submitting a fee request and suggested that the limit be 21 days. 651 F.2d at 583.

103 *Id.* at 584.

104 Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939); Central R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885); Trustees v. Greenough, 105 U.S. 527 (1882); *see infra* text accompanying notes 413-35.

105 337 U.S. 541 (1949); *see* Boeing Co. v. Van Gemert, 444 U.S. 472, 482-89 (1980) (Rehnquist, J., dissenting); Hirschkop v. Snead, 475 F. Supp. 59 (E.D. Va. 1979), *aff'd,* 646 F.2d 149 (4th Cir. 1981).

The mistaken use of the collateral order doctrine to justify separate appeals of the merits and attorney's fees is discussed *infra* text accompanying notes 484-91.

106 629 F.2d 697 (1st Cir. 1980), *rev'd,* 455 U.S. 445 (1982). At least one other district court ruled consistently with *White.* Suzuki v. Yuen, 507 F. Supp. 819, 821 n.2 (D. Hawaii 1981), *rev'd on other grounds,* 678 F.2d 761 (9th Cir. 1982). Before the First Circuit's holding in *White,* a Virginia district court had reached a similar holding. Hirschkop v. Snead, 475 F. Supp. 59 (E.D. Va. 1979), *aff'd on other grounds,* 646 F.2d 149 (4th Cir. 1981). In addition, the Second, Third, Fourth, and Tenth Circuits had at least implicitly rejected both the costs approach and the collateral and independent approach as of the time of the Supreme Court's decision in *White. See* Bacon v. Toia, 648 F.2d 801 (2d Cir. 1981), *aff'd on other grounds sub nom.*

treatment of requests for attorney's fees pursuant to statute. The plaintiff challenged the defendant's handling of unemployment compensation claims and obtained a favorable judgment in the district court.[107] After the defendant appealed, the parties entered into a settlement, and the case was remanded to the district court for entry of a consent decree. Approximately four and one-half months later, the plaintiff moved for an award of attorney's fees pursuant to the Fees Awards Act. The district court, over defendant's objections, awarded plaintiff attorney's fees in excess of $16,000. The district court later denied defendant's motion to vacate the award, and defendant appealed.

The First Circuit held that a postjudgment request for statutory attorney's fees is governed by rule 59(e). The ten-day time limit contained in rule 59(e) is inflexible; it cannot be extended by either the parties or the court.[108] In that sense it is "jurisdictional": the district court has no power to rule on a motion to amend or alter the judgment that is served more than ten days after entry of judgment.[109] Because plaintiff's request for attorney's fees was untimely, the court of appeals reversed the award.

4. *The* White *Decision, Limited Certainty, and Preventing Procedural Default*

In a narrow opinion that was nevertheless consistent with the Supreme Court's recent solicitude for successful civil rights plaintiffs seeking attorney's fees,[110] the Court in *White v. New Hampshire Department of Employment Security*[111] reversed the First Circuit and largely adopted the Eighth Circuit's "collateral and independent" approach from *Obin*

Blum v. Bacon, 457 U.S. 132 (1982); Johnson v. University of Bridgeport, 629 F.2d 828 (2d Cir. 1980) (per curiam) (statutorily authorized attorney's fees are not "collateral"); Croker v. Boeing Co., 662 F.2d 975 (3d Cir. 1981) (award of attorney's fees is part of relief sought and thus integral to judgment); Anderson v. Morris, 658 F.2d 246, 248 (4th Cir. 1981) (judgment that does not resolve request for attorney's fees is not final judgment); Cassidy v. Virginia Carolina Veneer Corp., 652 F.2d 380 (4th Cir. 1981) (where decision on attorney's fees had not been made, order is not final for purposes of appeal); Glass v. Pfeffer, 657 F.2d 252 (10th Cir. 1981) (order not final until award of attorney's fees decided). *But see* Gary v. Spires, 634 F.2d 772 (4th Cir. 1980) (indicating attorney's fees should be treated as "costs" for purposes of rule 54(d) review).

107 Neither the judgment nor the opinion of the district court contained any indication of an unresolved issue of attorney's fees. *White,* 629 F.2d at 698.

108 FED. R. CIV. P. 6(b).

109 Browder v. Director, Ill. Dep't of Corrections, 434 U.S. 257 (1978); Hirschkop v. Snead, 475 F. Supp. 59 (E.D. Va. 1979), *aff'd on other grounds,* 646 F.2d 149 (4th Cir. 1981); *see* Lapiczak v. Zaist, 451 F.2d 79, 80 (2d Cir. 1971). *But see* Thompson v. INS, 375 U.S. 384 (1964).

110 *See* Maher v. Gagne, 448 U.S. 122 (1980); Maine v. Thiboutot, 448 U.S. 1 (1980); New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980). *But see* Hanrahan v. Hampton, 446 U.S. 754, 757-58 (1980); Supreme Court of Va. v. Consumers Union, 446 U.S. 719, 738 (1980).

111 455 U.S. 445 (1982).

II as the appropriate procedural treatment of attorney's fees. The Court noted that rule 59(e) had generally been invoked only to limit reconsideration of those matters that might properly be included in the merits.[112] Reasoning that statutory fees are neither encompassed within the decision on the merits, nor an element of traditional relief, the Court concluded that a request for fees must be collateral and independent from the decision on the merits and thus not subject to the time limits of rule 59(e) or indeed any Federal Rule of Civil Procedure.[113]

In response to the First Circuit's concerns for promoting judicial efficiency by minimizing multiple appeals and preventing unfair surprise to unsuccessful litigants, the Court contended that uncoupling fees from the merits would better further those goals. First, expanding on a point made by the Eighth Circuit in *Obin II,*[114] the Court adverted to the prolonged civil rights case that involves equitable relief of a continuing nature. In such a case, "many final orders may issue in the course of the litigation,"[115] and uncertainty as to which ones are appealable judgments might result in parties making protective fee requests in response to every order; otherwise fees to which the party was entitled would be forfeited because not sought within the ten days permitted by rule 59(e). Second, the Court was concerned that the stringent time limits of rule 59(e) would discourage settlement of the fees issue.[116] Third, the Court reasoned that the discretion[117] afforded the trial court by the Fees Awards Act in deciding whether to award fees would justify denial if the timing of the fee request caused unfair surprise or prejudice to the defendant.[118] Finally, the Supreme Court asserted that prompt resolution of the fees request and subsequent consolidation of any fee award appeal with the merits appeal could preclude piecemeal appeals.[119] Interest-

112 *Id.* at 451 (citing Browder v. Director, Ill. Dep't of Corrections, 434 U.S. 257 (1978)).

113 The Court sanctioned the adoption of local rules by the district courts to govern postjudgment requests for attorney's fees, citing the Eighth Circuit's suggestion in *Obin II,* 651 F.2d at 583, that the district courts adopt a local rule governing requests for attorney's fees. *White,* 455 U.S. at 454 & n.16.

In a curious passage that apparently referred to the intercircuit conflict that had arisen, the Court stated: "As different jurisdictions have established different procedures for the filling of fee applications, there may be valid local reasons for establishing different time limits." *Id.* at 454 n.16. None of the courts of appeals had relied on local factors to justify a decision adopting an approach different from that of another circuit, and it is difficult to conceive of factors that would justify such differences. Even the Eighth Circuit, in proposing that the district courts adopt local rules, promoted a uniform 21-day limit. *Obin II,* 651 F.2d at 583.

114 651 F.2d at 581 n.8.

115 *White,* 455 U.S. at 453 (quoting Bradley v. School Bd., 416 U.S. 696, 722-23 (1974)).

116 *White,* 455 U.S. at 453.

117 *See infra* note 158.

118 *White,* 455 U.S. at 454.

119 *Id.* Presumably the Court assumed that the doctrine divesting a district court of jurisdiction once a notice of appeal is filed would not apply when a party seeks attorney's fees in the district court after an appeal of the merits is taken. Courts developed this jurisdictional dogma because of the physieal limitation that a case record could only be located in one court

ingly, the Court did not mention another point pressed by the plaintiff[120] and amicus:[121] ten days is simply insufficient time in which to expect attorneys, particularly after a lengthy case, to assemble and prepare the necessary information and documentation required for a fee request.[122]

The Court did not discuss the procedural quicksand that many litigants had fallen into because of the uncertainty and complexity surrounding the relationship among a decision on the merits, an appealable judgment, and a decision as to attorney's fees. The Court did not even advert to Mr. White's plight, although he surely presented a sympathetic case, having obtained a judgment based on violations of the Social Security Act and the due process clause of the fourteenth amendment and a substantial award of fees from the district court, only to lose the fees on appeal because of a technical procedural failing.[123]

---

at any given time. The rule has been justified as preventing two courts from addressing the same issue simultaneously. *See* Terket v. Lund, 623 F.2d 29, 33 (7th Cir. 1980); Crick, *supra* note 6, at 543-44. Courts have invoked the doctrine to justify dismissal of a motion for attorney's fees filed after a notice of appeal. DuBuit v. Harwell Enters., 540 F.2d 690, 693 (4th Cir. 1976); *see* Wright v. Jackson, 522 F.2d 955, 957 (4th Cir. 1975).

Nevertheless, the rule has been riddled with exceptions. *E.g.,* Century Laminating, Ltd. v. Montgomery, 595 F.2d 563, 567 (10th Cir.) (district court retains jurisdiction if notice of appeal is untimely filed or refers to nonappealable order), *cert. dismissed,* 444 U.S. 987 (1979). Given the rule's rationale, it would appear inapplicable when the district court is assessing the appropriate amount of fees while an appeal of the merits is pending. *But see* Taylor v. Sterrett, 640 F.2d 663, 667-68 (5th Cir. 1981).

120 Brief for Petitioner at 35 & n.31, White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445 (1982).

121 Brief for NAACP Legal Defense and Educational Fund, Inc. as Amicus Curiae at 14-16, White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445 (1982).

122 Among the items that the courts have generally required as part of an application for fees are affidavits of counsel detailing the amount of attorneys' time and the tasks performed, biographical information regarding the attorneys for whom fees are sought, and information about prevailing hourly rates in the community for comparable work. Other facts that bear on the applicable criteria for awarding fees, *see infra* note 167, as well as a memorandum of law, also may be necessary. *See, e.g.,* National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319 (D.C. Cir. 1982); Souza v. Southworth, 564 F.2d 609 (1st Cir. 1977); *see also* Hensley v. Eckerhart, 103 S. Ct. 1933, 1939-41 (1983).

In Bacon v. Toia, 648 F.2d 801 (2d Cir. 1981), *aff'd on other grounds sub nom.* Blum v. Bacon, 457 U.S. 132 (1982), the Second Circuit approved the district court's allowance of three months for the plaintiffs to prepare and submit their application for attorney's fees in a class action that had been litigated for four years. And in Codex Corp. v. Milgo Elec. Corp., 541 F. Supp. 1198 (D. Mass 1982), it was necessary to utilize a computer program to organize the attorney's time sheets accumulated over a period of six years by over 50 lawyers.

123 By contrast, a number of courts that had invoked procedural bars to deny a party recovery of attorney's fees had, quite sensibly, made it reasonably clear, if implicitly, that the barred party was not entitled to recover attorney's fees on other grounds as well.

This is perhaps best illustrated by a comparison of two cases decided by the Fourth Circuit. In DuBuit v. Harwell Enters., 540 F.2d 690 (4th Cir. 1976), the defendant sought and obtained statutory attorney's fees in a patent infringement case after a judgment on the merits had been entered and the time for appeal expired for two of the plaintiffs. Holding that the district court lacked jurisdiction to entertain a request for fees at this point, the Fourth Circuit reversed the fee award, commenting:

Furthermore, despite defendant's contention that it thought the settlement implicitly resolved the issue of attorney's fees, Mr. White's counsel had written to defendants' attorney five days after entry of the consent decree to discuss the unresolved issue of fees.[124] One suspects it was not entirely coincidental that the Court's resolution of the rule 59(e) issue may also, in addition to the express rationales contained in the opinion, have the unspoken advantage of preventing a party otherwise entitled to recover fees from forfeiting that right because of a delay in seeking fees,[125] a goal to which other courts have also been sympathetic.[126]

Unfortunately, the Court refused to write a broad opinion setting definitive standards and providing guidance to parties seeking attorney's fees in the future. In a separate concurrence, Justice Blackmun gently chided the majority for not deciding whether the Federal Rules covering "costs" govern fee requests pursuant to the Fees Awards Act.[127] As Justice Blackmun noted, the Court's failure to provide definitive answers will surely result in increased procedural defaults and increased litiga-

---

> As we have stated, the final order of the court disposed of all of the issues between these two plaintiffs and the defendants, and since no appeals were taken the judgment became a finality and terminated the case as to them. Under these circumstances, the case could only be reopened or the order revised under the provisions of Rule 59 or Rule 60, Federal Rules of Civil Procedure, neither of which was invoked as the basis of the court's order.

Id. at 692. In dicta, the Court proceeded to apply the "exceptional case" standard of the Patent Act, 35 U.S.C. § 285 (1976), to the facts of the case and concluded that the defendant was not entitled to recover fees. By contrast, in Fox v. Parker, 626 F.2d 351 (4th Cir. 1980), the Fourth Circuit largely affirmed an award of attorney's fees that had been sought by motion nine months after the judgment had become final. In response to the appellee's argument that the district court lacked jurisdiction to award fees, in support of which one would assume the appellee cited *DuBuit,* the court stated that even though the motion for fees "was not brought under the authority of any Rule" the district court had jurisdiction to decide the motion pursuant to Federal Rule of Civil Procedure 60(b). *See also* Hairline Creations, Inc. v. Kefalas, 664 F.2d 652, 659 (7th Cir. 1981) (in course of holding that defendant's fee request was untimely because made after period provided by rule 59(e), court gave two substantive reasons why fees would not have been warranted); Hirschkop v. Snead, 646 F.2d 149 (4th Cir. 1981), *aff'g on other grounds,* 475 F. Supp. 59 (E.D. Va. 1979); Laufenberg, Inc. v. Goldblatt Bros., 187 F.2d 823 (7th Cir. 1951). *But see* Lovell v. Snow, 637 F.2d 170 (1st Cir. 1981) (eschewing procedural error as ground for denial of fees, particularly in light of fact that plaintiff was incarcerated and proceeding pro se, and relying on merits to deny fees).

124 *White,* 455 U.S. at 447. Although Maher v. Gagne, 448 U.S. 122 (1980), had yet to be decided by the Supreme Court, the First Circuit, backed by very clear legislative history, had previously held that a plaintiff who favorably settled a case through a consent decree was eligible to recover statutory fees as a "prevailing party." Nadeau v. Helgemoe, 581 F.2d 275, 279 (1st Cir. 1978).

125 To the extent that district courts adopt the suggestion of the Eighth Circuit in *Obin II,* 651 F.2d at 583, that they establish local rules limiting the time in which parties may seek statutory attorney's fees and sanctioning noncompliance with forfeiture of any right to obtain fees, even this advantage will disappear. *See White,* 455 U.S. at 454; *see also infra* notes 308-13 and accompanying text.

126 *See, e.g.,* Fox v. Parker, 626 F.2d 351, 353 (4th Cir. 1980); Knighton v. Watkins, 616 F.2d 795, 798 (5th Cir. 1980).

127 *White,* 455 U.S. at 455 (Blackmun, J., concurring).

tion over such defaults.[128]

In addition, the Court left untouched the question of how to treat attorney's fees sought pursuant to other federal fee shifting statutes. Although the Court's citation of several appellate cases involving different fee shifting statutes[129] implicitly suggests that such statutes are to be treated similarly, at least one court of appeals prior to *White* had concluded otherwise, treating attorney's fees sought under the Lanham Act[130] as an element of relief that must be sought by rule 59(e) motion, despite having previously treated fees sought pursuant to the Fees Awards Act as costs.[131]

Even the preservation of attorney's fees from procedural default, a result promoted by the "collateral and independent" theory of statutory fees first announced in *Obin II* and subsequently adopted by the Supreme Court in *White,* has its costs. The reciprocal side of the "collateral and independent" coin is a concomitant loss of the opportunity to obtain appellate review of the merits of the case, as the facts in *Obin II* illustrate. There, Obin, the appellant, lost on the merits, and the district court assessed fees against him. He filed a notice of appeal within thirty days of the fees award but approximately four and one-half months after the judgment entered on the merits.[132] In *Obin I,*[133] the Eighth Circuit denied the appellees' motion to dismiss the appeal of the merits on the ground that the notice of appeal was untimely. The *Obin I* panel held that the unresolved question of attorney's fees prevented the merits decision from being appealable and thus concluded that the notice of appeal was timely as to both the merits and the award of fees.[134] The *Obin II* determination that a decision on fees, and therefore on the merits as well, is independently appealable effectively overruled the prior decision.[135] Because the *Obin II* panel's reasoning meant that the merits

---

128 *Id.*

129 *White,* 455 U.S. at 450 n.9, 452 n.14.

130 Lanham Act § 35, 15 U.S.C. § 1117 (1982).

131 *Compare* Hairline Creations, Inc. v. Kefalas, 664 F.2d 652, 657-58 (7th Cir. 1981) (because legislative history of Lanham Act suggested fees award constituted additional remedy, motion for attorney's fees treated as governed by rule 59(e)) *with* Bond v. Stanton, 630 F.2d 1231, 1234 (7th Cir. 1980) (construing phrase "as part of the costs" in Fees Awards Act to require treatment of fees as costs governed by rule 54(d)). *But see* Black Gold, Ltd. v. Rockwool Indus., 666 F.2d 1308 (10th Cir. 1981) (no distinction between procedural treatment of fees in antitrust cases and civil rights cases).

132 *Obin II,* 651 F.2d at 578 n.4. The district court entered judgment on the merits on December 21, 1979 and decided the outstanding motion for fees on April 9, 1980. The notice of appeal was filed on May 5, 1980. *Id.*

133 623 F.2d 521 (8th Cir. 1980) (per curiam).

134 *Id.* at 522.

135 The court intimated that it was not overruling the prior panel's decision, but merely rejecting dicta in that opinion. *Obin II,* 651 F.2d at 584 n.12. That explanation is belied by the *Obin II* court's summary of its ruling: "[A] judgment on the merits of an action, otherwise final, is final for purposes of appeal notwithstanding that a claim for attorney's fees may remain to be decided." *Id.* at 584. The court also effectively overruled two unpublished

decision was final and appealable when entered, it necessarily follows that the notice of appeal, filed four and one-half months later was untimely. As a result, Obin theoretically lost the opportunity to obtain appellate review of the merits; the court lacked jurisdiction because of the absence of a timely notice of appeal.[136] Despite this lack of jurisdiction,[137] the *Obin II* panel did review the district court's judgment on the merits, summarily affirming.[138]

Thus, although the *White* decision may preserve the opportunity to obtain fees despite delayed application, it has the concomitant effect of enhancing the possibility that a party will lose the right to appellate review of the merits because of procedural error.[139]

Despite this effect, the *White* decision is desirable for the limited certainty it provides.[140] Justice Brandeis's comment in *Burnet v. Coronado Oil & Gas Co.* is apt:

> *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true even where the error is a

---

decisions that held that resolution of the merits was not appealable where there was an unresolved issue of statutory attorney's fees. Fulbright v. Brown Group, Inc., No. 80-1234 (8th Cir. May 20, 1980); Yellow Bird v. Barnes, No. 79-1958 (8th Cir. May 20, 1980).

136 FED. R. APP. P. 3, 4; *see* United States v. Robinson, 361 U.S. 220, 224 (1960).

137 In Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981), the Supreme Court held that the court of appeals could not make a decision that it lacked jurisdiction and apply it prospectively; once the court concluded it lacked appellate jurisdiction, it was barred from addressing the merits.

138 *Obin II,* 651 F.2d at 588. It might reasonably be asserted that the appellant had no interest in appealing the merits until after the district court awarded over $20,000 in fees and costs to the appellees. Thus, the failure to file a timely notice of appeal from the judgment on the merits may have been a conscious choice by appellant, who only later decided to appeal the merits in an attempt to reverse the attorney's fee award. This scenario is even more plausible given that the parties seeking fees in *Obin* were the defendants and therefore demonstrated to the district court that plaintiff's claims were "frivolous, unreasonable or groundless," to justify the district court's award of fees. *See* Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

This exegesis, however, does not diminish the point. Although Mr. Obin's failure to file a timely appeal may have been deliberate, there are a number of reported decisions (and, one would suspect, unreported decisions, *see supra* note 33 and accompanying text) in which a party forfeited appellate review of the merits because of an inadvertent failure to file a timely notice of appeal, as determined by the court of appeals after the fact. Swanson v. American Consumer Indus., 517 F.2d 555, 561 (7th Cir. 1975); *see* Halderman v. Pennhurst State School & Hosp., 673 F.2d 628 (3d Cir. 1982); *cf.* United States v. Taylor, 632 F.2d 530, 531 (5th Cir. 1980) (notice of appeal filed after unappealable order but before final judgment was insufficient to invoke court of appeals's appellate jurisdiction).

139 On the importance of appellate review, see Carrington, *supra* note 40, at 550-51. *But see generally* Wright, *supra* note 50.

140 One respect in which the Court's decision will encourage future litigation is through the amorphous standard it provided for rejecting a fee award on the ground that the request was untimely filed. *See* Baird v. Bellotti, 555 F. Supp. 579, 581-89 (D. Mass. 1982); *supra* text accompanying notes 117-18.

> matter of serious concern, provided correction can be had by legislation.[141]

In the long run, the loss of either fees or appellate review because of procedural errors should be substantially reduced simply by providing counsel with certainty as to how to proceed. For the inevitable percentage of attorneys, however, who, for whatever reason, will not comply with settled procedural requirements, the *White* decision tends to preserve the opportunity to obtain fees at the possible cost of sacrificing appellate review of the merits.

5. *Beyond Certainty: Effectuating Efficiency and Fairness*

a. *Efficiency Considerations.* Accepting the benefits of certainty and clarity in the regulation of judicial jurisdiction, it must be recognized that other policies also bear on such decisions. Unlike the theoretical implications of the Coase theorem[142] for tort law, it is not entirely a matter of indifference how the courts' jurisdiction is finally resolved, as long as it is clearly settled. No less a proponent of simplicity in jurisdictional law than Professor Currie, whose statement that "[j]urisdiction should be as self-regulated as breathing; the principal job of the courts is to decide whether the plaintiff gets his money, and litigation over whether the case is in the right court is essentially a waste of time and resources,"[143] must rank him as one of the leaders, spent one hundred pages critically analyzing the merits of the American Law Institute's proposal for reform of federal jurisdiction.[144]

Thus, the Court's resolution of the appropriate jurisdictional treatment of a case in which a party seeks statutory attorney's fees deserves scrutiny in light of the principles and policies governing the allocation of jurisdiction between the district courts and the courts of appeals. A careful analysis of these policy concerns as applied to statutory fees suggests that the *White* case was wrongly decided.

The procedural context in which *White* arose may provide one possible explanation for the Court's failure to recoguize the remedial nature of attorney's fees and the consequent implications for finality and appealability. The petitioner in *White* sought attorney's fees only after a concededly final judgment, albeit a consent decree, thus obviating con-

---

141 285 U.S. 393, 406 (1932). With respect to the importance of certainty in the particular context of the jurisdiction of appellate courts, see Crick, *supra* note 6, at 557-58. *But see* Redish, *supra* note 39, at 104-05.

142 The Coase theorem posits that in maximizing efficiency it is irrelevant whether the law imposes the costs of an accident on the injurer or the injured. Absent transaction costs, the person on whom the loss is imposed will either take all cost-effective precautions, or, if more cost effective, pay another person to take those precautions. Coase, *The Problem of Social Cost,* 3 J. LAW & ECON. 1 (1960); *see* Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication,* 8 HOFSTRA L. REV. 487, 502-06 (1980).

143 Currie, *supra* note 1, at 1 (footnote omitted).

144 Currie, *supra* note 1.

cerns about piecemeal appeals in that case.[145] Nevertheless, the Court did address this concern. In passing, it offhandedly rejected the notion that attorney's fees are simply another form of relief by noting that unlike other forms of relief, attorney's fees are not awarded to compensate for the injury sued upon, but arise in connection with litigation to recover other relief.[146] Despite that conceptual difference, the Court's decision in *Vaughan v. Atkinson*[147] illustrates the chameleon-like quality of attorney's fees. *Vaughan* involved an admiralty suit for maintenance and cure by a seaman. The Court permitted the plaintiff to recover *as damages* attorney's fees incurred in prosecuting the action because defendant failed to pay maintenance and cure.[148] As in *Vaughan,* a few federal fee shifting statutes explicitly invoke the remedial aspect of attorney's fees by permitting recovery of "damages (including reasonable attorney . . . fees)."[149]

One practical consequence of the difference between attorney's fees and traditional damages is that, unlike other forms of monetary relief, statutory attorney's fees cannot always be finally determined at the time of judgment; in the event of an appeal of the merits, additional fees for the appeal may have to be awarded or a downward adjustment in the

---

145 A party who has agreed to the entry of a consent judgment may not attaek the validity of the judgment on appeal. Swift & Co. v. United States, 276 U.S. 311, 323-24 (1928).

146 *White,* 455 U.S. at 452; *see* Hutto v. Finney, 437 U.S. 678, 695 n.24 (1978). *But see id.* at 707 (Powell, J., concurring in part and dissenting in part).

147 369 U.S. 527 (1962); *see The Effect of Legal Fees on the Adequacy of Representation: Hearings Before the Subcomm. on Rep. of Citizen Interests of the Senate Comm. on the Judiciary,* 93d Cong., 1st Sess. 1263 (1973) (statement of C. Dallas Sands, Professor of Law, University of Alabama).

148 The Court characterized defendant's failure to pay as "willful" and "persistent," *Vaughan,* 369 U.S. at 531. It is difficult, however, to distinguish defendant's refusal to pay from other disputed damages cases. Although defendant's minimal investigation of plaintiff's claim may make defendant's conduet in disputing the elaim more egregious, perhaps even justifying punitive damages, *see id.* at 540 (Stewart, J., dissenting), it is difficult to see why this would justify recovery of attorney's fees as an element of damages.

Both the Court and commentators have, in retrospect, characterized the *Vaughan* decision as involving the "bad faith" exception to the American rule. *See, e.g.,* Summit Valley Indus. v. Local 112, United Bhd. of Carpenters, 456 U.S. 717, 721 (1982); F.D. Rich Co. v. United States *ex rel.* Indus. Lumber Co., 417 U.S. 116, 129 (1974); Note, *Bad Faith Attorneys' Fees in Implied Private Rights of Action Under the Securities Exchange Act of 1934,* 13 LOY. U. CHI. L.J. 347, 353 n.33 (1982). It is difficult to reconcile the purely compensatory focus of the Court's opinion in *Vaughan* with later statements about the vindicatory and deterrent function of bad faith fees. *See* Hutto v. Finney, 437 U.S. 678, 690-92 (1978). Indeed, as late as 1967, the Supreme Court referred to the attorney's fees awarded in *Vaughan* as constituting an item of "compensatory damages." Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967); *see also* Holmes v. J. Ray McDermott & Co., 682 F.2d 1143 (5th Cir. 1982) (characterizing attorney's fees as damages in action for maintenance and cure, thereby rendering order that resolved everything but amount of attorney's fees unappealable), *cert. denied,* 103 S. Ct. 732 (1983).

149 Outer Continental Shelf Lands Act § 208, 43 U.S.C. § 1349(b)(2) (Supp. V 1981); *see also* Surface Mining Control and Reclamation Act of 1977, § 520, 30 U.S.C. § 1270(f) (Supp. V 1981).

fees already awarded may be required.[150] A remand to the district court may be necessary to make the evidentiary findings necessary to determine the appropriate fees in connection with the appeal.[151] Several courts have attempted to justify deferral of fees until after appellate review of the merits by noting that multiple appeals may result if the unsuccessful party seeks review of the supplemental fee award or even subsequent supplemental awards.[152] However, this possibility will exist as long as the district court is assigned initial responsibility for deciding the appropriate amount of fees, regardless of the procedural treatment of attorney's fees.[153] Significantly, the appellate court's discretion to award fees itself serves as a check on this largely theoretical concern.[154]

The proposition that attorney's fees paid by an unsuccessful litigant

---

150 Obviously, if the losing party succeeds on appeal, the reversal will make the award of fees, along with all other relief, moot. The potential for reversal does not prevent determination of other types of relief from being a requisite for a final decision; it should not have a different impact on attorney's fees. *But see* Memphis Sheraton Corp. v. Kirkley, 614 F.2d 131 (6th Cir. 1980); *cf.* Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939) (resolution of merits on appeal will put request for fees in better perspective).

151 Most courts of appeals have allowed the district courts to conduct the proceedings necessary for awarding fees for appellate work, reserving the option to make an award itself under appropriate circumstances. *See, e.g.,* Universal Amusement Co. v. Vance, 587 F.2d 159, 172-73 (5th Cir. 1978); *aff'd,* 445 U.S. 308 (1980) (per curiam). The Supreme Court has remarked that "[t]he amount of the award for [appellate] services should, as a general rule, be fixed in the first instance by the District Court." Perkins v. Standard Oil Co., 399 U.S. 222, 223 (1970) (per curiam).

152 *See* Memphis Sheraton Corp. v. Kirkley, 614 F.2d 131, 133 (6th Cir. 1980); Black Gold, Ltd. v. Rockwool Indus., 529 F. Supp. 272, 273 (D. Colo. 1981); *cf.* Sprague v. Ticonic Nat'l Bank, 110 F.2d 174, 177 (1st Cir. 1940) (reversing district court's denial of plaintiff's supplemental petition for fees incurred in attempting to obtain fees requested in first petition and noting that second supplemental petition for fees incurred in litigating first supplemental petition would be appropriate).

Parenthetically, there is no reason why the original judgment, if affirmed, should not be treated as final, even if a remand to determine additional fees for the appeal is necessary. *See* Parker v. Lewis, 670 F.2d 249 (D.C. Cir. 1982) (per curiam). Unlike a reversal or modification of the merits on appeal, which is likely to affect the amount of fees to be awarded in connection with the merits, subsequent appcals limited to the appropriate amount of supplemental fees will have no impact on the merits or the appropriate amount of fees for the merits.

153 *See* Muscare v. Quinn, 680 F.2d 42, 44 (7th Cir. 1982). A few courts have asserted a different advantage in deferring a decision on fees until after resolution of any appeal of the merits: promoting efficiency in those cases where the decision on the merits is sufficiently impacted on appeal so that attorney's fees would no longer be recoverable. *E.g.,* Memphis Sheraton Corp. v. Kirkley, 614 F.2d 131 (6th Cir. 1980); Cinerama Inc. v. Sweet Music, S.A., 482 F.2d 66, 70 n.2 (2d Cir. 1973); Black Gold, Ltd. v. Rockwool Indus., 529 F. Supp. 272, 273 (D. Colo. 1981). However, the argument for generally deferring consideration of relief until liability has been reviewed on appeal for the sake of efficiency has long been resolved. *See infra* note 175. Congress provided an escape hatch from the final decision requirement for specific cases where an immediate appeal of an interlocutory order would substantially promote efficient resolution of the particular case. 28 U.S.C. § 1292(b) (1976).

154 *See, e.g.,* Morrow v. Finch, 642 F.2d 823 (5th Cir. 1981); Furtado v. Bishop, 635 F.2d 915 (1st Cir. 1980). In reviews of administrative decisions, the courts of appeals regularly decide requests for statutory attorney's fees. *See, e.g.,* Northern Plains Resource Council v. EPA, 670 F.2d 847 (9th Cir. 1982).

to a successful party are a form of relief for purposes of an appeal can be illustrated by considering a hypothetical contract case. Two parties enter into a contract that provides for the recovery of attorney's fees in the event of breach by either party. Plaintiff then sues for breach of contract damages and for attorney's fees incurred in litigating the action. Most courts have recognized[155] that the dollars plaintiff recovers for fees are fungible with the dollars plaintiff recovers for breach and that the complexion of defendant's total liability as fees or damages is likely to be a matter of indifference. Although perhaps not as directly as damages, attorney's fees incurred in recovering damages are a result of defendant's breach.[156] Once the initial question of liability is resolved, both may be recovered, although determining the amounts is likely to require different evidentiary considerations.[157]

One difference between contractually stipulated fees and statutory fees is that the prerequisite for recovery of statutory fees may not precisely coincide with the determination of liability for other relief.[158] Al-

---

155 Union Tank Car Co. v. Isbrandtsen, 416 F.2d 96, 97 (2d Cir. 1969) (per curiam); Aetna Cas. & Sur. Co. v. Giesow, 412 F.2d 468, 470 (2d Cir. 1969); *see* Cinerama, Inc. v. Sweet Music, S.A., 482 F.2d 66, 69-70 (2d Cir. 1973); *cf.* Cady v. Dick Loehr's, Inc., 100 Mich. App. 543, 299 N.W.2d 69 (1980) (attorney's fees may be recovered as element of damages in breach of warranty case). *But see* Memphis Sheraton Corp. v. Kirkley, 614 F.2d 131, 133 (6th Cir. 1980); *cf.* IOWA CODE § 625.22 (1983) (characterizing contractual attorney's fees as "part of the costs").

156 When a successful defendant seeks attorney's fees from the plaintiff, it is more difficult to see how the plaintiff's "wrong" has caused the defendant to incur a loss, unless the plaintiff's institution of an unsuccessful suit is characterized as a wrong. *See* McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages,* 15 MINN. L. REV. 619, 639-43 (1931).

157 Recently, Justice Brennan observed that the fee shifting statutes enacted by Congress create what amounts to remedial relief provisions for civil rights plaintiffs. Hensley v. Eckerhart, 103 S. Ct. 1933, 1951 (1983) (Brennan, J., concurring in part).

158 A related difference that has occasionally been cited as a justification for different treatment is that many federal statutes provide for judicial discretion in whether to award fees. *E.g.,* Obin v. District No. 9 of the Int'l Ass'n of Machinists, 651 F.2d 574, 581 (8th Cir. 1981) ("[A]n award of fees generally represents a discretionary rather than a legal judgment by the court."). Both the Fees Awards Act and title VII provide: "[T]he court, in its discretion, may allow the prevailing party, other than the . . . United States, a reasonable attorney's fee as part of the costs." This discretion has been substantially circumscribed by Supreme Court decisions and by the legislative history of the Fees Awards Act to the effect that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968) (per curiam) (Title II of Civil Rights Act of 1964); *accord* Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975) (title VII); S. REP. NO. 1011, 94th Cong., 2d Sess. 4-5, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5908, 5912 (Fees Awards Act); *see* Note, *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); Comment, *Calculation of a Reasonable Award of Attorney's Fees Under the Attorney's Fees Awards Act of 1976,* 13 J. MAR. L. REV. 331, 336 n.18 (1980) [hereinafter cited as Comment, *Reasonable Awards*]; *see also* Comment, *Attorney's Fees in Damage Actions Under the Civil Rights Attorney's Fees Awards Act of 1976,* 47 U. CHI. L. REV. 332 (1980).

Also, a court must explain its determination that special circumstances exist justifying denial of fees. Sethy v. Alameda County Water Dist., 602 F.2d 894, 897 (9th Cir. 1979), *cert. denied,* 444 U.S. 1046 (1980); Sargeant v. Sharp, 579 F.2d 645, 647 (1st Cir. 1978). The courts

though a contract could provide otherwise, one would expect attorney's fees to be recoverable in connection with any breach—thereby entitling plaintiff to fees once the defendant's liability had been determined, much like other forms of relief. The threshold for recovery of statutory fees, however, may not be precisely congruent with liability; the plaintiff must qualify as a "prevailing party"[159] under the Fees Awards Act before recovering fees. The *White* Court, in justifying its conclusion that the fees issue was collateral and independent, appeared, somewhat obscurely, to make this point by stating that the fees question is "an inquiry that cannot even commence until one party has 'prevailed.' "[160] But it is difficult to understand why the existence of a statutory precondition to recovery of fees—a precondition that in the vast run of Fees Awards Act cases will be virtually coextensive with whether defendant is liable to plaintiff[161]—makes resolution of the fees question a "collateral

---

of appeals have been less than deferential in reviewing those determinations. *See* International Oceanic Enters. v. Menton, 614 F.2d 502 (5th Cir. 1980); Perez v. University of P.R., 600 F.2d 1 (1st Cir. 1979); *cf.* Gurule v. Wilson, 635 F.2d 782, 794 (10th Cir. 1980) (vacating as unreasonably low hourly rates set by district court although within discretion of lower court).

Thus, the "discretion" in awarding fees to a prevailing plaintiff boils down to a very narrow set of circumstances where a plaintiff who is otherwise entitled to relief may not recover fees. *See* Ramos v. Lamm, 539 F. Supp. 730, 734 n.8 (D. Colo. 1982); E. LARSON, FEDERAL COURT AWARDS OF ATTORNEY'S FEES 51 (1981).

To the extent that other federal statutes contain a less objective threshold for recovery of fees, *see supra* text accompanying notes 73-76, the discretion exercised by the district court in awarding attorney's fees vel non will be greater but far from unbridled. *See, e.g.,* Plastic Container Corp. v. Continental Plasties, 607 F.2d 885, 905-06 (10th Cir. 1979) (reversing award of attorney's fees to defendant in patent infringement case requiring "exceptional circumstances"), *cert. denied,* 444 U.S. 1018 (1980). *See generally* Note, *supra* note 83, at 323-35.

159 Although the precise contours of "prevailing party" are not yet established, it is at least clear that a plaintiff who is successful on the merits of some aspects of a claim qualifies. Hensley v. Eckerhart, 103 S. Ct. 1933, 1943 (1983); Hanrahan v. Hampton, 446 U.S. 754, 757-58 (1980). A settlement by which a plaintiff obtains relief for her claim is also sufficient. Maher v. Gagne, 448 U.S. 122, 129 (1980); S. REP. NO. 1011, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5908, 5912. However, it may be necessary to obtain something more than trivial relief. *See* Harrington v. Vandalia-Butler Bd. of Educ., 585 F.2d 192, 197 (6th Cir. 1978) (although plaintiff established defendant's discrimination, plaintiff was not prevailing party because she was not entitled to any relief), *cert. denied,* 441 U.S. 932 (1979); *see also infra* note 173. A substantial volume of scholarly comment has addressed the question in a variety of contexts. Note, *supra* note 83, at 286-301 & n.35 (citing articles).

160 455 U.S. at 451-52.

161 In Hanrahan v. Hampton, 446 U.S. 754 (1980), the Supreme Court held that plaintiffs who obtained a reversal of the trial court's dismissal of their case on appeal were not "prevailing parties" for purposes of obtaining an interim fee award. After reviewing the legislative history of the Fees Awards Act, the Court described the threshold for recovery of fees:

> It seems apparent from these passages 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.

Id. at 757-58 (footnote omitted); *see* Wharton v. Knefel, 562 F.2d 550, 556-58 (8th Cir. 1977)

and independent" matter. The comments of Judge Seymour in reviewing an appeal of the merits and an award of attorney's fees to the plaintiff pursuant to the Fees Awards Act belie any notion of independence between the two matters:

> To determine whether plaintiffs prevailed on the merits, it was necessary for us to review the entire record with the same scrutiny as our review to determine the outcome on the merits. Thus, the propriety of the fee award and the correctness of the decision on the merits are inextricably bound.[162]

This conclusion would follow even for more restrictive fee shifting statutes in which the threshold for recovery of fees is not coextensive with liability.[163]

Another difference between statutory fees and traditional monetary damages is that Congress has given the trial judge fact-finding responsi-

---

(reversing district court's finding for defendant and remanding to determine appropriate monetary and equitable relief along with attorney's fees); James v. Stockham Valves & Fittings Co., 559 F.2d 310, 358-59 (5th Cir. 1977) (directing district court to award attorney's fees to plaintiffs who had established defendant's liability), *cert. denied,* 434 U.S. 1034 (1978); Grubbs v. Butz, 548 F.2d 973, 976-77 (D.C. Cir. 1976) (attorney's fees appropriate once plaintiff has established discrimination in title VII suit); Nicodemus v. Chrysler Corp., 445 F. Supp. 559 (N.D. Ohio 1977) (awarding attorney's fees after finding that defendant discriminated on basis of sex, but before any relief had been awarded); *see also supra* note 158.

162 Gurule v. Wilson, 635 F.2d 782, 788 (10th Cir. 1980).

163 The argument that statutes such as the Lanham Act § 35, 15 U.S.C. § 1117 (1982), which require a more stringent standard as a prerequisite for recovery of attorney's fees, should be treated differently than statutes containing the "prevailing party" standard, would largely be based on the fact that the relationship between the merits and the heightened threshold would be less direct than that which exists when a prevailing plaintiff seeks attorney's fees. The force of such an argument is substantially muted because, although the threshold may be marginally more or less related, once it has been met the standards for awarding fees are the same. Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?,* 126 U. PA. L. REV. 281, 315-26 (1977). Apparently unaware of the latter point, the Seventh Circuit nevertheless got it backwards when it held that fees sought under the Lanham Act were "relief" governed by Federal Rule of Civil Procedure 59(e) and distinguished its earlier decisions that fees sought under the Fees Awards Act are deemed "costs" for purposes of appeal. Hairline Creations, Inc. v. Kefalas, 664 F.2d 652 (7th Cir. 1981). The court's suggestion that the equitable underpinnings of the Fees Awards Act require different treatment, *id.* at 660, fails to recognize that the process of awarding prevailing party fees is more closely connected to the merits. Such reasoning ultimately exalts theoretical conceptualism over functional impact. Interestingly, only two months earlier another panel of the Seventh Circuit had rejected such distinctions: "We see no reason why fees should be characterized as incidental or non-incidental to a judgment on the merits based on the nature of the suit." Crowder v. Telemedia, Inc., 659 F.2d 787, 788 (7th Cir. 1981).

More importantly, the *Hairline* court mistakenly adopted different procedural treatment of attorney's fees based on the specific federal statute involved. Although one could make arguments for different treatment, *see* Black Gold, Ltd. v. Rockwool Indus., 529 F. Supp. 272, 273 (D. Colo. 1981), the need for uniformity and certainty outweighs the shadings of degree, right or wrong, attempted by the *Hairline* court. I do not envy the tasks of attorneys in future Seventh Circuit cases involving other fee shifting statutes, in attempting to preserve their clients' statutory rights to fees and to appellate review of the merits. At the very least, distinctions such as the *Hairline* court made will engender a substantial amount of unnecessary protective lawyering.

bility for determining the appropriate amount of fees.[164] This is, however, of little consequence in evaluating the role attorney's fees play in determining appealability. Whenever a party seeks both legal and equitable relief, the possibility exists for split fact-finding between judge and jury.[165] Courts have never viewed such a division of duties as affecting the requirement that all relief be awarded before an appeal can be pursued.[166]

In addition to the interrelationship of the merits and the threshold for fees, the court's determination of the appropriate amount of attorney's fees is also more closely tied to the merits than the *White* Court recognized. Although the standards for awarding statutory attorney's fees continue to evolve,[167] a number of the factors commonly relied on

---

164 Most federal statutes explicitly state that determination of the fee award is left to the court. *E.g.,* Civil Rights Attorney's Fees Awards Act of 1976, § 2, 42 U.S.C. § 1988 (Supp. V 1981); Civil Rights Act of 1964, § 706, 42 U.S.C. § 2000e-5(B) (1976). Courts have interpreted statutes lacking such explicit statements as delegating the responsibility to the court. *See, e.g.,* Cape Cod Food Prods. v. National Cranberry Ass'n, 119 F. Supp. 900, 911 (D. Mass. 1954) (amount of fees awarded pursuant to Clayton Act is within court's province).

Excluding the jury from the attorney's fee decision is not a universal practice. Texas, for example, leaves to the jury the valuation of an attorney's services in contract cases where a statute permits recovery of attorney's fees. Graves v. Sommerfeld, 618 S.W.2d 952, 954-55 (Tex. Civ. App. 1981); *see also* A.G. Becker-Kipnes & Co. v. Letterman Commodities, Inc., 553 F. Supp. 118, 122-24 (N.D. Ill. 1982) (no seventh amendment right to have jury decide claim for contractual attorney's fees); Maday v. Elview-Stewart Syss. Co., 324 N.W.2d 467 (Iowa 1982).

165 *E.g.,* Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).

166 *See, e.g.,* Harris v. Goldblatt Bros., 659 F.2d 784 (7th Cir. 1981).

167 A considerable body of case law governing the determination of a reasonable attorney's fee has developed. *See, e.g.,* FED. ATTORNEYS FEE AWARDS REP. (Harcourt Brace Jovanich); E. LARSON, *supra* note 158, at 115-240; Berger, *supra* note 163, at 283-94; Comment, *Reasonable Awards, supra* note 158, at 341-76. Although at the margin there is considerable controversy, *compare, e.g.,* Swicker v. William Armstrong & Sons, 484 F. Supp. 762 (E.D. Pa. 1980) (reducing fee award by one-third beeause of small recovery) *with, e.g.,* Furtado v. Bishop, 635 F.2d 915 (1st Cir. 1980) (amount of recovery may not be used as arbitrary mcasure to reduce fee award), the core approaches are somewhat similar and appear to be becoming more homogeneous.

The basic strands derive from two decisions: Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974) and Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973) (*Lindy I*).

In *Johnson,* the Fifth Circuit listed 12 factors, largely drawn from DR 2-106(b) of the Model Code of Professional Responsibility, that were to be considered in setting an appropriate fee in a title VII case. *Johnson,* 488 F.2d at 717-19. These included: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the result obtained; (9) the experience, rcputation and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. In *Lindy I,* a class action antitrust case, the court set out a two-step process for determining an appropriate fee. First, a "lodestar," which consists of the number of compensable hours of work multiplied by an appropriate hourly rate for those hours, must be calculated. Once the lodestar is calculated, the second step permits an adjustment of the lodestar based on the quality of the attorney's work, and a risk factor representing

require scrutiny of the merits. In determining the number of compensable attorney hours, a court must first eliminate any unnecessary or excessive work. This determination requires reference to the issues involved in the merits of the case.[168] Where a plaintiff is not successful on every aspect of the case, the fee determination may also require an analysis of the extent to which the attorney's efforts are attributable to the successful claims and the relation of those claims to the unsuccessful ones.[169] The "novelty and difficulty of the questions" involved[170] calls for a direct examination of the merits of the case. Similarly, assessment of the probability of success,[171] another potential element of the fee shifting

---

the probability that the attorney will lose the case and recover no fees. 487 F.2d at 167-69. Subsequently, in an appeal from the remand in *Lindy I,* Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 117-18 (3d Cir. 1976), the Third Circuit elaborated on the appropriate factors to be considered under the risk rubrie. These included: the legal and factual complexity of the case, the probability of proving defendant's liability, the difficulty of establishing damages, and a number of other factors less related to the merits. *Id.* at 117. The court also admonished that the hourly rates set for calculating the lodestar normally reflect the quality of an attorney's work; only exceptional services would justify an adjustment. The primary factor cited in adjusting the lodestar was the benefit obtained. *Id.* at 117-18. Although the award of fees in *Lindy I* was based on the common fund rationale, courts have applied its two-step process to statutory fee awards with only slight modifications. Hughes v. Repko, 578 F.2d 483 (3d Cir. 1978); Prandini v. National Tea Co., 557 F.2d 1015, 1020 (3d Cir. 1977). Other circuits have largely followed *Lindy I* or *Johnson* or some combination thereof. The trend is toward the analytical formula provided in *Lindy I,* largely because the *Johnson* approach provides no guidance in how to weigh and apply its 12 factors. *See* Copeland v. Marshall, 641 F.2d 880, 890-91 (D.C. Cir. 1980) (en banc); Copper Liquor, Inc. v. Adolph Coors Co., 624 F.2d 575 (5th Cir. 1980). For a detailed description of the standards applied in awarding attorney's fees in each of the circuits, see A. MILLER, ATTORNEY'S FEES IN CLASS ACTIONS 74-184 (1980).

Recently, the Supreme Court touched on the ealculation of a reasonable fee in Hensly v. Eckerhart, 103 S. Ct. 1933 (1983). In *Hensley,* the Court cited *Johnson* approvingly, 103 S. Ct. at 1937-38, but then proceeded to endorse an analytical framework similar to the one in *Lindy I. Id.* at 1939-41. Before *Hensley,* the Court had never squarely addressed the question. *See* Leubsdorf, *The Contingency Factor in Attorney Fee Awards,* 90 YALE L.J. 473, 473 n.2 (1981).

Courts have made some minor adjustments to the appropriate factors depending on the statute that authorizes fees, *e.g., Copeland,* 641 F.2d at 892 n.22 (authorizing recovery of attorney's fees in Fair Housing Act cases only when plaintiff is financially unable to pay them), but for the most part courts apply the same nominal standard in ealculating statutory fees, *see* Henson v. Columbus Bank & Trust, 651 F.2d 320 (5th Cir. 1981). Three statutes contain general guidelines on computing fees, two of which use language similar to the lodestar analysis in *Lindy I.* Consumer Product Safety Commission Improvements Act, Pub. L. No. 94-284, § 10(a), 90 Stat. 503, 506-07 (1976), *repealed by* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1210, 95 Stat. 357, 721 (1981); Natural Gas Pipeline Safety Act § 17, 49 U.S.C. § 1686(e) (1976); *see also* Alaska Native Claims Settlement Act § 20, 43 U.S.C. § 1619(d)(2) (1976).

168 *See* Gagne v. Maher, 594 F.2d 336 (2d Cir. 1979), *aff'd on other grounds,* 448 U.S. 122 (1980); King v. Greenblatt, 560 F.2d 1024, 1027 (1st Cir. 1977), *cert. denied,* 438 U.S. 916 (1978).

169 Hensley v. Eckerhart, 103 S. Ct. 1933 (1983); *see also infra* note 173.

170 Johnson v. Georgia Highway Express, 488 F.2d 714, 718 (5th Cir. 1974); *see also* Lindy Bros. Builders v. Ameriean Radiator & Standard Sanitary Corp., 540 F.2d 102, 117 (3d Cir. 1976) (complexity of case bears on contingency factor).

171 Professor Leubsdorf has recently undertaken a thorough and critical analysis of the

calculus,[172] requires a close evaluation of the merits.[173]

The case for requiring that fees be decided as part of the merits judgment is enhanced by the overlap between the two issues, but is not entirely dependent on it. Damages are recoverable only after a court has determined that the defendant is liable to the plaintiff. In many cases the liability and damages inquiries will be unrelated in the sense that proof of each will require completely different evidence. Separate trials on the two questions are occasionally held,[174] yet no "final decision" and therefore no judgment exists until the court has resolved the issues of liability and damages (or other elements of relief).[175] Even more compelling in this regard is the case in which the plaintiff asserts two completely unrelated claims against the defendant, a practice permitted by the Federal Rules of Civil Procedure.[176] Although each claim is entirely distinct from the other, final resolution of one is not an ap-

---

current doctrine adjusting an award based on the probability of success of the particular case. Leubsdorf, *supra* note 167.

172 The majority and concurring opinions in Hensley v. Eckerhart, 103 S. Ct. 1933 (1983), raise doubts as to the legitimacy of adjusting an award to reflect the probability of success. The majority referred only to the achievement of "exceptional success" as grounds for an "enhanced award." *Id.* at 1940. Justice Brennan wrote separately, apparently unable to attract a majority, to point out the importance of the likelihood of success in determining an appropriate fee award. *Id.* at 1948 (Brennan, J., concurring in part and dissenting in part).

173 Although not detracting from the point, the dichotomy suggested between fees vel non and the amount thereof is not as clear-cut as may appear. When a plaintff is not successful on all asserted claims, or is unsuccessful on various procedural skirmishes, the question of the extent to which the plaintiff is a "prevailing party," or conversely whether the amount of fees awarded should, in some fashion, be adjusted to reflect those aspects of the case is raised.

The Supreme Court addressed this issue in Hensley v. Eckerhart, 103 S. Ct. 1933 (1983). When a plaintiff is unsuccessful on claims unrelated to those on which the plaintiff prevailed, attorney efforts in connection with the unsuccessful claim are not compensable. *Id.* at 1940. When a plaintiff obtains less than all of the relief that was initially sought, the extent of the relief obtained must be factored into the fee determination. *Id.* at 1941.

174 *See* FED. R. CIV. P. 42(b).

175 Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1976); United States v. Dember Constr. Corp., 600 F.2d 11 (4th Cir. 1979).

The proposition that a precondition to a final appealable order is resolution of all claims for monetary relief appears to have been first accepted by the Supreme Court in The Palmyra, 23 U.S. (10 Wheat.) 502 (1825). In that case, the Court dismissed an appeal of a libel action where restitution of the vessel had been ordered but the amount of damages due the claimants remained undetermined. Chief Justice Marshall stated:

> The damages remained undisposed of, and an appeal may still lie upon that part of the decree awarding damages. The whole cause is not, therefore, finally determined in the Circuit Court; and we are of opinion that the cause cannot be divided, so as to bring up successively distinct parts of it.

Id. at 503-04. The Court has unflaggingly adhered to this requirement for a final judgment. *See* Guarantee Co. v. Mechanics' Sav. Bank & Trust Co., 173 U.S. 582 (1899); Dainese v. Kendall, 119 U.S. 53 (1886); Railroad Co. v. Swasey, 90 U.S. (23 Wall.) 405 (1874); Brown v. Swann, 34 U.S. (9 Pet.) 1 (1835); Canter v. American Ins. Co., 28 U.S. (3 Pet.) 307 (1830); Chace v. Vasquez, 24 U.S. (11 Whcat.) 429 (1826).

176 FED. R. CIV. P. 18(a).

pealable final decision, absent a certification pursuant to rule 54(b).[177] Unless there are specific reasons justifying severance of the claims—rule 54(b) requires the district court to find that "there is no just reason for delay"[178]—procedural efficiency is enhanced by delaying the appellate process until the entire case is concluded,[179] ensuring that only one appellate proceeding is necessary.[180]

The *White* Court concluded its three paragraph explanation of why statutory attorney's fees are not an element of relief by quoting the Fifth

---

177 Federal Rule of Civil Procedure 54(b) provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Despite the *White* Court's intimation to the contrary, 455 U.S. at 451-52 n.13, a request for statutory attorney's fees is not a separate "claim for relief" that can be severed from the merits by a rule 54(b) certification. *See* Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1976); *infra* note 262. *But see* David v. Travisono, 621 F.2d 464, 467 n.2 (1st Cir. 1980).

178 A court exercising its discretion under rule 54(b) may consider factors unrelated to appellate efficiency, including the time value of money. *See* Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1 (1980); *infra* note 259.

179 *See* Campbell v. Westmoreland Farm, Inc., 403 F.2d 939, 942 (2d Cir. 1968) (preference against rule 54(b) certification unless there is danger of hardship or injustice through delay). *But see* Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 8-9 (1980) (suggesting appellate efficiency concerns may be satisfied when two claims are distinct, and appellate court would not be required to decide same issue in both appeals).

180 Responding to these efficiency concerns, the Court in *White* suggested that prompt submission and resolution of attorney's fee requests would ordinarily permit any appeals of the fee award to be consolidated with a preexisting appeal of the merits. 455 U.S. at 454. History will ultimately determine whether the Court's assessment is realistic, but the matter is far more problematical than the Court's optimistic prediction suggests. *See, e.g.,* Nottleson v. Smith Steel Workers D.A.L.U. 19806, 643 F.2d 445, 455 n.14 (7th Cir. 1981) (trial court's award of attorney's fees five months after final judgment unavailable at time of appellate briefing). At least one circuit, the third, has no internal procedure for sua sponte consolidation. Telephone conversation with Betty Fergnson, Chief Deputy Clerk for the United States Court of Appeals for the Third Circuit (July 16, 1982). At some point in the appellate process, around the time briefs are filed or the case is submitted to the court, consolidation becomes infeasible. *Id.;* Telephone conversation with Robert St. Vran, Clerk of the United States Court of Appeals for the Eighth Circuit (July 15, 1982). For the year ending June 30, 1981, the median time from filing of the notice of appeal to filing of the last brief was 4.4 months, with a range of 2.9 months in the Eighth Circuit to 6.1 months in the District of Columbia Circuit. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1981 ANNUAL REPORT OF THE DIRECTOR, table B4. Even if local rules limiting the time in which to submit an application for fees are adopted, whether district court judges will be willing or able to resolve those motions within the time remaining to permit consolidation is uncertain. This will be particularly true in fee proceedings where a factual dispute requires a hearing, discovery, or both.

Circuit's opinion in *Knighton v. Watkins:*[181] "[A] motion for attorney's fees is unlike a motion to alter or amend a judgment. It does not imply a change in the judgment, but merely seeks what is due because of the judgment."[182] The court of appeals in *White* was surely correct when it observed that this statement merely begs the question.[183] Because a judgment is not a prerequisite for statutory fees,[184] whether fees must be determined as part of the final decision required for a judgment, or instead are an independent matter, is, unquestionably, the issue at hand.

The Court neglected to mention two prior cases that suggested that statutory fees were relief for purposes of determining whether a final decision had been reached. In *Liberty Mutual Insurance Co. v. Wetzel,*[185] plaintiffs obtained partial summary judgment establishing defendant's liability for violations of title VII. The district court made the rule 54(b) determination required for entry of judgment, and the court of appeals affirmed. The Supreme Court concluded that the court of appeals lacked jurisdiction and vacated its judgment, stating:

> [R]espondents, although having received a favorable ruling on the issue of petitoner's liability to them, received none of the relief which they expressly prayed for in the portion of their complaint set forth above. They requested an injunction, but did not get one; they requested damages, but were not awarded any; *they requested attorneys' fees, but received none.*
>
> . . . [T]he District Court's order . . . finally disposed of none of respondents' prayers for relief.[186]

The Court's opinion in *Boeing Co. v. Van Gemert*[187] suggests that the reference in *Wetzel* to undecided attorney's fees was not purely gratuitous. *Van Gemert* presented a troublesome procedural hybrid of the common fund and statutory fee situations. There, the plaintiff class had obtained a judgment for a sum certain on behalf of the class. The judgment also provided that attorney's fees, in an amount not yet determined, were to be awarded from the entire fund established by the judgment. Although the class attorneys sought fees on the authority of the common fund exception, the defendant, unlike the typical common fund defendant, claimed an interest in the allocation of those fees because it asserted a claim to any residual portion of the fund that went unclaimed by class members. It appeared that as much as fifty percent

---

181 616 F.2d 795 (5th Cir. 1980).

182 455 U.S. at 452 (quoting Knighton v. Watkins, 616 F.2d 795, 797 (5th Cir. 1980)).

183 White v. New Hampshire Dep't of Employment Sec., 629 F.2d 697, 702 n.8 (1st Cir. 1980), *rev'd,* 455 U.S. 445 (1982).

184 *See* Deerfield Medical Center v. City of Deerfield Beach, 661 F.2d 328 (5th Cir. 1981); Ruiz v. Estelle, 609 F.2d 118 (5th Cir. 1980).

185 424 U.S. 737 (1976).

186 *Id.* at 742 (emphasis added).

187 444 U.S. 472 (1980).

of the fund might remain unclaimed.[188] Because the district court had not yet determined the amount of fees, the defendant appealed only that portion of the district court's judgment that provided that fees would be paid from the entire fund, which would have had the effect of reducing any unclaimed portion by its proportionate share of attorney's fees.

The Supreme Court held that the judgment was a final decision and was properly appealed. The Court emphasized that the "judgment terminated the litigation between Boeing and the class concerning the extent of Boeing's liability,"[189] and distinguished *Wetzel* as a case "where a prayer for attorney's fees against an opposing party remains unanswered."[190] The Court concluded that final resolution of the defendant's liability to the class constituted a judgment sufficient for appellate jurisdiction, yet recognized the defendant's inchoate claim to any unclaimed portion of the judgment, thus permitting the defendant to challenge the allocation of attorney's fees across the fund.[191] Regardless of whether the Court was correct in sanctioning an appeal of the allocation of fees before those fees were awarded,[192] it is difficult to understand how the *White* Court could ignore in its discussion of the relationship between statutory fees and a final decision both *Wetzel,* which stated that an award of statutory fees was an element of relief required for a final judgment, and *Van Gemert,* which suggested the Court meant what it said in *Wetzel.*[193]

b. *Fairness Considerations.* Although *Wetzel* and *Van Gemert* deserved attention by the *White* Court, those cases do not establish that tying statutory fees to the merits as a prerequisite for a final decision is wise policy. In addition to the efficiency concerns already addressed, the Court in *White* also overlooked the uncertainty and consequent unfairness a losing party faces when she must decide whether to appeal without complete knowledge of the scope of liability.[194] As the *White* Court

---

188 *Id.* at 477 n.4.

189 *Id.* at 480 n.5.

190 *Id.*

191 Recognition of these conflicting notions was crucial to the propriety of the appeal. Otherwise, either the district court's purported judgment was not appealable, *id.* at 479-80 n.5, or the defendant lacked standing to appeal, *id.* at 488 n.4 (Rehnquist, J., dissenting).

192 *See infra* text accompanying notes 493-94.

193 Justice Rehnquist, who authored the *Wetzel* opinion and wrote a dissent in *Van Gemert* that carefully explicated the confusion surrounding the relationship between attorney's fees (both common fund and statutory) and appealable orders, was curiously silent in *White.* His advocacy for a coupling of the merits and fees in the common fund context for appeal purposes, *Van Gemert,* 444 U.S. at 483-84, would a fortiori suggest coupling when the fees involved are statutory, *see infra* text accompanying notes 436-94.

194 In response to the court of appeals's concern about unfair postjudgment surprise, *White,* 629 F.2d at 704, *rev'd,* 455 U.S. 445 (1981), the Supreme Court noted that the "discretion" afforded the district court in awarding attorney's fees pursuant to the Fees Awards Act would justify denial of fees where the motion "unfairly surprises or prejudices" the opposing party. *White,* 455 U.S. at 454. However, given the prominence and notoriety of the major federal fee shifting statutes, it is often the *size* of the award—a sum that may have no connec-

recognized, "a fee award could affect substantially the total liability of the parties."[195] The decision to appeal will, obviously, include a panoply of factors, including the likelihood of success, the costs involved, the benefits of further delay, and the extent of liability (or the onerousness of an equitable decree). The amount of attorney's fees the unsuccessful party would otherwise be required to pay would also inform such a decision. In evaluating the benefits of a reversal,[196] the unsuccessful party is likely to be indifferent as to whether she is required to pay X dollars as money damages or as attorney's fees.[197] As a matter of fairness, a litigant should know the full extent of the adverse consequences before a decision whether to appeal is required.[198] Yet, if attorney's fees are severed from the merits, it is unlikely that the trial judge will have fixed the liability for fees before the expiration of the thirty-day period[199] in which to appeal the judgment.[200] Although a losing party will appeal

---

tion with the relief already granted—that causes surprise or prejudice, rather than the request for fees itself. *See, e.g.,* Skoda v. Fontani, 646 F.2d 1193 (7th Cir. 1981) (per curiam) (plaintiff who won jury verdict of one dollar in civil rights action entitled to attorney's fees, absent finding of special circumstances making award unjust); Lamphere v. Brown Univ., 610 F.2d 46 (1st Cir. 1979) (award well in excess of $250,000). The "discretion" to deny an untimely fee request has no utility in avoiding this problem.

Moreover, the losing party's ability to estimate the ultimate fee award is complicated by a number of factors. Normally the losing party will not know the amount of the opposing attorney's time with any precision. The vagaries in applying the standards for awarding fees substantially aggravate uncertainty about the size of the ultimate award. *See supra* notes 167, 172-73. This is particularly so because of the use of the multiplier in stage two of the *Lindy* analysis; an award may be increased by as much as 400% of the lodestar under this rubric. *See* Leubsdorf, *supra* note 167.

195 455 U.S. at 449.

196 Because, at a minimum, attorney's fees pursuant to the Fees Awards Act and title VII are only awarded to a prevailing party, reversal of the judgment on appeal would normally have the same effect on the award of attorney's fees as it would have on other relief awarded.

197 Some governmental entities may find it more politically palatable to pay attorney's fees rather than money damages, particularly in a civil rights case involving an unsympathetic plaintiff.

198 Gary v. Spires, 634 F.2d 772, 773 (4th Cir. 1980); *see* Glass v. Pfeffer, 657 F.2d 252, 254 (10th Cir. 1981); Gurule v. Wilson, 635 F.2d 782 (10th Cir. 1980); *cf.* Comment, *Taxation of Costs In Federal Courts—A Proposal,* 25 AM. U.L. REV. 877, 879 (1976) (advocating pretrial determination of which costs may be taxed where party anticipates incurring taxable costs in excess of $500).

199 FED. R. APP. P. 4(a)(1). The time for appeal is measured from the date of entry of judgment. *Id.* When the United States or any officer or agent of the United States is a party, the time for appeal is extended to 60 days. *Id.*

200 *E.g.,* Croker v. Boeing Co., 662 F.2d 975, 981 (3d Cir. 1981); Crowder v. Telemedia, Inc., 659 F.2d 787, 788 (7th Cir. 1981); Knighton v. Watkins, 616 F.2d 795, 797 (5th Cir. 1980). Although a number of federal district courts have adopted local rules imposing a time limit on submission of bills for costs, *see infra* note 309, and a number of others may follow the suggestion of the *White* and *Obin II* courts regarding the promulgation of local rules setting time limits for submission of statutory fee applications, *White,* 455 U.S. at 454 & n.16; *Obin II,* 651 F.2d at 583, these time limits on applying for attorney's fees would not ensure that the amount of fees would be determined by the trial court before the period in which to perfect an appeal had expired.

The *Obin II* court suggested a 21-day period for submission of fee applications, leaving

some cases regardless of liability for, or the extent of, fees,[201] in other cases an informed decision will require full information about fees[202]—information that may be unavailable if attorney's fees are uncoupled from the merits.

A particularly egregious example of this unfairness occurred in *Johnson v. Snyder,*[203] in which judgment on a claim under the federal Fair Housing Act[204] was entered on a jury verdict in the amount of one dollar. Neither party appealed in the thirty days subsequent to entry of judgment. The trial court then entertained a motion for attorney's fees pursuant to the Fees Awards Act and awarded plaintiff $8,600 in fees. Because the court of appeals adopted a view that uncoupled the merits from fees,[205] defendant's opportunity to challenge the merits on appeal was lost. Although there are procedures that a clever attorney might invoke to ameliorate this unfairness, all are cumbersome to some extent and none is entirely satisfactory.[206]

6. *The Consequences of Recoupling Fees to the Merits*

If the foregoing discussion is correct in suggesting that statutory attorney's fees should be treated as simply another form of relief, then it follows that fees should be requested in the plaintiff's complaint.[207] It

---

the district court with nine days to decide the request before the time for appeal would expire. The court may actually have less than nine days if the party from whom fees are sought is given additional time to respond to the fee application. A number of factors suggest that a district court would be unable to render a decision within this brief period. The process of determining fees may require an evidentiary hearing, or at least consideration of substantial factual information about hours, services, and the like contained in affidavits, *supra* note 122. The courts of appeals have also imposed significant obligations on the district courts to explain and justify the basis for a fee award. *See* O'Neil v. City of Lake Oswego, 642 F.2d 367 (9th Cir. 1981); Northcross v. School Bd., 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); *In re* First Colonial Corp. of Am., 544 F.2d 1291 (5th Cir.), *cert. denied,* 431 U.S. 904 (1977).

201 *E.g.,* Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1976).

202 *See, e.g., supra* note 138. Similarly, in *White,* the defendant moved to vacate the consent decree only *after* the district court awarded plaintiff over $16,000 in attorney's fees, because of the impact of those fees on its total liability. 455 U.S. at 448.

203 639 F.2d 316 (6th Cir. 1981).

204 Pub. L. No. 90-284, § 801, 82 Stat. 81 (1968) (codified as amended in scattered sections of 42 U.S.C.).

205 The court adopted the fees as costs approach of Knighton v. Watkins, 616 F.2d 795 (5th Cir. 1980).

206 One method would be to take a protective appeal of the merits judgment and then move for dismissal of the appeal pursuant to Federal Rule of Appellate Procedure 27 if, after the amount of fees is set, prosecuting an appeal of the merits is no longer desired. Another possibility might be to request a 30-day extension of time in which to file a notice of appeal from the district court. FED. R. APP. P. 4(a)(5). This option would only be useful where there was some assurance that the district court would make a decision on the fee request before the extended period for appeal expired. Finally, the district court might be persuaded to withhold rendering judgment on the merits until the issue of fees is resolved, thereby effectively recoupling the fees to the merits.

207 Federal Rule of Civil Procedure 8(a) provides: "A pleading which sets forth a claim

appears that, before the *White* decision, most plaintiffs seeking statutory attorney's fees were proceeding in this fashion.[208] The plaintiff in *White* did not request attorney's fees in his complaint, as the Supreme Court explicitly noted,[209] probably because the complaint was filed before the Fees Awards Act was enacted.[210] Thus, even if fees were deemed relief, entry of the consent decree in *White,* which on its face resolved all the outstanding issues between the parties, was a final, appealable decision, and the plaintiff's only avenue for obtaining fees after judgment would be by way of a rule 59(e) motion. That would not, of course, be the case where the plaintiff made a proper request for attorney's fees before judgment.[211] Even if the trial court had resolved all other issues in connection with the merits, a final judgment would not be proper until the court had also decided the issue of fees. Although entry of a judgment[212] that did not resolve an outstanding plea for fees would satisfy one of the requisites for a final judgment—the apparent intention of the judge that the decision be final—there nevertheless would be lacking another necessary condition for a final judgment—resolution of all matters of relief.[213] Thus, the judgment would be invalid, and an appeal ineffective,

---

for relief . . . shall contain . . . (3) a demand for judgment for the relief to which [the claimant] deems himself entitled. Relief in the alternative or of several different types may be demanded."

208 *E.g.,* Anderson v. Morris, 658 F.2d 246, 248 (4th Cir. 1981); Gurule v. Wilson, 635 F.2d 782, 786 (10th Cir. 1980); Johnson v. University of Bridgeport, 629 F.2d 828 (2d Cir. 1980).

209 White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445, 448 (1982). It is somewhat curious that the Court made it a point to mention this fact. Given the Court's rejection of attorney's fees as a form of relief, it would be irrelevant that the plaintiff sought them in the complaint or in some other fashion before judgment.

210 *White* was filed in the district court in March 1976. The Fees Awards Act was enacted and became effective on October 19, 1976. Pub. L. No. 94-559, § 2, 90 Stat. 2641, 2641 (1976) (codified as amended at 42 U.S.C. § 1988 (Supp. V 1981)). Its provisions have been applied to all cases pending on the date of enactment. Hutto v. Finney, 437 U.S. 694 n.23 (1978).

211 Federal Rule of Civil Procedure 8(a)(3) requires the plaintiff to state the relief to which he deems himself entitled. Although some plaintiffs have made their initial prejudgment request for fees by motion, rather than in their complaint, the correct procedure would probably require a motion to amend the complaint adding recovery of attorney's fees to the relief requested. *See* FED. R. CIV. P. 15(a).

Although making a request for a specific form of relief is not required for recovery, and rule 54(c) states that a party shall receive all the relief to which that party is entitled, the pleadings do define the scope of the case, and an unresolved request for relief would impact on the existence of a final decision. *See* Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1976).

212 Federal Rule of Civil Procedure 58, governing the form of judgment, was amended in 1963 to require that judgments be set forth in separate documents. The purpose was to provide a clear benchmark to the parties signifying when entry of judgment had occurred, thereby preventing procedural defaults in making post-trial motions or filing notices of appeal because of uncertainty as to the date of entry of judgment. *Proposed Amendments to Rules of Civil Procedure for the United States District Courts,* 31 F.R.D. 625, 649 (1962) (advisory committee note to rule 58).

213 The necessary elements for a final judgment are (1) resolution of all issues in the case, Catlin v. United States, 324 U.S. 229, 233 (1945); (2) the intention of the trial judge that the

because the court of appeals would lack jurisdiction. Significantly, the district court would retain jurisdiction over the entire case to resolve the outstanding issue of fees[214] after one of the parties (or the court of appeals)[215] raised the invalidity of the judgment.

In determining whether all issues have been resolved by the judgment, a knotty question of interpretation may arise where the judgment awards or denies relief generally but does not specifically address an issue such as attorney's fees. A general award of monetary relief could mean that the judge intended to deny recovery of attorney's fees, or simply that the judge failed to decide the question. Another possiblility, although less likely, is that the judge intended the general award to include an amount for attorney's fees.[216] Depending on the extent of dis-

---

resolution be final and not subject to later amendment or modification in the trial court, United States v. F & M Schaefer Brewing Co., 356 U.S. 227, 232 (1958); and (3) entry of judgment in accord with the formalities of Federal Rules of Civil Procedure 58 and 79(a).

Unless all three of these elements are present, the judgment is insufficient to support appellate jurisdiction, and the district court would retain jurisdiction over the entire case. *See* Lee v. Washington County Bd. of Educ., 682 F.2d 894 (11th Cir. 1982); Harris v. Goldblatt Bros., 659 F.2d 784 (7th Cir. 1981). A number of courts have failed to recognize this. In Hairline Creations v. Kefalas, 664 F.2d 652 (7th Cir. 1981), the court held that attorney's fees sought pursuant to the Lanham Act were relief and therefore a motion for attorney's fees 28 days after entry of "judgment" was untimely. However, both the plaintiff and defendant (who asserted counterclaims) sought attorney's fees as part of the relief in each of their pleadings. *Id.* at 654. Thus, the "judgment" entered by the district court did not resolve all requests for relief in the case and should not have been given effect by the court of appeals. *See also* Davis Harvester Co. v. Long Mfg. Co., 283 F. Supp. 536 (E.D.N.C. 1967) (district court failed to decide defendant's prejudgment request for attorney's fees, nevertheless court of appeals affirmed decision on merits without recognizing absence of appellate jurisdiction); *cf.* White v. New Hampshire Dep't of Employment Sec., 629 F.2d 697, 704-05 (1st Cir. 1980) (dicta stating that judgment that did not resolve attorney's fees would, even if nonappealable, "otherwise be effective"), *rev'd,* 455 U.S. 445 (1982); Dubuit v. Harwell Enters., 540 F.2d 690, 693 (4th Cir. 1976) (district court had no jurisdiction to consider postjudgment request for fees once notice of appeal was filed where district court failed to either mention request in its order or reserve jurisdiction).

214 Croker v. Boeing Co., 662 F.2d 975, 983-84 (3d Cir. 1981); Anderson v. Morris, 658 F.2d 246, 248 (4th Cir. 1981); Gurule v. Wilson, 635 F.2d 782, 787-88 (10th Cir. 1980).

215 Federal Rule of Civil Procedure 60(a) permits correction of "errors [in judgments] arising from oversight or omission" at any time either on motion or by the court, sua sponte. Presumably this would include the power to withdraw a judgment that is invalid. *Cf.* Cinerama, Inc. v. Sweet Music, S.A., 482 F.2d 66, 68 (2d Cir. 1973) (rule 60(b) motion used to vaeate improper judgment). Alternatively, upon recognizing the absence of a final decision, the court of appeals could dismiss the appeal and remand to the district court to resolve the remaining issues. *E.g.,* Lee v. Washington County Bd. of Educ., 682 F.2d 894 (11th Cir. 1982); Black Gold, Ltd. v. Rockwool Indus., 666 F.2d 1308 (10th Cir. 1981); *see* Cassidy v. Virginia Carolina Veneer Corp., 652 F.2d 380 (4th Cir. 1981).

216 In this regard, Federal Rule of Civil Procedure 58 is inadequate when statutory attorney's fees are sought in addition to monetary damages. Unlike damages, which are typically decided by a jury, statutory attorney's fees are decided by the court. *See supra* note 164 and accompanying text. If a jury renders a general verdict, rule 58 authorizes the clerk, in the absence of contrary direction by the court, to enter judgment. If attorney's fees remain to be awarded, the onus is on the court to order the judgment delayed, and if it neglects to do so, judgment may be entered erroneously. *See* Harris v. Goldblatt Bros., 659 F.2d 784 (7th Cir. 1981). Indeed, this problem can arise any time there are issues that will not be resolved by a

cretion in the trial court to deny fees,[217] interpretation of the judgment may be more or less difficult.[218] The solution to this interpretation concern is tractable: in any case in which the successful party has made a prejudgment request for recovery of attorney's fees, the judgment should specifically address that claim.[219] This practice should not impose any significant additional burden, given the existing requirements for explication by the trial judge of rulings on requests for statutory attorney's fees.[220]

One reason asserted by the *Obin II* court,[221] and echoed by the

---

jury's general verdict. *See* Hooks v. Washington Sheraton Corp., 642 F.2d 614 (D.C. Cir. 1980). If attorney's fees were relief, it would be preferable to amend rule 58 so that when attorney's fees have been requested (or more generally, whenever additional matters exist in a case that a jury verdict will not resolve), the authority to enter judgment on a general jury verdict would not be vested in the court clerk as a ministerial act.

217 *See supra* notes 77-78 and accompanying text.

218 However, even where the district court has discretion to deny attorney's fees to a successful plaintiff, that discretion is considerably circumscribed, and when exercised the court must articulate the reason fees were denied. *See supra* note 158.

219 *See* North East Indep. School Dist. v. Aldridge, 400 S.W.2d 893, 898 (Tex. 1966); *cf.* United States v. F & M Schaefer Brewing Co., 356 U.S. 227, 251 (1958) (Harlan, J., dissenting) (noting that district court judges should indicate intention regarding finality of decision).

Judge Warriner, who first held that a postjudgment request for attorney's fees under the Fees Awards Act was subject to rule 59(e) in Hirschkop v. Snead, 475 F. Supp. 59 (E.D. Va. 1979), *aff'd on other grounds,* 646 F.2d 149 (4th Cir. 1981), recently observed that "[i]n virtually every case, in both Complaint and Answer . . . counsel fees and other forms of relief are requested; the requests are then disregarded by everyone unless appropriately pressed during the litigation." El-Amin v. Williams, 92 F.R.D. 454, 455 (E.D. Va. 1981).

The first point is probably correct, as well as troublesome, if fees are treated as relief. Boilerplate requests for fees are commonly added to the concluding paragraph of both complaint and answer, regardless of whether there is any basis for such recovery. Thus, before a judge could confidently direct entry of judgment in almost any case, a review of the complaint, and perhaps, the answer, *see infra* note 386, would be required.

Thus, although Judge Warriner's second point may also be accurate historical description, some adaptation by district court judges would probably be necessary. The certification procedure contained in Federal Rule of Civil Procedure 54(b) certainly required similar adjustments, as did the amendments in 1963 to rule 58, which required a judgment to be set forth in a separate document. *See supra* note 212.

Moreover, numerous methods exist for eliminating an unwarranted request for attorney's fees before judgment. A motion under Federal Rule of Civil Proccdure 12(b) or (f) to dismiss or strike the request for fees could be made by the opposing party. The pretrial conference and order may also be appropriate vehicles for summary disposition of an attorney's fee request. Judge Warriner's concern that if fees are treated as an element of relief, "[b]efore making a dispositive decision, the Court would need to conduct a scavenger hunt through all of the pleadings, searching for any requests for relief mentioned, however briefly or cursorily," *El-Amin,* 92 F.R.D. at 455, appears substantially exaggerated. Furthermore, even if the district courts do not conduct a review of the record before directing entry of judgment, the courts of appeals frequently do, with the result that an unnecessary and improper appeal is dismissed. *See, e.g.,* Chacon v. Babcock, 640 F.2d 221 (9th Cir. 1981).

220 *See* Davis v. City of Abbeville, 633 F.2d 1161, 1163 (5th Cir. 1981) (citing cases in which Fifth Circuit has vacated fee awards and remanded to district court to articulate how it applied applicable standards for awarding fees to particular case); *supra* note 158.

221 651 F.2d at 582.

Supreme Court in *White,*[222] for severing the merits decision from consideration of an award of attorney's fees is the need for adequate time after resolution of the merits for the parties to discuss and possibly settle the question of attorney's fees. Both courts expressed their concern that the ten-day limitation of rule 59(e) would prevent out-of-court settlement of fees in a number of cases.[223] In addition to the very plausible response that the parties are free to settle the matter even after the motion is made,[224] adoption of local rules governing the time in which to move for fees, as suggested by both courts,[225] would similarly constrain the settlement process.[226] On the other hand, this problem is solved if an unresolved request for fees deprives a merits decision of finality.

Treating statutory fees as integral to a final judgment would not exacerbate the ethical dilemma faced by counsel in negotiating settlement of a case involving statutory fees. The problem arises because a defendant will generally prefer to settle both the merits and attorney's fees simultaneously so that its total liability is determined. The defendant may thus make an offer of settlement contingent upon a waiver of attorney's fees, offer a lump sum settlement to encompass both merits relief and attorney's fees, or offer a substantial sum as attorney's fees to induce a cheap settlement of the merits.[227] To some degree, all of these alternatives put the plaintiff's counsel in conflict with her client.

To avoid this ethical quandary, the petitioner in *White* sought a prophylactic rule barring (or strongly discouraging) simultaneous negotiation of the merits and attorney's fees; a judgment on the merits would be required before attorney's fees could be discussed.[228] This solution

---

222 455 U.S. at 453.

223 *Id.; Obin II,* 651 F.2d at 583.

224 Most judges would be more than willing to defer consideration of a motion for fees if the parties state that they are engaged in settlement negotiations. *Cf.* Bacon v. Toia, 648 F.2d 801, 810 (2d Cir. 1981) (permitting prevailing party three months in which to submit request for attorney's fees), *aff'd on other grounds sub nom.* Blum v. Bacon, 457 U.S. 132 (1982); O'Connor v. Keller, 90 F.R.D. 599 (D. Md. 1981) (after plaintiff served motion for fees within time limits set by Federal Rule of Civil Procedure 59(e), defendant's request for extension of time in which to respond was granted).

225 *White,* 455 U.S. at 454; *Obin II,* 651 F.2d at 583.

226 To the extent the local rules provide a longer time in which to seek fees than the 10 days provided for in rule 59(e), there may be some improvement in facilitating settlements. The *Obin II* court suggested a 21-day time limit. 651 F.2d at 583. However, attorneys are notorious for not seriously addressing settlement until required by a deadline, such as the impending call of a case for trial.

227 *See* Mendoza v. United States, 623 F.2d 1338, 1352-53 (9th Cir. 1980), *cert. denied,* 450 U.S. 912 (1981); Prandini v. National Tea Co., 557 F.2d 1015, 1020-21 (3d Cir. 1977); Note, *Attorneys' Fees—Conflicts Created by the Simultaneous Negotiation and Settlement of Damages and Statutorily Authorized Attorneys' Fees in a Title VII Class Action,* 51 TEMP. L.Q. 799 (1978); *cf.* Delta Airlines v. August, 450 U.S. 346, 364 (1981) (Powell, J., concurring) (recognizing potential conflict of interest when defendant makes Federal Rule of Civil Procedure 68 offer of judgment that does not provide for attorney's fees).

228 *White,* 455 U.S. at 454 n.15.

would deprive the defendant of any assurance of the extent of its liability if it settled the merits, which explains why the Supreme Court refused to adopt petitioner's suggestion.[229] Even if such a rule were deemed desirable and implemented,[230] however, a trial court has ample flexibility to give formal credence to a settlement of the merits, short of entry of judgment.[231]

Aside from devices to separate negotiations on fees and the merits, a major premise of petitioner's argument is highly questionable. Although there is scattered authority to the contrary,[232] it is reasonably well-settled that the party, and not counsel, is entitled to an award of statutory attorney's fees.[233] Thus, the attorney's interest in the allocation of any recovery between damages and attorney's fees is presumably because the attorney-client contract makes the attorney's remuneration a function of the amount recovered as statutory attorney's fees.[234] Modifying this arrangement[235] so that the contractually specified fee is in-

---

229 The conflicting interests are often exacerbated in the class action context. *See* Note, *Timeliness of Post-Judgment Motions for Attorney's Fees Under the Civil Rights Attorney's Fees Awards Act,* 16 VAL. U.L. REV. 355, 394 (1982).

230 *But see* Note, *supra* note 227, at 812-13 (concluding that mandatory rule barring simultaneous negotiation of merits and fees is unworkable and undesirable).

231 *See, e.g.,* Lisa F. v. Snider, 561 F. Supp. 724 (N.D. Ind. 1983).

232 *See, e.g.,* Regalado v. Johnson, 79 F.R.D. 447, 451 (E.D. Ill. 1978); *cf.* Greenspan v. Automobile Club, 536 F. Supp. 411 (E.D. Mich. 1982) (civil rights organization that advanced costs of suit to plaintiff may recover them from defendant pursuant to title VII). Where the client does not have an obligation to pay attorney's fees, a number of courts have made awards directly to counsel; typically this occurs when a legal services organization represents a prevailing party. *E.g.,* Miller v. Apartments & Homes, Inc., 646 F.2d 101 (3d Cir. 1981); Harris v. Tower Loan, Inc., 609 F.2d 120, 124 (5th Cir.), *cert. denied,* 449 U.S. 826 (1980); Rodriguez v. Taylor, 569 F.2d 1231, 1244-46 (3d Cir. 1977), *cert. denied,* 436 U.S. 913 (1978); Miller v. Amusement Enters., 426 F.2d 534, 539 (5th Cir. 1970); *see* Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts,* 122 U. PA. L. REV. 636, 685-89 (1974).

233 Fee shifting statutes almost universally provide for an award of attorney's fees to the party rather than to the attorney. Berger, *supra* note 163, at 303-04; Dawson, *supra* note 18, at 1600; *see, e.g.,* Nottelson v. Smith Steel Workers D.A.L.U. 19806, 643 F.2d 445, 455 (7th Cir.), *cert. denied,* 454 U.S. 1046 (1981); Richards v. Reed, 611 F.2d 545, 546 n.2 (5th Cir. 1980); Hirschkop v. Snead, 475 F. Supp. 59, 64 (E.D. Va. 1979), *aff'd,* 646 F.2d 149 (4th Cir. 1981); Civil Rights Attorney's Fees Awards Act of 1976, § 2, 42 U.S.C. § 1988 (Supp. V 1981); Civil Rights Act of 1964, § 706, 42 U.S.C. § 2000e-5(k) (1976).

A few federal statutes are couched in terms of fee awards to the attorney. These, however, are not fee shifting statutes, but instead regulate fees as between attorney and client and are thus inapplicable to this discussion. *E.g.,* Military Personnel and Civilian Employees' Claims Act of 1964, § 8, 31 U.S.C. § 243 (1976); War Hazards Compensation Act § 204, 42 U.S.C. § 1714 (1976).

234 *See* Hamilton v. Ford Motor Co., 636 F.2d 745, 746-47 (D.C. Cir. 1980); Hughes v. Repko, 578 F.2d 483, 485 (3d Cir. 1978); Farmington Dowel Prods. Co. v. Foster Mfg. Co., 421 F.2d 61, 86-89 (1st Cir. 1969); Rogers v. Fansteel, Inc., 533 F. Supp. 100, 101 (E.D. Mich. 1981).

235 Even where the attorney and her client have not done so, the court has power to review and modify the fees provided for in the attorney-client contract. International Travel Arrangers v. Western Airlines, 623 F.2d 1255, 1277 (8th Cir.), *cert. denied,* 449 U.S. 1063 (1980); Russo v. New York, 515 F. Supp. 470, 472 (S.D.N.Y. 1981), *rev'd on other grounds,* 672 F.2d 1014 (2d Cir. 1982).

dependent of the statutory fees recovered, at least in the case of a settlement, would largely obviate the problem.[236]

The *White* Court also justified severing fees from the merits by relying on the premise, derived from *Bradley v. School Board,*[237] that "many final orders may issue in the course of the litigation."[238] Adding the corollary that determining whether a particular order is a final judgment often engenders substantial uncertainty, the Court concluded that if fee requests were governed by rule 59(e) counsel would frequently file protective motions for attorney's fees after every ruling relating to the merits to avoid losing the opportunity to claim fees. Not only is the premise misleading, the syllogism is myopic. Needless to say, the conclusion is wanting.

The Supreme Court in *Bradley* was faced with two interrelated problems. The plaintiffs sought recovery of attorney's fees in connection with efforts to desegregate the Richmond school system. Approximately one and one-half months after entering a decree requiring implementation of a desegregation plan, the district court awarded plaintiffs attorney's fees based on nonstatutory grounds.[239] While an appeal of the fee award was pending, Congress enacted section 718 of the Education Amendments of 1972,[240] which authorized a prevailing party in a school desegregation case to recover reasonable attorney's fees "[u]pon the entry of a final order."[241] When the case reached the Supreme Court,

---

236 The most obvious solution is to provide for a contingent fee arrangement in the event of settlement. This may be the only alternative for a plaintiff who could not otherwise afford an attorney. The contingent fee arrangement itself has been subject to criticism for the ethical problems it poses. *See generally* F. MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES 159-67, 195-206 (1964); Symposium, *Contingent Fee: Champerty or Champion?,* CLEV. ST. L. REV., May 1972, at 15. The utility of this alternative is to a great extent limited to nonclass action cases where monetary damages are the primary relief sought. Where equitable relief is dominant, a contingent fee arrangement is not a viable alternative. In the class action context, the class representative's fee arrangement with counsel does not bind the remaining members of the class. Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 120 (3d Cir. 1976).

237 416 U.S. 696 (1974).

238 *White,* 455 U.S. at 453 (quoting Bradley v. School Bd., 416 U.S. 696, 723 (1974)).

239 In a lengthy and rambling opinion, the court based its award on the "bad faith" and "private attorney general" exceptions to the Ameriean rule. Bradley v. School Bd., 53 F.R.D. 28 (E.D. Va. 1971), *rev'd,* 472 F.2d 318 (4th Cir. 1972), *rev'd on other grounds,* 416 U.S. 696 (1974).

240 Education Amendments of 1972, Pub. L. No. 92-318, § 718, 86 Stat. 235, 369 (codified as amended at 20 U.S.C. § 3205 (Supp. V 1981)), *repealed by* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 587(a)(1), 95 Stat. 357, 480.

241 The entire statute provided:

> Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision of this subchapter or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion,

both the existence of a final order upon which to predicate the district court's award of fees and the retroactivity of section 718 to services performed before its effective date were disputed. The Court resolved the issue of retroactivity by concluding that the statute should be applied to all cases pending on appeal[242] at the time section 718 became effective.[243]

The Court then faced what amounted to diametrically opposed arguments proffered by the defendants on the proper interpretation of the clause permitting an award of attorney's fees "[u]pon the entry of a final order." In a confusing passage that addressed both arguments simultaneously, the Court rejected defendants' contention that the district court's award of fees was too late because it was not entered until one and one-half months after the desegregation decree. Recognizing that resolution of the fee request could, because of its complexity and factual nature, take some time, the Court rejected an interpretation that would require a fee award to be made simultaneously with the final order.[244] Unabashed, the defendants antithetically contended that because requests for further relief were pending in the district court at the time of the fee award, the desegregation decree was not a final order sufficient under section 718 as a predicate for attorney's fees.[245] Recognizing that desegregation cases typically require long periods for final resolution—the *Bradley* case, instituted in 1961, was still being litigated twelve years later[246]—the Court sensibly declined to read the section 718 "final order" requirement literally. Instead, the Court suggested that "any order that determines substantial rights of the parties" may justify an award of counsel fees.[247] Quite obviously, many such "final orders" might occur in the course of a desegregation lawsuit.[248] Congress implicitly ap-

---

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 costs.

20 U.S.C. § 1617 (1976), *amended by* 20 U.S.C. § 3205 (Supp. V 1981), *repealed by* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 587(a)(1), 95 Stat. 357, 480.

242 *Bradley,* 416 U.S. at 715-16.

243 The Court followed this holding in connection with the applicability of the Fees Awards Act to cases pending when that act became effective. Hutto v. Finney, 437 U.S. 678, 694 n.23 (1978).

244 *Bradley,* 416 U.S. at 722-23.

245 A motion to consolidate the Richmond school district with two contiguous county districts was still pending in the district court when the fee award was made. Bradley v. School Bd., 472 F.2d 318, 331 (4th Cir. 1972), *rev'd on other grounds,* 416 U.S. 696 (1974). The district court ultimately ordered consolidation, Bradley v. School Bd., 338 F. Supp. 67 (E.D. Va. 1972), but was reversed on appeal by the Fourth Circuit, Bradley v. School Bd., 462 F.2d 1058 (4th Cir. 1972). The Supreme Court affirmed by an equally divided Court. School Bd. v. State Bd. of Educ., 412 U.S. 92 (1973) (per curiam).

246 *See* Bradley v. School Bd., 416 U.S. 696, 699 (1974). Eight of the 10 oldest cases in the federal system are desegregation cases. Stewart, *Endless Litigation,* AM. LAW., July 1982, at 46.

247 *Bradley,* 416 U.S. at 723 n.28.

248 Unfortunately, the Court did not clarify the meaning of "final order." This confusion

proved the Court's authorization for interim fees when it enacted the Fees Awards Act and, significantly, omitted the final order predicate.[249]

Thus, the Court's statement in *White* that many final orders may occur is irrelevant in determining the *latest* point at which fees may be sought unless the Court was suggesting that a final order is synonymous with a final decision—the prerequisite for an appeal under section 1291.[250] A broad reading of final order is desirable because of the flexibility that it provides in authorizing interim fee awards; there is no analogous justification for a similarly broad reading of final decision and consequently no reason to treat the two terms as synonymous. To make the point in more concrete terms, a finding of liability on the part of defendant, without a finding as to damages, may be sufficient to justify an interim award of attorney's fees, but it is not appealable as a final decision under section 1291. Affording flexibilty in awarding interim fees should not straight-jacket the courts and parties into being required to address attorney's fees every time a plaintiff is successful in obtaining

---

led to the *White* Court's misplaced reliance on the premise that "many final orders may issue." 455 U.S. at 453. Although making clear that attorney's fees could be awarded *pendent lite,* the Court in *Bradley* cited Johnson v. Combs, 471 F.2d 84, 87 (5th Cir. 1972), *cert. denied,* 413 U.S. 922 (1973), to suggest that the term "final order" in § 718 was coextensive with "final decision" in 28 U.S.C. § 1291 (1976). *Bradley,* 416 U.S. at 722 n.28. The Court then cited several of its opinions to suggest that there is substantial flexibility in the requirement of a "final decision," and that it is not necessarily the last order in a case. *Id.* Eschewing any definitive resolution, the court proceeded to retreat from its analysis equating a final order with a final decision: "[W]e venture to say only that the entry of any order that determines substantial rights of the parties may be an appropriate occasion upon which to consider the propriety of an award of counsel fees in school desegregation cases." *Id.* at 723 n.28. The conclusion is desirable; the manipulation of § 1291's "final decision" requirement necessitated by the implication that "final order" is its equivalent is not. No subsequent decision of the court has addressed the relationship between "final order" and "final decision," and no court other than the Fifth Circuit in *Johnson v. Combs* has squarely held them to be synonymous. *But cf.* Wheeler v. Durham City Bd. of Educ., 585 F.2d 618, 622-23 (4th Cir. 1978) (interpreting *Bradley* to mean that phases of desegregation case are so distinct that each may be conceived as mini-case, with final decision at conclusion of each); Tasby v. Estes, 498 F. Supp. 1130, 1132-33 (N.D. Tex. 1980), *vacated on other grounds,* 651 F.2d 287 (5th Cir. 1981); McPherson v. School Dist. #186, 465 F. Supp. 749, 751-52 (S.D. Ill. 1978) (alternative holding that final order is equivalent to final decision).

In school desegregation cases, § 1291 appeals would not play a major role. Most of the trial judge's orders providing interim relief would be appealable as injunctions pursuant to 28 U.S.C. § 1292(a)(1) (1976). Only when the court provided what it intended to be the final plan for relief would a final decision exist.

249 S. REP. NO. 1011, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5908; H.R. REP. NO. 1558, 94th Cong., 2d Sess. 8 (1976) ("[T]he word 'prevailing' is not intended to require the entry of a *final* order before fees may be recovered.") (emphasis in original). *See* Hanrahan v. Hampton, 446 U.S. 754, 756-58 (1980). *See generally* Note, *Interim Awards of Attorneys' Fees Under the Civil Rights Attorney's Fees Awards Act of 1976,* 21 ARIZ. L. REV. 893, 906-16 (1979).

In light of the Court's holding that the Fees Awards Act is applicable to all violations of federal law, Maine v. Thiboutot, 448 U.S. 1, 4 (1980), a prevailing plaintiff need not rely on the Court's opinion in *Bradley* to justify interim fees; the Fees Awards Act would provide an alternative basis for recovery. *See* Davis v. Reed, 72 F.R.D. 644 (N.D. Miss. 1976).

250 *See supra* note 248.

an interlocutory order determining "substantial rights," as the *White* Court implied would be the result if attorney's fees were tied to the merits as relief.[251]

The Court also may have overestimated the difficulty of determining which orders constitute final decisions where equitable relief is sought in a case like *Bradley*. Interim decrees might constitute judgments, but would be appealable only as injunctions pursuant to section 1292(a)(1), not as final decisions. On the other hand, to the extent that the Court's judgment was intended as the final word on equitable relief, with no other issues remaining in the case, the judgment would constitute a final decision, even though the Court retained jurisdiction to consider later modification.[252] Although the line between the two might in some cases be uncertain, it is probably not as pervasive a problem as the Court suggested.

Uncertainty as to which orders constitute final decisions in this area is a serious concern, regardless of the impact on attorney's fees.[253] One would expect this uncertainty to generate unnecessary protective appeals to preserve the opportunity for appellate review.[254] Furthermore, failure to recognize a final judgment and to perfect a timely appeal will cause some parties to forfeit appellate review. These effects may be ameliorated somewhat if courts shift their view of what constitutes a final decision when the consequence is to uphold appellate jurisdiction rather than to deny appellate review because the final decision had already been entered and not appealed.[255] In any case, the solution requires clarification of the term "final decision," not severing attorney's fees from the merits.

Finally, the Court's concern regarding unnecessary fee applications and related litigation could be avoided if fees were recognized as relief, thereby requiring the resolution of prejudgment requests for fees before a final judgment could occur. Thus, the uncertainty that might surround the appealability of a given order would not engender protective

---

251 Thus, in Morgan v. McDonough, 511 F. Supp. 408 (D. Mass. 1981), the court found the plaintiff-intervenor entitled to attorney's fees pursuant to the Education Amendments of 1972. The court reached its decision after considering the *Bradley* interpretation of "final order" and concluding that "[s]ince many such orders have been entered in this case, [plaintiff-intervenor's] application for fees is not premature." 511 F. Supp. at 413.

252 *See* Northcross v. Board of Educ., 312 F. Supp. 1150, 1164 (W.D. Tenn. 1970), *remanded,* 444 F.2d 1179 (6th Cir. 1971).

253 *See supra* text accompanying notes 37-62.

254 *See supra* text accompanying notes 27-34. Thus, in Holmes v. J. Ray McDermott & Co., 682 F.2d 1143 (5th Cir. 1982), *cert. denied,* 103 S. Ct. 732 (1983), the *appellant* raised the issue of the appellate court's jurisdiction because the district court's judgment had not resolved the issue of attorney's fees. Uncertain whether the "judgment" was proper, the appellant took a protective appeal only to have the appeal dismissed for lack of jurisdiction and returned to the district court after a delay of more than one year. *Id.* at 1144, 1148.

255 *See supra* note 84.

fee applications, because the order would not be a final judgment until related questions of attorney's fees had been resolved.

Although there was no mention of it in *White,* the *Bradley* case suggests one possible objection to tying attorney's fees to the merits: linking the two may delay entry of judgment. Thus, in *Bradley,* after commenting on the complexity of proceedings to determine appropriate attorney's fees, the Court concluded: "It would therefore be undesirable to delay the implementation of a desegregation plan in order to resolve the question of fees simultaneously."[256] The district court, however, can readily avoid this potential delay. To generalize the situation in *Bradley,* whenever the district court determines that equitable relief is appropriate and must be effected with dispatch, an injunction may be granted and appealed despite the existence of other, unresolved prayers for relief.[257] Appeals of injunctions are authorized by section 1292(a)(1) in the absence of a final decision under section 1291 and therefore constitute "judgments" under rule 54(a). Although severing injunctive relief from attorney's fees may result in multiple appeals, the importance of affording prompt appellate review of a coercive decree requires sacrificing the efficiency derived from delaying and consolidating appellate review of a case until its conclusion.[258] In addition, if the relief obtained

---

256 *Bradley,* 416 U.S. at 723. The Court in this passage was responding to the appellee's argument that fees must be awarded simultaneously with the final order because of the "upon the entry of a final order" language. *See supra* notes 240-41 and accompanying text. Nevertheless, it is valid to question whether resolution of a request for fees would delay entry of an otherwise effective order on the merits. The court of appeals in *White* addressed this concern, albeit incorrectly. The court suggested that where speed was important, the district court could enter a judgment reserving the question of fees. *White,* 629 F.2d at 704. Although recognizing that such a judgment would be of dubious appealability under § 1291, *see* Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1976), the First Circuit nevertheless asserted that "even if [the judgment were] non-appealable because still interlocutory the judgment would otherwise be effective." *White,* 629 F.2d at 705. If unappealable, the order would not be a judgment. Cinerama, Inc. v. Sweet Music, S.A., 482 F.2d 66 (2d Cir. 1973); *see supra* note 88 and accompanying text. The court's statement that rule 54(b) would authorize certification, thereby making appealable a judgment that did not decide fees, *White,* 629 F.2d at 705, is also incorrect. *See infra* text accompanying notes 261-63.

257 Thus, in Anderson v. Morris, 658 F.2d 246 (4th Cir. 1981), *aff'g,* 500 F. Supp. 1095 (D. Md. 1980), John Anderson obtained an injunction requiring that his name be placed on the ballot for the 1980 Presidential election in Maryland. Because attorney's fees had been requested in plaintiff's complaint, the injunction was not appealable as a final decision, but rather pursuant to § 1292(a)(1). While the appeal of the injunction was under consideration, the trial court awarded attorney's fees. This award constituted the final decision in the case. *Id.* at 248. *Accord* Halderman v. Pennhurst State School & Hosp., 673 F.2d 628 (3d Cir. 1982); Bacon v. Toia, 648 F.2d 801 (2d Cir. 1981), *aff'd on other grounds sub nom.* Blum v. Bacon, 457 U.S. 132 (1982); *see also* Note, *supra* note 229, at 389 n.172.

258 Halderman v. Pennhurst State School & Hosp., 673 F.2d 628, 635-56 (3d Cir. 1982); *see* Baltimore Contractors v. Bodinger, 348 U.S. 176, 181 (1955); Frank, *supra* note 6, at 293; Note, *Appealability in the Federal Courts,* 75 HARV. L. REV. 351, 364 (1961).

One commentator has suggested that the Court's decision in Switzerland Cheese Ass'n v. E. Horne's Market, 385 U.S. 23 (1966), limits the applicability of § 1292(a)(1) to preliminary injunctions. Redish, *supra* note 39, at 89 n.2. The Court, however, qualified its decision by

by the plaintiff is not injunctive and therefore not immediately appealable, delay in the entry of judgment until the trial court decides attorney's fees would not be a serious problem.[259] To some extent, a plaintiff who has obtained a favorable ruling on the merits can minimize the delay in entry of judgment by promptly filing an application for fees with the requisite documentation.[260]

---

noting that some permanent injunctions may fall within the language of the statute and that the challenged order, denying a motion for summary judgment that included a permanent injunction, in no way decided the merits of the request for an injunction, but only decided that there were issues of fact to be resolved. *Switzerland Cheese,* 385 U.S. at 25. Subsequent cases in the lower courts have not read *Switzerland Cheese* as limiting § 1292(a)(1) to preliminary injunctions. *E.g.,* Tokarcik v. Forest Hills School Dist., 665 F.2d 443, 446-47 (3d Cir. 1981), *cert. denied,* 102 S. Ct. 3508 (1982); Shirely v. Bensalem Township, 663 F.2d 472, 476-78 (3d Cir. 1981).

259 *Cf.* FED. R. CIV. P. 54(b) (delaying entry of judgment in case involving multiple claims or parties despite monetary recovery on one of those claims unless district court determines that "there is no just reason for delay"). *But see* Acha v. Beame, 570 F.2d 57, 64 (2d Cir. 1978).

The substantial gap in recent years between the legal and market rate of interest provided another parameter that made prompt disposition of money damage cases even more important. *See, e.g.,* Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1 (1980). However, whether delaying entry of judgment until fees are decided will actually exacerbate the legal-market interest rate gap is problematical. Among the considerations are:

(1) Whether prejudgment interest is available. *See* General Motors Corp. v. Devex Corp., 103 S. Ct. 2058 (1983) (prejudgment interest may be awarded in patent infringement ease); Blau v. Lehman, 368 U.S. 403, 414 (1962) (prejudgment interest may be awarded in response to equitable considerations but is not required as element of compensation); Note, *Interest on Judgments Against the Federal Government: The Need for Full Compensation,* 91 YALE L.J. 297, 302 (1981) (describing breakdown of rule limiting prejudgment interest to liquidated damages). *Compare* Crawford v. Roadway Express, Inc., 485 F. Supp. 914, 925 (W.D. La. 1980) (awarding prejudgment interest in title VII case) *with* Baldwin Cooke Co. v. Keith Clark, Inc., 420 F. Supp. 404, 409 (N.D. Ill. 1976) (prejudgment interest in copyright infringement case denied).

(2) Any difference in the legal rate for pre- and post-judgment interest. *See* West v. Harris, 573 F.2d 873, 884 (5th Cir. 1978) (prejudgment interest rate based on forum state's provision); Barger v. Petroleum Helicopters, Inc., 514 F. Supp. 1199, 1211 (E.D. Tex. 1981) (asserting discretion to award prejudgment interest at rate higher than legal postjudgment rate), *rev'd on other grounds,* 692 F.2d 337 (5th Cir. 1982).

(3) Whether interest is available on awards of attorney's fees. *Compare* Gates v. Collier, 616 F.2d 1268, 1272-79 (5th Cir. 1980) (interest available for fees awarded pursuant to Fees Awards Act) *with* Carpa, Inc. v. Ward Foods, Inc., 567 F.2d 1316 (5th Cir. 1978) (interest may not be recovered on fees awarded pursuant to the Clayton Act, 15 U.S.C. § 15 (1976)).

(4) Whether tying fees to the merits as compared with severing fees speeds or delays the point of final resolution of the case including appeals.

(5) Whether tying fees to the merits results in their being resolved more quickly than if they are severed.

Congress recently attempted to ameliorate the interest rate gap by providing that postjudgment interest be calculated based on treasury bill interest rates rather than the state law rate. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 302, 96 Stat. 55 (amending 28 U.S.C. § 1961 (1976)).

260 Of course, the court could deny relief to the plaintiff for failure to prosecute in the event of substantial delay in seeking fees. *See* FED. R. CIV. P. 41(b). The court also would have the option of setting a deadline for submission of an application for fees after a decision resolving all other matters.

Before the Supreme Court's decision in *White,* a number of courts had suggested that a court could avoid delay in the entry of a judgment by certifying for appeal a decision on the merits pursuant to rule 54(b), even though attorney's fees remained undecided.[261] This solution would give the district court discretion to make the requisite determination and thereby permit appeal of the merits while the fee question remained in the district court. Because the decision in *White* automatically severs the merits from fees, the need for a discretionary device becomes largely academic. Nevertheless, it is doubtful whether rule 54(b), which is limited to cases involving multiple "claims for relief" or multiple parties, authorizes an appeal of the merits while statutory attorney's fees remain unresolved. Even if fees were recognized as relief, they are only an additional element of relief that arises from the single "claim" asserted by the plaintiff.[262] Because rule 54(b) is not applicable in single "claim"

---

261 Halderman v. Pennhurst State School & Hosp., 673 F.2d 628, 636 (3d Cir. 1982); de Mouy v. Ingvoldstad, 664 F.2d 21, 22 (3d Cir. 1981); White v. New Hampshire Dep't of Employment Sec., 629 F.2d 697, 705 (1st Cir. 1980), *rev'd,* 455 U.S. 445 (1982).

For a more extensive discussion of rule 54(b), see *infra* text accompanying notes 462-68, 477-83.

262 The Supreme Court has declined to formulate precisely the scope of "claim for relief" in rule 54(b). *See* Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 744 n.4 (1976); Sears Roebuck & Co. v. Mackey, 351 U.S. 427 (1956); *infra* note 512. Despite the lack of a definitive standard, *Wetzel,* in holding improper a rule 54(b) certification of a decision in a title VII case that adjudged defendant liable but did not address any of the elements of relief sought, makes clear that an attempt to appeal the merits while fees remain outstanding would be improper. *See also* Acha v. Beame, 570 F.2d 57, 62 (2d Cir. 1978); *cf.* Union Tank Car Co. v. Isbrandtsen, 416 F.2d 96, 97 (2d Cir. 1969) (rule 54(b) cannot be used to sanction appeal of merits where unresolved issue of attoruey's fees is "dependent on a contract under construction by the court").

In a footnote, the *White* Court tantalizingly hinted that statutory fees may be sufficiently distinct from the merits of a case that a separate action, divorced from the initial suit, could be brought to recover fees. *White,* 455 U.S. at 451 n.13. After rejecting the defendant's contention that Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939), controlled the outcome, Justice Powell wrote:

> Nonetheless, we agree with petitioner to this extent: *Sprague* at least establishes that fee questions are not inherently or necessarily subsumed by a decision on the merits. See also *New York Gaslight Club, Inc. v. Carey,* 447 U.S. 54, 66 (1980) (a claimed entitlement to attorney's fees is sufficiently independent of the merits action under Title VII to support a federal suit "solely to obtain an award of attorney's fees for legal work done in state and local proceedings").

Id. The citation to and parenthetical description of *New York Gaslight* implies that a statutory claim for fees is a separate cause of action that may be independently sued on and that such a suit would not be precluded by the res judicata doctrine of merger. Efficiency concerns suggest that such a reading would be unfortunate. *See supra* text accompanying notes 37-47. The language used by Congress in authorizing statutory attorney fees also belies any such conclusion. *See* Derheim v. Hennepin County Bureau of Social Servs., 524 F. Supp. 1321, 1325 (D. Minn. 1981), *aff'd,* 688 F.2d 66 (8th Cir. 1982); Blow v. Lasearis, 523 F. Supp. 913, 917 (N.D.N.Y. 1981), *aff'd per curiam,* 688 F.2d 670 (2d Cir.), *cert. denied,* 103 S. Ct. 225 (1982).

Finally, the citation to *New York Gaslight* is misleading. Because title VII uniquely requires an employment discrimination claimant initially to assert her claim in available state proceedings, as the plaintiff in *Gaslight* had done, the primary issue was whether those state

cases, its availability would be limited to those cases in which a plaintiff was asserting multiple legal rights to recovery. Even in that instance, current rule 54(b) doctrine would require final resolution of all aspects of relief pertaining to at least one claim, including fees, before a rule 54(b) judgment could be entered.[263]

Articulating a related concern about delay, the *Obin II* court asserted that tying the merits and fees together in one judgment "may force an appeal of the entire case when the sole issue of concern to appellant may be the propriety or size of the attorney's fees award."[264] Severing the merits and fees, on the other hand, "would allow for the judgment on the merits to be in effect and any remedy operative while the appellate court reviews the award of fees."[265] This contention ignores the fact that appeals may be taken of a portion of a judgment,[266] and that, in any case, stays of judgment are not automatic; no reason would exist to stay equitable relief when only attorney's fees are

---

proceedings constituted an "action or proceeding under this title," the language used in § 706(k) of the Civil Rights Act of 1964 that authorizes recovery of attorney's fees in title VII cases. After concluding that the language did encompass the state proceedings required by title VII the Court added:

> Since it is clear that Congress intended to authorize fee awards for work done in administrative proceedings, we must conclude that § 706(f)(1)'s authorization of a civil suit in federal court encompasses a suit solely to obtain an award of attorney's fees for legal work done in state and local proceedings.

New York Gaslight, 447 U.S. at 66. This necessity rationale would not apply to statutory claims that do not contain a requirement of resort to state proceedings. *Derheim,* 524 F. Supp. at 1324; *Blow,* 523 F. Supp. at 915-16.

263 The rule 54(b) issue might arise in two different multiple claim contexts. In the first, at least one claim for which statutory fees are available has been resolved, except for the matter of fees, but one or more claims remains, none of which would provide a basis for awarding fees. In the second, one or more of the unresolved claims would also provide for recovery of attorney's fees, thereby leaving the potential for further proceedings regarding fees. Presumably the unresolved claims in each case would not be merely alternative theories for the resolved claims, and thereby mooted by resolution of the latter.

Allowing the trial judge discretion to sever the merits of the resolved claim in the second situation would appear desirable: future proceedings on fees may be required if plaintiff is successful on the remaining claims. Particularly where the judgment loser seeks or does not oppose a rule 54(b) certification, thus obviating concerns about the sufficiency of information to make the decision to appeal, providing flexibility should not engender much controversy. On the other hand, where the remaining claims do not provide the potential for further attorney's fee proceedings, permitting use of the rule 54(b) certification procedure would have the effect of giving the trial judge discretion to sever the merits and fees.

There is at least one siguificant argument to be made on behalf of providing that fiexibility, indeed even extending it to the single claim, multiple relief case. Given the res judicata requirement of a "final judgment," a court may proceed with a complex case for a lengthy period, making partial, yet substantial, decisions toward final resolution, only to have all those efforts negated by a later controlling decision. *See* Acha v. Beame, 570 F.2d 57, 64 n.8 (2d Cir. 1978). This would require, however, a fundamental change in the current interpretation of rule 54(b).

264 *Obin II,* 651 F.2d at 581 n.8.

265 *Id.*

266 Spound v. Mohasco Indus., 534 F.2d 404, 410 (1st Cir. 1976), *cert. denied,* 429 U.S. 886 (1976); *see* Boeing Co. v. Van Gemert, 444 U.S. 472, 479 & n.5 (1980).

challenged.[267]

In summary, severing statutory attorney's fees from the merits raises serious concern about efficient judicial administration in the chronological allocation of jurisdiction between the district courts and the courts of appeals. Moreover, uncoupling may also force unsuccessful parties to decide whether to appeal before they know the full extent of their liability. Although some of these effects may be ameliorated by adoption of local rules, that alternative is a second-best solution to the competing concerns reflected in the limitations on appellate jurisdiction and related policies in the determination of an appropriate statutory fee award.

B. An Afterword: Fees As Costs

In a number of respects, the "fees as costs" approach adopted by a number of courts before *White,* and left unaffected by that decision, produces results identical to those reached by the collateral and independent approach of *White.*[268] Treating fees as costs allows a decision on the merits to become final for purposes of appeal despite an outstanding request for attorney's fees.[269] This result follows from the requirement of rule 58 of the Federal Rules of Civil Procedure that entry of judgment should not be delayed for taxation of costs.[270] Furthermore, the Federal Rules of Civil Procedure impose no explicit time limit on submission of a bill of costs.[271] Thus, although the "costs" approach is conceptually quite different from the collateral and independent approach—indeed the *Obin II* court flatly rejected fees as costs[272]—the two can peacefully coexist, as the Supreme Court recognized in *White.*[273] The primary functional difference between these two approaches is whether a local

---

267 *See* Edelman v. Jordan, 414 U.S. 1301 (Rehnquist, Circuit Justice, 1973); FED. R. CIV. P. 62; FED. R. APP. P. 8; *cf.* Parker v. Lewis, 670 F.2d 249 (D.C. Cir. 1982) (per curiam) (summarily affirming portion of judgment that was not contested on appeal); Barnes v. United States, 678 F.2d 10 (3d Cir. 1982) (same as *Parker*). *But cf.* Kean v. National City Bank, 294 F. 214, 227 (6th Cir. 1923) ("There cannot be a final judgment granting or denying a part of the damages claimed under one count, and at the same time contemplating further proceedings in the suit to determine the liability as to the remainder of the damages claimed."), *cert. denied,* 263 U.S. 629 (1924).

268 *E.g.,* Crowder v. Telemedia, 659 F.2d 787 (7th Cir. 1981).

269 *See, e.g.,* Terket v. Lund, 623 F.2d 29 (7th Cir. 1980); Baughman v. Cooper-Jarrett, Inc., 530 F.2d 529, 531 n.2 (3d Cir.), *cert. denied,* 429 U.S. 825 (1976).

270 This was the case even before adoption of the Federal Rules of Civil Procedure. Fowler v. Hamill, 139 U.S. 549 (1891); Prescott & A. Cent. Ry. v. Atchison, T. & S.F.R.R., 84 F. 213 (2d Cir. 1897) (per curiam).

271 American Infra-Red Radiant Co. v. Lambert Indus., 41 F.R.D. 161 (D. Minn. 1966).

When the request for costs is delayed unreasonably, courts have denied recovery on equitable grounds. *See, e.g.,* United States v. Pinto, 44 F.R.D. 357 (W.D. Mich. 1968).

A substantial number of federal district courts have promulgated local rules that place an outside time limit on seeking costs. *See infra* note 309.

272 *Obin II,* 651 F.2d at 580.

273 *See White,* 455 U.S. at 454 & n.17.

district court rule prescribing time limits for submission of a bill of costs also governs fee requests.[274]

Thus, one could view the arguments and case law in favor of treating statutory fees as part of the costs of the action as giving succor to the *White* decision, at least on a functional level. Given this similarity and the unresolved nature of the issue, some further analysis is appropriate. This section initially presents arguments in favor of assessing fees in the same fashion as costs. After consideration of the differences between costs and attorney's fees as well as the functional disadvantages of uncoupling fees from the merits, however, this article concludes that rule 58 is inappropriate for the fee assessing process.

In support of treating attorney's fees as taxable costs, proponents have aptly noted that the language of several federal statutes authorizing an award of attorney's fees, including the Fees Awards Act, provides that a prevailing party may be awarded "a reasonable attorney's fee as part of the costs."[275] Attorney's fees, like costs, primarily are incurred as a consequence of the litigation in which plaintiff seeks relief; unlike money damages, they are not awarded as compensation for the wrong upon which suit is brought.[276] As a result, both attorney's fees and costs normally are awarded at the conclusion of the case.[277] Finally, treating fees as costs avoids denying a deserving party attorney's fees because of a procedural default.[278]

There is also historical precedent for awarding attorney's fees with other taxable costs. In England, which has a long history of awarding costs to the prevailing party in actions at law and equity,[279] taxable

---

274 Watkins v. Mobile Housing Bd., 632 F.2d 565 (5th Cir. 1980); Knighton v. Watkins, 616 F.2d 795 (5th Cir. 1980).

There is precedent for treating statutory attorney's fees as costs that precedes much of Congress's recent activity in the fee shifting arena. *See* Danzig v. Virgin Isle Hotel, 278 F.2d 580 (3d Cir. 1960). *But see infra* note 285.

275 42 U.S.C. § 1988 (Supp. V 1981).

276 *See* Hutto v. Finney, 437 U.S. 678, 695 n.24 (1978). *But see id.* at 707 (Powell, J., concurring in part and dissenting in part).

277 Knighton v. Watkins, 616 F.2d 795, 797 (5th Cir. 1980). *But see infra* text accompanying notes 331-38.

278 *See* Comment, *Procedural Characterization of Post-Judgment Requests for Attorney's Fees in Civil Rights Cases—Eliminating Artificial Barriers to Awards,* 49 FORDHAM L. REV. 827, 839 (1981); *supra* text accompanying note 125. The Fifth Circuit, which adopted the fees as costs approach in Knighton v. Watkins, 616 F.2d 795 (5th Cir. 1980), was motivated in part by a desire to avoid denying fees simply because of a procedural error. The Third Circuit, in Baughman v. Cooper-Jarrett, Inc., 530 F.2d 529, 531 n.2 (3d Cir.), *cert. denied,* 429 U.S. 825 (1976), relied on the costs characterization to conclude that an antitrust case was properly appealed despite the unresolved question of attorney's fees authorized by 15 U.S.C. § 15 (1982). That statute permits a prevailing plaintiff "threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

279 Since at least 1275, when the Statute of Gloucester, 6 Edw., ch. 1, was enacted, prevailing plaintiffs have recovered costs in common law actions. Goodhart, *Costs,* 38 YALE L.J. 849, 852 (1929); Comment, *Distribution of Legal Expense Among Litigants,* 49 YALE L.J. 699, 700 (1940). It was not until the enactment of the Statute of Westminster, 4 Jac., ch. 3, in 1607

costs include a substantial portion of the fees paid for legal counsel.[280] Although the English practice of awarding attorney's fees was for the most part not adopted in colonial times,[281] and was largely rejected in America at least until the federal fee shifting statutes of the last several decades, proposals for reform often recall the English practice and procedure.[282]

On closer examination, however, treating statutory attorney's fees as costs in determining whether a resolution of the merits is appealable cannot be justified. Reliance on statutory language describing attorney's fees as an element of costs is dubious. Coupling fees with the merits does no violence to the plain meaning of those statutes that suggest attorney's fees are an element of costs.[283] First, no fee shifting statute explicitly states that the procedures of rule 54(d) and 58, which sever

---

that a successful defendant's right to costs was established in all common law cases. Goodhart, *supra*, at 853. In the interim period, the Chancellor awarded costs in equity cases, albeit with more discretion than in the common law courts. *Id.* at 854.

280 Goodhart, *supra* note 279, at 856-58. For a description of the procedure by which costs are taxed in England, see Goldberger, *The Cost of Justice: An American Problem, An English Solution,* 9 VILL. L. REV. 400, 402-04 (1964); Goodhart, *supra* note 279, at 854-55; Comment, *supra* note 232, at 638 n.7.

281 The most plausible explanation for the refusal to permit fee shifting in the late eighteenth and nineteenth centuries in America was a prevailing distrust of lawyers among the largely rural populace. Goodhart, *supra* note 279, at 873; Comment, *supra* note 279, at 701. A number of jurisdictions had statutes that provided for recovery of fixed sums as counsel fees, but these sums were so small as to be de minimus. *Id.* at 701 nn.20, 22; *see* 28 U.S.C. § 1923(a) (1982).

Others have interpreted history differently, ascribing more significance to the statutory provisions for fixed recovery, *see* C. MCCORMICK, DAMAGES 235 (1935); Note, *Use of Taxable Costs to Regulate the Conduct of Litigants,* 53 COLUM. L. REV. 78, 80 (1953), and concluding that they were the alternative that permitted rejection of the English rule but ultimately became inadequate because of their maximum, Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society,* 54 CALIF. L. REV. 792, 798-99 (1966). Professor Falcon has suggested that some combination of these factors, plus historical accident, explains the American rule. Falcon, *Award of Attorney's Fees in Civil Rights and Constitutional Litigation,* 33 MD. L. REV. 379, 381-82 n.5 (1973). Professor Leubsdorf has recently suggested that the American rule evolved as a compromise in which the bar accepted the statutes regulating the amount of fees that the victor could recover in exchange for freedom to contract with their clients for payment of fees. Leubsdorf, *Toward the History of the American Rule on Attorney Fee Recovery* (forthcoming in LAW & CONTEMP. PROBS.).

282 Goodhart, *supra* note 279, at 849-72; Comment, *supra* note 279, at 700-02; *see* Stoebuck, *Counsel Fees Included in Costs: A Logical Development,* 38 U. COLO. L. REV. 202, 204-07 (1966); Note, *Attorney's Fees and the Federal Bad Faith Exception,* 29 HASTINGS L.J. 319, 320 (1977); Comment, *Theories of Recovering Attorneys' Fees: Exceptions to the American Rule,* 47 UMKC L. REV. 566, 592 (1979).

283 A basic canon of statutory interpretation requires the court to determine if the issue at hand can be resolved by resort to the clear meaning of the language of an applicable statute. *See, e.g.,* United States v. Missouri P.R.R., 278 U.S. 269, 278 (1929). The plain meaning rule, particularly in its strictest formulation, has not been without its critics. *See generally* Kelso & Kelso, *Appeals in Federal Courts by Prosecuting Entities other than the United States: The Plain Meaning Rule Revisited,* 33 HASTINGS L.J. 187 (1981); Murphy, *Old Maxims Never Die: The "Plain Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts,* 75 COLUM. L. REV. 1299 (1975).

costs from the merits, should be adopted for attorney's fees.[284] Second, the term "costs" is generic and, when contained in fee shifting statutes, need not be read as referring to the statutorily authorized costs that are taxed pursuant to rule 54(d).[285]

Finally, the oft-cited explanation for characterizing fees as costs in the Fees Awards Act is that Congress chose this method to avoid the eleventh amendment barrier to monetary awards against the states.[286] Although the legislative history provides some support for this argument,[287] there are indications that Congress selected the language to make the Fees Awards Act consistent with fee provisions in earlier civil rights statutes. No sovereign immunity problems could arise under these statutes because the states enjoyed an express exemption from coverage.[288] There is also evidence that the drafters of the Fees Awards Act

---

284 Indeed, it would be impossible to adopt these procedures, because Congress has provided that the court, rather than the clerk of the court, should initially assess the amount of fees, *see supra* notes 164-66 and accompanying text, thereby rejecting at least one aspect of the rule 54(d) procedure. *See infra* note 300 and accompanying text. In a related vein, rule 58 specifies that the judgment should not be delayed for the "taxing" of costs; the term "taxing" is commonly used to refer to the process engaged in by the clerk of the court rather than the judge. *E.g.,* FED. R. CIV. P. 54(d) ("Costs may be taxed by the clerk on one day's notice.").

285 *See* People of Sioux County, Neb. v. National Sur. Co., 276 U.S. 238, 244 (1928) (holding that state statute that authorized plaintiff to recover attorney's fee "to be taxed as part of the costs," which was applicable in diversity case, did not govern procedural fashion in which fees should be awarded; fees should be treated as part of the judgment, not taxed as costs); *accord* Oxford Prod. Credit Ass'n v. Duckworth, 689 F.2d 587 (5th Cir. 1982); Alcan Pac. Co. v. Mauk Seattle Lumber Co., 302 F. Supp. 606 (D. Alaska 1966), *aff'd,* 414 F.2d 832 (9th Cir. 1969); Reynolds v. Wade, 140 F. Supp. 713 (D. Alaska 1956), *rev'd on other grounds,* 249 F.2d 73 (9th Cir. 1957). *Contra* Henlopen Hotel Corp. v. Aetna Ins. Co., 38 F.R.D. 155 (D. Del. 1965).

Similarly, where a state statute authorizes recovery of attorney's fees, the amount of the fees may be considered as part of the amount in controversy for purposes of establishing jurisdiction based on diversity of citizenship, despite the exclusion of costs in the statutory language of 28 U.S.C. § 1332 (1976). Missouri State Life Ins. Co. v. Jones, 290 U.S. 199 (1933); Batts Restaurant v. Commercial Ins. Co., 406 F.2d 118 (7th Cir. 1969); Mutual Benefit Health & Accident Ass'n v. Bowman, 96 F.2d 7 (8th Cir.), *vacated on other grounds,* 304 U.S. 549 (1938); *cf.* Graham v. Henegar, 640 F.2d 732 (5th Cir. 1981) (amount of attorney's fees requested by plaintiff included in calculating amount of claim for purposes of jurisdiction under Tucker Act, 28 U.S.C. § 1346(a)(2) (1976)).

286 Hutto v. Finney, 437 U.S. 678, 696 (1978); Gates v. Collier, 616 F.2d 1268, 1276 (5th Cir. 1980); Morrow v. Dillard, 580 F.2d 1284, 1299 n.18 (5th Cir. 1978).

For a discussion of the eleventh amendment and its impact on attorney's fees awards prior to *Hutto v. Finney,* see Note, *Attorney's Fees and the Eleventh Amendment,* 88 HARV. L. REV. 1875 (1975).

287 *See* S. REP. NO. 1011, 94th Cong., 2d Sess. 5 n.6, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5908, 5913 n.6. The report cited Fairmont Creamery Co. v. Minnesota, 275 U.S. 70 (1927), in connection with its statement that attorney's fees, like costs, could be collected from the state official or state entity involved. In *Fairmont Creamery,* the court upheld its power to tax costs against a state in a criminal appeal. For an argument that *Fairmont Creamery* dealt only with common law sovereign immunity, see Note, *supra* note 286, at 1890-91.

288 *See* S. REP. NO. 295, 94th Cong., 1st Sess. 49-50 (1975); 122 CONG. REG. 35,122 (1976) (remarks of Rep. Drinan).

The earlier civil rights acts referred to in the text were Titles II and VII of the Civil

read *Fitzpatrick v. Bitzer*[289] as permitting Congress to authorize awards of monetary relief against states in exercising its power under section 5 of the fourteenth amendment,[290] thus rendering the "costs" characterization unnecessary in order to except fees from the barrier of the eleventh amendment. In any case, the eleventh amendment was not the impetus for authorizing an antitrust plaintiff to recover "the costs of suit, including a reasonable attorney's fee"[291] in 1890 when Congress passed the Sherman Act. Indeed, at that time, the statute governing awards of costs required that costs be included as part of the judgment.[292]

Because Congress has employed a myriad of verbal formulations in fee shifting statutes, including many that do not characterize attorney's fees as costs,[293] it is difficult to ascribe any significance to such language for purposes of determining the appropriate procedural context in which to treat statutory attorney's fees.[294] There simply is no indication that the language used in these statutes was, in any sense, meant to address this question.[295]

More importantly, the differences between routine costs awarded to the prevailing party and attorney's fees—their quantum, the standards applicable to determine their amount, the procedure by which they are determined, and their significance in relation to the underlying merits in

---

Rights Act of 1964, 42 U.S.C. §§ 2000a-3(b), 2000e-5(b) (1976) and the Emergency School Aid Act of 1972, 29 U.S.C. § 1617 (1976) (repealed 1982). Under Title VII of the Civil Rights Act of 1964, state governments were initially exempted from coverage and therefore no eleventh amendment issue could have motivated the "fees are costs" characterization. 42 U.S.C. § 2000e(b)(1) (1964). In 1972, Congress amended title VII to include state governments within its scope. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(1), 86 Stat. 103, 103. *But see* Gates v. Collier, 616 F.2d 1268, 1276 (5th Cir. 1980).

289 427 U.S. 445 (1976).

290 H.R. REP. NO. 1558, 94th Cong., 2d Sess. 7 n.14 (1976); *see* Hutto v. Finney, 437 U.S. 678, 693-94 (1978).

291 Sherman Act § 7, 26 Stat. 209, 210 (1890) (current version at 15 U.S.C. § 15 (1982)); *see* Gates v. Collier, 616 F.2d 1268, 1276-77 (5th Cir. 1980).

292 *See infra* notes 315-17 and accompanying text.

293 *E.g.*, Equal Credit Opportunity Act Amendments of 1976, § 706, 15 U.S.C. § 1691e(d) (1982) ("costs of the action, together with a reasonable attorney's fee"); Truth in Lending Act § 130, 15 U.S.C. § 1640(a) (1982) (same); Equal Access to Justice Act § 204, 28 U.S.C. § 2412(d)(1)(A) (Supp. V 1981) ("fees and other expenses, in addition to any costs"); Outer Continental Shelf Lands Act Amendments of 1978, § 208, 43 U.S.C. § 1349(b)(2) (Supp. V 1981) ("damages including reasonable attorney and expert witness fees").

294 *See supra* note 78 and accompanying text.

295 *Cf.* 122 CONG. REC. 35,116 (1976) (statement of Rep. Drinan characterizing wording of Fees Awards Act as "routine, boilerplate, legal language"). The characterization of fees as costs in many of the federal statutes probably can be traced to a number of related factors: the English practice of awarding some measure of attorney's fees as part of the costs, Goodhart, *supra* note 279, at 856; the adoption of that view by a few of the states in the early nineteenth century in their statutes providing for a minimal sum to be recovered as fees, Comment, *supra* note 279, at 701; the continuation of that characterization by a number of states that permitted a substantial attorney's fee to be recovered in certain cases, *see supra* note 17; and the superficial similarity that attorney's fees have with taxable costs incurred in litigation, *see supra* note 276 and accompanying text.

the case—counsel against adoption of the fees as costs approach for several reasons.

First, the taxable "costs" normally awarded a prevailing party in the district court[296] are defined by statute[297] and generally are neither significant in amount[298] nor representative of the total expenses incurred by a party in litigation.[299] In the vast run of cases, costs are taxed by the clerk of the court[300] based on a bill of costs submitted by the prevailing party for a reasonably well-defined class of costs.[301] Typically these costs include docket, filing, service and witness fees, and the cost of obtaining a transcript of trial and printing briefs. Thus, although there are exceptions, the costs taxed in the district court pursuant to rule 54(d) are generally not significant sums and do not comprise a significant percentage of the amount otherwise at stake in the case.[302]

---

296 FED. R. CIV. P. 54(d).

297 28 U.S.C. § 1920 (1976 & Supp. V 1981). Other statutes concerning costs in other federal courts and fees charged to litigants are contained in 28 U.S.C. §§ 1911-1930 (1976 & Supp. V 1981). The court retains discretion to award other expenses incurred by a party as costs. *See* Peck, *Taxation of Costs in United States District Courts,* 37 F.R.D. 481, 485-95 (1965) [hereinafter cited as Peck, *District Courts*]; Peck, *Taxation of Costs—New Developments,* 43 F.R.D. 55 (1967). The court also has discretion to deny items of expense as taxable costs, Farmer v. Arabian Am. Oil Co., 379 U.S. 227 (1964), or to deny costs in toto, FED. R. CIV. P. 54(d).

298 *See* Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 235 (1964); Comment, *supra* note 279, at 700-01. *But see infra* note 328. The relative unimportance of costs may explain the observation that the few cases that deal with taxable costs are not written with "a 'fastidious precision' " of language. Maryland Cas. Co. v. Jacobson, 37 F.R.D. 427, 430 (W.D. Mo. 1965) (quoting Commissioner v. Estate of Bedford, 325 U.S. 283, 287 (1945)).

299 Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 235 (1964); *see* Peck, *District Courts, supra* note 297, at 485-95. *See generally* Goodhart, *supra* note 279.

300 Costs are taxed after submission of a verified bill of costs, except in instances where the trial court exercises its discretion. Opposing parties may file written objections or appear and object orally at the time set for taxation by the clerk. Peck, *District Courts, supra* note 297, at 482-84.

The differing processes by which costs and statutory attorney's fees are determined is best illustrated by the treatment of each in the federal courts of appeals. The clerk of the appellate court taxes costs on appeal after submission of a bill of costs by a party that deems itself entitled to costs. 28 U.S.C. § 1920 (1976 & Supp. V 1981). Because a party authorized by statute to recover attorney's fees may recover for attorney efforts in connection with an appeal, Love v. Mayor of Cheyenne, 620 F.2d 235, 237 (10th Cir. 1980), the courts of appeals have been faced with the question of who should make the factual and evaluative determinations necessary to fix the amount of attorney's fees. The courts of appeals have, for the most part, left this determination to the district courts, which have superior and more fiexible fact-finding capabilities. *See supra* note 151.

301 *See* Peck, *District Courts, supra* note 297, at 485-94.

302 Those who advocate limiting the amount of costs recoverable by the victor point to the same egalitarian notions cited in support of the Ameriean rule requiring that each party bear its own attorney's fees to justify such limitations. Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 234-45 (1964). These same concerns recently prompted Judge Weinfeld to disallow over $160,000 that had been taxed against the plaintiff as costs by the clerk. The judge reached this determination despite his earlier assessment that "the factual underpinnings for plaintiff's Sherman and Clayton Act claims are somewhat shallow." Brager & Co v. Leumi Sec. Corp., 530 F. Supp. 1361, 1363 (S.D.N.Y.), *aff'd without opinion,* 697 F.2d 288 (2d Cir. 1982).

By contrast, the attorney's fees that courts award pursuant to fee shifting statutes are frequently substantial amounts, in most cases comprising a significant proportion of the total monetary relief recovered.[303]

Second, because the fees as costs approach is functionally similar to the collateral and independent characterization adopted in *White,* one can level many of the same criticisms of the latter at the former as well. The minimal impact of costs may justify severing them from the judgment to speed its entry, but a losing party required to pay attorney's fees should know the amount at stake before deciding whether to appeal the merits.[304] Similarly, addressing fees and the merits in close temporal proximity in the trial court and, if necessary, reviewing them in the same appellate proceeding fosters judicial efficiency in both the trial and appellate courts. Unlike attorney's fees, the clerk's largely ministerial assessment of costs[305] rarely requires assessment of the merits,[306] and frequently is concluded in a matter of days. The relative unimportance of keeping costs closely connected with the merits is demonstrated by cases in which taxation of costs is deferred until after the conclusion of an appeal.[307]

Third, treating attorney's fees in the same fashion as costs is also an imperfect vehicle for minimizing procedural defaults.[308] Currently more than one-third of the district courts have local rules prescribing time limits for submitting a bill of costs.[309] These time limits vary from

---

303 This generalization, without empirical support, may seem suspect, even with copious citation to individual cases that appear to provide support. Nevertheless, as any contemporary observer of the attorney's fee litigation explosion can attest, "[t]he impact of [federal fee-shifting] statutes, and particularly of the awards under them, has been enormous." E. LARSON, *supra* note 158, at 1 (1981); *see, e.g.,* Boeing Co. v. Van Gemert, 444 U.S. 472, 483 (1980) (Rehnquist, J., dissenting); White v. New Hampshire Dep't of Employment Sec., 629 F.2d 697, 702-04 (1st Cir. 1980), *rev'd on other grounds,* 455 U.S. 445 (1982).

304 *See supra* notes 194-206 and accompanying text.

305 *Compare* Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967) ("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.") *with* Peck, *District Courts, supra* note 297, at 482-84 (mechanies of taxing costs are simple).

306 *See supra* notes 300-01 and accompanying text. *But see, e.g.,* Farmer v. Arabian Am. Oil Co., 379 U.S. 227 (1964); Brager & Co. v. Leumi Sec. Corp., 530 F. Supp. 1361, 1363 (S.D.N.Y.), *aff'd without opinion,* 697 F.2d 288 (2d Cir. 1982).

307 American Infra-Red Radiant Co. v. Lambert Indus., 41 F.R.D. 161 (D. Minn. 1966); Fleischer v. A.A.P. Inc., 36 F.R.D. 31 (S.D.N.Y. 1964); *see* Boice v. Boice, 56 F. Supp. 339 (D.N.J. 1944).

308 *See* Metcalf v. Borba, 681 F.2d 1183 (9th Cir. 1982).

309 These districts include: Middle and Southern Districts of Alabama; District of Alaska; District of Arizona; Central, Eastern, Northern, and Southern Districts of California; District of Colorado; Middle and Northern Districts of Florida; Northern and Southern Districts of Georgia; District of Idaho; Northern District of Illinois; Northern and Southern Districts of Iowa; Western District of Louisiana; District of Maryland; Northern District of Mississippi; Eastern District of Missouri; District of Montana; District of Nebraska; District of Nevada; District of New Jersey; District of New Mexico; Southern District of New York; District of North Dakota; Eastern, Northern, and Western Districts of Oklahoma; District of Oregon; Middle District of Pennsylvania; District of Puerto Rico; District of Rhode Island;

district to district[310] and in some the deadline is as short as five days after notice of entry of judgment,[311] a limitation even more restrictive than the ten days from entry of judgment provided in rule 59(e). In districts with local rules, the worst effects of placing tight time constraints on applications for fees combine[312] with the disadvantages of severing fees from the merits,[313] if the rules applicable to costs also govern statutory attorney's fees.

Finally, the haphazard historical developments that led to the provision in rule 58 severing costs from the judgment suggest that the reasons for divorcing costs from the judgment do not apply to attorney's fees.

The first comprehensive statute[314] governing the award of costs in the federal courts was the Fee Bill Act of 1853.[315] In applying the Act, courts treated a final disposition of the merits that did not provide for costs as a final judgment,[316] even though the statute required that "[costs] . . . shall be taxed . . . and . . . included in and form a portion of a judgment or decree against the losing party."[317] In some instances, subsequently taxed costs would be inserted in the judgment nunc pro

---

Middle and Western Districts of Tennessee; Southern District of Texas; District of Utah; Eastern and Western Districts of Washington; Eastern District of Wisconsin. *See* [Fed. Local Ct. Rules] FED. R. SERV. 2D (Callaghan).

One significant difference between a post judgment time limit on submission of a request for attorney's fees imposed by local rules governing costs, and the time constraints of rule 59(e), is that the latter limitation is jurisdictional and cannot be extended, *see supra* text accompanying notes 108-09, while the former can be enlarged, FED. R. CIV. P. 6(b).

310 From five days after entry of judgment in the Western District of Washington, W.D. WASH. R. 54, [Fed. Local Ct. Rules] FED. R. SERV. 2D (Callaghan), to 40 days after entry of judgment or 10 days after the issuance of the mandate of the appellate court, whichever is later, in the Eastern District of Missouri, E.D. MO. R. 24, [Fed. Local Ct. Rules] FED. R. SERV. 2D (Callaghan).

311 W.D. LA. R. 5(c), [Fed. Local Ct. Rules] FED. R. SERV. 2D (Callaghan). The Western District of Washington is even more restrictive, imposing a five-day deadline from *entry* of judgment. W.D. WASH. R. 54, [Fed. Local Ct. Rules] FED. R. SERV. 2D (Callaghan).

312 *See supra* text accompanying notes 120-22.

313 *See supra* text accompanying notes 145-206.

314 For a historical discussion of federal statutes bearing on costs, see S. LAW, THE JURISDICTION AND POWERS OF THE UNITED STATES COURTS 255-82 (1852); Payne, *Costs in Common Law Actions in the Federal Courts,* 21 VA. L. REV. 397, 401-03 (1935); *see also* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247-51 (1975) (discussing congressional treatment of attorney's fees before 1853).

315 Act of Feb. 26, 1853, ch. 80, 10 Stat. 161.

316 Fowler v. Hamill, 139 U.S. 549, 550 (1891); United States v. Nordbye, 75 F.2d 744, 746 (8th Cir.), *cert. denied,* 296 U.S. 572 (1935); Prescott & A. Cent. Ry. v. Atchison T. & S.F.R.R., 84 F. 213, 214 (2d Cir. 1897).

317 Act of Feb. 26, 1853, ch. 80, § 3, 10 Stat. 161, 168.

One might assert that the language of the statute only requires that the judgment include a discretionary decision on whether to tax costs and not a determination of the amount thereof. The mandatory nature of the statute along with the language providing that costs shall comprise a "portion of a judgment," although not conclusive, suggest otherwise.

The current federal statute authorizing taxation of costs, 28 U.S.C. § 1920 (1976 & Supp.

tunc;[318] in others, a separate order would subsequently be entered assessing costs.[319] Either way, as is the case today, the taxing of costs affected neither the judgment nor the beginning of the period in which a disappointed party might take an appeal.

The virtual unappealability of an award of costs partially explains the development of this practice. Both in equity,[320] where the courts exercised great discretion in awarding costs, and—to a lesser extent—at law,[321] appellate review of costs was quite limited.[322] Thus, uncoupling the costs from the merits presented few problems in terms of piecemeal appeals or procedural inefficiencies, and had the advantage of permitting earlier entry of judgment.[323] Even in 1946, when rule 58 of the Federal Rules of Civil Procedure was amended to overrule explicitly the practice in several New York federal district courts of delaying entry of judgment until the assessment of costs,[324] the volume and availability of appeals of costs were minimal.[325]

V 1981), is also inconsistent with rule 58. It provides in relevant part: "A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree." *Id.*

The Rules Enabling Act, 28 U.S.C. § 2072 (1976), provides that the Federal Rules of Civil Procedure supersede inconsistent federal law. *See generally* Clinton, *Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts,* 63 IOWA L. REV. 15, 53-54 (1977).

318 *E.g.,* Stallo v. Wagner, 245 F. 636, 640 (2d Cir. 1917); Allis-Chalmers Co. v. United States, 162 F. 679, 680 (7th Cir. 1908).

319 *E.g.,* Fowler v. Hamill, 139 U.S. 549, 550 (1891); United States v. Nordbye, 75 F.2d 744, 745 (8th Cir.), *cert. denied,* 296 U.S. 572 (1935); Prescott & A. Cent. Ry. v. Atchison, T. & S.F.R.R., 84 F. 213, 213 (2d Cir. 1897).

320 Newton v. Consolidated Gas Co., 265 U.S. 78, 82-84 (1924); Trustees v. Greenough, 105 U.S. 527, 527-28 (1881); Canter v. American Ins. Co., 28 U.S. (3 Pet.) 307, 319 (1830); Stallo v. Wagner, 245 F. 636, 639 (2d Cir. 1917); Payne, *supra* note 314, at 400.

321 Maryland Cas. Co. v. Jacobson, 37 F.R.D. 427, 430 n.5 (W.D. Mo. 1965).

322 One commentator, writing in 1929, contrasted the significance of costs in Great Britain and America, stating: "In America, on the other hand, the subject of costs seems to be a minor one." Goodhart, *supra* note 279, at 851; *see* Payne, *supra* note 314, at 430.

323 The parties who lost the opportunity for appellate review of the merits because they erroneously thought that a judgment that included taxable costs was a prerequisite to begin the time within which to appeal might disagree. *See, e.g.,* Fowler v. Hamill, 139 U.S. 549 (1891); Allis-Chalmers Co. v. United States, 162 F. 679, 681 (7th Cir. 1908).

324 Local Rule 22 for the Southern District of New York provided: "The judgment in any case may be signed, leaving a blank space for the insertion of costs by the clerk as and when they have been taxed. But the judgment shall not be entered until costs have been taxed or waived." United States District Court Rules for the Southern District of New York 36-37 (Sept. 16, 1938); *see* Harris v. Twentieth Century-Fox Film Corp., 139 F.2d 571, 572 (2d Cir. 1943); Kehaya v. Axton, 32 F. Supp. 273, 275 (S.D.N.Y. 1940); FED. R. CIV. P. 58 advisory committee note, 5 F.R.D. 433, 475-76 (1946).

The practice apparently developed because state practice required costs to be determined and included as part of the judgment. *See* J. CLEVENGER, ANNUAL PRACTICE OF NEW YORK § 1532 (1946); D. SIEGEL, HANDBOOK ON N.Y. PRACTICE 552-53 (1978); 8 J. WEINSTEIN, H. KORN & A. MILLER, NEW YORK CIVIL PRACTICE ¶ 8402.01 (1982).

The Southern District annulled rule 22 on October 1, 1945, because it was inconsistent with amended Federal Rule 58. FED. R. CIV. P. 58 advisory committee note, 5 F.R.D. 433, 475-76 (1946).

325 Harris v. Twentieth Century-Fox Film Corp., 139 F.2d 571, 572 n.1 (2d Cir. 1943).

By contrast, there is virtually no limitation on appellate review of attorney's fee awards other than the standard deference to a trial judge with regard to factual matters that he or she may be in a better position to determine. The courts of appeals require trial judges to articulate the basis of their fee awards for the purpose of facilitating appellate review.[326] To the extent that the minimal amounts awarded as costs were a factor in discouraging appeals,[327] the substantial amounts courts award as attorney's fees belie any similarity. In short, apart from a literal minded reliance on "attorney's fees as costs," there is little reason to employ the procedures for taxing costs[328] in the assessment of attorney's fees.[329]

C. Interim Awards of Attorney's Fees

1. *General Considerations*

The authorization for interim attorney's fees announced in *Bradley v. School Board,*[330] and subsequently adopted by Congress in numerous

---

326 Davis v. City of Abbeville, 633 F.2d 1161, 1163 (5th Cir. 1981) (citing cases); Van Ooteghem v. Gray, 628 F.2d 488, 497 (5th Cir. 1980), *aff'd in part, vacated and remanded in part,* 654 F.2d 304 (5th Cir. 1981) (en banc), *cert. denied,* 455 U.S. 909 (1982); Northcross v. Board of Educ., 611 F.2d 624, 636 (6th Cir. 1979), *cert. denied,* 447 U.S. 911 (1980).

327 *See* Comment, *supra* note 198, at 883-85.

328 The increasing willingness of appellate courts to review awards of costs, *see, e.g.,* Farmer v. Arabian Am. Oil Co., 379 U.S. 227 (1964), and, in a small number of cases, the increasing significance of cost awards, Peck, *District Courts, supra* note 297, at 482, suggest that the rule 58 uncoupling of costs from the judgment may be outdated.

To some extent, this problem has been alleviated by local rules mandating a time limit within which a request for costs must be made. *See supra* note 309. Although these rules still do not require that costs be awarded before a judgment may validly be entered, a requirement that would violate rule 58, they do ensure that a party contemplating appeal will at least know the costs being sought before deciding to appeal. These rules also increase the probability, given the lag time in the courts of appeals, that an appellate court will consolidate an appeal of costs with any appeal of the judgment in the case. *See, e.g.,* Schneider v. Lockheed Aircraft Corp., 658 F.2d 835 (D.C. Cir. 1981), *cert. denied,* 455 U.S. 994 (1982); *cf. supra* note 180.

329 Interestingly, some of the early cases awarding statutory attorney's fees authorized by the Clayton Act § 4, 15 U.S.C. § 15(a) (1982), which permits a successful plaintiff to recover "the costs of suit, including a reasonable attorney's fee," treated attorney's fees and other taxable costs quite differently, without any explicit recognition of the issue. Thus, in Twentieth Century Fox Film Corp v. Goldwyn, 328 F.2d 190 (9th Cir.), *cert. denied,* 379 U.S. 880 (1964), the trial court included $100,000 as attorney's fees in the judgment and taxed $66,507.31 separately as costs. Although the court of appeals reviewed and affirmed the attorney's fee award without commenting on its appealability, it reviewed the lower court's taxation of costs only after addressing the appealability of cost awards. *Id.* at 221-23. *See also* Montague & Co. v. Lowry, 193 U.S. 38, 42 (1904) (including attorney's fees but not costs in judgment); Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference, 166 F. Supp. 163, 168-73 (E.D. Pa. 1958) (same), *aff'd,* 273 F.2d 218 (3d Cir. 1959), *rev'd on other grounds,* 365 U.S. 127 (1961); *cf.* Clapper v. Original Tractor Cab Co., 270 F.2d 616, 627 (7th Cir. 1959) ("We cannot agree that attorneys' fees are meant to be thus included as an item of the usual 'costs' taxed against the unsuccessful litigant."), *cert. denied,* 361 U.S. 967 (1960).

330 416 U.S. 696 (1974); *see supra* notes 237-49 and accompanying text.

fee shifting statutes[331] raises another issue concerning the relationship between statutory fees and appeals:[332] when a district court grants attorney's fees before judgment on the merits, can a party appeal the award immediately or must the party defer appeal until the case is concluded? An intuitive analysis based on *White* might proceed as follows: because attorney's fees are collateral and independent and therefore separately appealable when awarded after judgment, they are also appealable before a final determination of the merits. That intuitive conclusion is at least superficially buttressed by the Supreme Court's decision in *Trustees v. Greenough.*[333] In that case, an appeal of an award of attorney's fees was permitted before judgment on the merits because the fee issue was "a collateral one, having a distinct and independent character."[334] An analysis of the situation, however, reveals that such a conclusion is incorrect and further demonstrates that reliance on the collateral and independent theory of *White* to sever fees from the merits is less than desirable.[335]

As the lower federal courts have recognized,[336] there is even less reason to sever prejudgment fees from the merits than postjudgment fees. One reason for this is that consolidation of appeals of prejudgment

---

331 Congress enacted the Fees Awards Act two years after *Bradley,* and authorized recovery of interim fees. *See supra* note 249 and accompanying text.

332 This issue has only surfaced recently and infrequently, probably because interim fee awards are relatively uncommon. Note, *supra* note 249, at 915; *see* Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act,* 80 COLUM. L. REV. 346, 357-59 (1980).

333 105 U.S. 527 (1881); *see infra* text accompanying notes 412-21.

334 *Greenough,* 105 U.S. at 531.

335 The conclusion that interim fee awards should not generally be appealable also demonstrates the inapplicability of the collateral order doctrine to sanction separate appeals of fees and the merits. *See infra* text accompanying notes 484-91.

336 *See* Hastings v. Maine-Endwell Cent. School Dist., 676 F.2d 893 (2d Cir. 1982); Bradford Exch. v. Trein's Exch., 644 F.2d 682 (7th Cir. 1981); Wheeler v. Anchor Continental, Inc., 622 F.2d 94 (4th Cir. 1980); Ruiz v. Estelle, 609 F.2d 118 (5th Cir. 1980); *cf. In re* Underwriters at Lloyds, 666 F.2d 55 (4th Cir. 1981) (appeal of attorney's fees awarded as sanctions under Federal Rule of Civil Procedure 37 may not be taken until final judgment). *Contra* Ohio v. Arthur Anderson & Co., 570 F.2d 1370 (10th Cir.), *cert. denied,* 439 U.S. 833 (1978).

In *Ruiz* and *Bradford Exchange,* the Fifth and Seventh Circuits held they did not have jurisdiction over an appeal of a prejudgment fee award, even though both circuits had previously sanctioned uncoupling postjudgment fees from the merits by subscribing to the fees as costs theory. *See supra* note 100 and accompanying text. In *Bradford Exchange,* the Seventh Circuit justificd its holding by citing two cases that involved "similar situations," where the courts rejected bifurcated appeals. 644 F.2d at 683. Both of those cases, Richerson v. Jones, 551 F.2d 918 (3d Cir. 1977), and Union Tank Car Co. v. Isbrandtsen, 416 F.2d 96, 97 (2d Cir. 1969), had held that a decision *on the merits* was not appealable until attorney's fees had been determined, a position the Seventh Circuit had previously rejected when it accepted the fees as costs doctrine. *See* Bond v. Stanton, 630 F.2d 1231 (7th Cir. 1980), *cert. denied,* 454 U.S. 1063 (1981); Terket v. Lund, 623 F.2d 29 (7th Cir. 1980). Well after *Bradford Exchange,* the Seventh Circuit held that attorney's fees awarded in a trademark infringement case were diffcrent than civil rights fees and had to be resolved before the merits could be appealed. Hairline Creations, Inc. v. Kefalas, 664 F.2d 652 (7th Cir. 1981).

fees and the merits is substantially less likely to occur than when fees are awarded after the merits.[337] As with postjudgment fees, when various forms of relief are awarded seriatim, delay of appellate review until the trial court has resolved all aspects of relief generally promotes both efficiency in judicial administration and fairness to the parties.[338] Furthermore, an interim fee award is unlikely to be the final word on the amount of attorney's fees awarded during the district court's initial consideration of the case.

The Supreme Court in *White* did not purport to address the question of interim fees. The Court formulated the issue before it as whether a "postjudgment request" for fees pursuant to the Fees Awards Act "is a 'motion to alter or amend the judgment,' subject to the 10-day timeliness standard of Rule 59(e),"[339] and the opinion gives little guidance for resolving the question of interim fees. Given the Court's concern for avoiding the filing of protective fee requests and the resulting nonproductive litigation over them, it is ironic that the *White* decision is likely to spawn protective appeals of interim fee awards by attorneys concerned that a failure to appeal the award may preclude appellate review of it later with the merits appeal.[340]

The one situation in which deferring appellate review of an interim fee award becomes problematic is where the party paying the award[341]

---

337 This is so because the time span between an award of interim fees and final resolution of the merits frequently will be substantially longer than the gap between the merits and postjudgment fees. *See supra* notes 180, 200.

338 *See supra* text accompanying notes 37-62.

339 *White,* 455 U.S. at 446-47.

340 *See, e.g.,* Bradford Exch. v. Trein's Exch., 644 F.2d 682, 683 (7th Cir. 1981).

341 In order to effectuate its purpose, *see supra* text accompanying notes 246-49, an interim fee award must be effective immediately. Ironically, the conclusion that the order awarding fees is unappealable may, in the event of a recalcitrant defendant, make execution pursuant to Federal Rule of Civil Procedure 69(a) unavailable; execution is only available for judgments. *See* Wilson v. Daniel, 3 U.S. (3 Dall.) 401 (1798); International Controls Corp. v. Vesco, 535 F.2d 742, 744-45 (2d Cir. 1976), *cert. denied,* 434 U.S. 1014 (1978); Redding & Co. v. Russwine Constr. Co., 417 F.2d 721, 727 (D.C. Cir. 1969); Biggins v. Oltmer Iron Works, 154 F.2d 214, 215-16 (7th Cir. 1946). The unappealable interim fee award is not a judgment. *In re* Long Island Properties, Inc., 42 F. Supp. 323, 325 (S.D.N.Y. 1941); FED. R. CIV. P. 54(a). Under such circumstances, the inadequacy of legal remedies would seem to justify an equitable order requiring payment. The order would be enforceable by contempt or other equitable sanctions such as attachment and sequestration. *Cf., e.g.,* Spain v. Mountanos, 690 F.2d 742 (9th Cir. 1982) (equitable authority used by court to effectuate payment of attorney's fees by recalcitrant state); *In re* International Syss. & Controls Corp. Sec. Litig., 94 F.R.D. 640 (S.D. Tex. 1982) (attorney's fee awarded as discovery sanction to be paid within 30 days on penalty of contempt). *But see* Governor Clinton Co. v. Knott, 120 F.2d 149, 153 (2d Cir.), *appeal dismissed,* 314 U.S. 701 (1941). There is precedent authorizing immediate execution on a civil contempt citation. New York Tel. Co. v. Communication Workers of Am., AFL-CIO, 445 F.2d 39 (2d Cir. 1971).

The appealability of such an equitable order under § 1292(a)(1), because of its injunctive nature, probably depends on whether the attorney's fees are incidental to the other relief sought in the case, as suggested by *White,* or whether they are relief. In the former case, the notion that injunctive orders incidental to the relief sought are not within the scope of

is concerned about recoupment. If the party later obtains reversal or reduction of the award on appeal,[342] delayed review may be a futile exercise.[343] However, the simple device of requiring the party recovering interim fees to post a bond guaranteeing repayment in the event of reversal[344] ameliorates much of this problem.[345] Should the posting of a bond be infeasible, an immediate appeal should be available.

Two judicially created exceptions to the final decision requirement of section 1291 would probably sanction such an appeal. In *Cohen v. Beneficial Industrial Loan Corp.*,[346] the Court announced the "collateral order" exception[347] to the final decision requirement. Although the

---

§ 1292(a)(1) would preclude immediate appeal. Hastings v. Maine-Endwell Cent. School Dist., 676 F.2d 893, 896 (2d Cir. 1982); Weight Watchers, Inc. v. Weight Watchers Int'l, Inc., 455 F.2d 770, 774 (2d Cir. 1972); *see* Halderman v. Pennhurst State School & Hosp., 673 F.2d 645, 645-46 (3d Cir. 1982) (Seitz, J., concurring); *cf.* Andre, *The Final Judgment Rule and Party Appeals of Contempt Orders: Time For a Change,* 55 N.Y.U. L. REV. 1041, 1093-97 (1980) (hardship caused by imposition of fines for contempt that may be executed on immediately point to need for immediate appeal).

342 *See, e.g.,* Ruiz v. Estelle, 609 F.2d 118 (5th Cir. 1980); Nicodemus v. Chrysler Corp., 445 F. Supp. 559, 560 (N.D. Ohio 1977). In Blaylock v. Cheker Oil Co., 547 F.2d 962 (6th Cir. 1976), the court of appeals permitted immediate appellate review of a contempt citation imposing a $10,000 per diem fine on the defendant, payable to the plaintiff. The court noted that the defendant had been "ordered to pay an amount far in excess of any proven damages—not into court, but to the plaintiff—and no bond was required." *Id.* at 966. Professor Andre has quite reasonably suggested that this statement reveals the court's concern regarding the ineffectiveness of delayed appellate review. Andre, *supra* note 341, at 1094 n.276.

343 In other areas, most notably civil contempt, the traditional view has been that immediate appellate review is unavailable even though delayed review may be ineffective. Doyle v. London Guar. & Accident Co., 204 U.S. 599 (1907). The refusal to permit immediate review of a civil contempt order has been criticized by commentators, Andre, *supra* note 341, at 1091; Redish, *supra* note 39, at 123-24, and is subject to a number of exceptions, *e.g.,* New York Tel. Co. v. Communication Workers of Am., AFL-CIO, 445 F.2d 39 (2d Cir. 1971) (collateral order doctrine); Vincent v. Local 294, Int'l Bhd. of Teamsters, 424 F.2d 124 (2d Cir. 1970) (civil contempt order after conclusion of principal action immediately appealable). The doctrine may be undergoing evisceration, at least where the underlying order affects a significant interest of the contemnor or the contempt sanction imposes a substantial hardship. Halderman v. Pennhurst State School & Hosp., 673 F.2d 628, 636 (3d Cir. 1982); *In re* Attorney Gen., 596 F.2d 58, 60 (2d Cir. 1979), *cert. denied,* 444 U.S. 903 (1979); New York Tel. Co. v. Communication Workers of Am., AFL-CIO, 445 F.2d 39 (2d Cir. 1971); Andre, *supra* note 341, at 1063 n.138, 1084-1108.

344 Alternatively, the attorney may be required to post a bond, especially in a case where, because of the contractual arrangement with the client, the attorney effectively has the economic interest in the recovery of fees.

345 *See* Nicodemus v. Chrysler Corp., 445 F. Supp. 559, 560 (N.D. Ohio 1977); Patterson v. American Tobacco Co., 11 Fair Empl. Prac. Cas. (BNA) 586 (E.D. Va. 1975).

346 337 U.S. 541 (1949).

347 The collateral order doctrine has been described as both an exception to the final decision requirement of § 1291 and an interpretation of it. R. STERN, APPELLATE PRACTICE IN THE UNITED STATES 69-70 (1981).

This characterization is of little practical importance except that it may affect the question of whether a failure to appeal immediately from a collateral order would preclude later appellate review at the conclusion of the entire case. If viewed as an exception, later review might be permitted. This situation is analogous to review of injunctive relief on appeal from a final decision, which is permitted despite the exception permitting immediate review con-

merits of the case were in an early stage at the time of appeal, the Court sanctioned appellate review of an order refusing to require the plaintiff in a shareholders' derivative action to post security for costs. The Court referred to a number of attributes of the challenged order: the trial court's decision on the matter was concluded; the order was neither enmeshed in nor affected by the resolution of the merits; refusing immediate review might well deny defendant any effective review thereby resulting in "irreparable harm"; the rights asserted were too important to be denied review; and the issue involved a serious and unsettled question.[348] Although the precise contours of *Cohen* are amorphous,[349] the combination of two factors—a significant right (ownership of the amount of interim fees awarded is analogous to the right in *Cohen* to be assured of recovery of costs), and the inability to review effectively the order on appeal (which is posited)—should be sufficient to permit appeal.[350]

In addition to the collateral order doctrine, *Forgay v. Conrad,*[351] in which the court created one of the first exceptions to the final decision rule, would appear applicable to an interim fee award where recoupment is in doubt. In *Forgay,* the Court permitted an appeal of a nonfinal

---

tained in 28 U.S.C. § 1292(a)(1) (1976). If viewed as an interpretation, once the time for appeal of the collateral order expired, no review would be available.

348 *Cohen,* 337 U.S. at 546-47.

349 *Compare, e.g.,* Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) (relying in part on efficacy of appellate review after final judgment in preserving appellant's rights as grounds for refusing to permit appeal under collateral order doctrine of order denying certification of class action) *with* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (authorizing appeal of order permitting published notice rather than individual notice for substantial portion of rule 23(b)(3) class and allocating 90% of notice costs to defendant without reference to irreparable injury). *See also* Redish, *supra* note 39, at 111-13; Note, *supra* note 258, at 364-66; Comment, *The Collateral Order Doctrine After* Firestone Tire & Rubber Co. v. Risjord: *The Appealability of Orders Denying Motions for Appointment of Counsel,* 62 B.U.L. REV. 845, 854-55 (1982); Comment, *Collateral Orders and Extraordinary Writs as Exceptions to the Finality Rule,* 51 NW. U.L. REV. 746, 749-51 (1957).

350 There is language in Hastings v. Maine-Endwell Cent. School Dist., 676 F.2d 893, 896 (2d Cir. 1982), that suggests an interim award of fees could never be appealed under the *Cohen* rationale because the amount is not final and may be adjusted in the final award, presumably upward, to reflect additional services by the attorney. But the right to fees and the amount awarded to that point had been fixed and were not likely to be adjusted. The district court's *power* to reconsider the order does not prevent it from being appealable as a collateral order. Otherwise, no order entered before final judgment and therefore theoretically subject to reconsideration could ever fall within the *Cohen* doctrine.

Also, given the decision in *White,* the requirement that the order be completely separate from the merits would appear satisfied. To the extent one concludes that the court was wrong in *White,* or that the "collateral and independent" characterization by the *White* Court is not identical to the *Cohen* requirement that the challenged order be collateral to the merits, *but see* Note, *supra* note 258, at 365 n.123, appeal would still be permitted either under *Forgay v. Conrad, see infra* text accompanying notes 351-54, or under 28 U.S.C. § 1292(a)(1) because the fees would be an element of the ultimate relief. *See supra* notes 257-58 and accompanying text.

351 47 U.S. (6 How.) 201 (1848).

order directing the defendants to deliver real property and slaves to the complainant assignee of a bankrupt for distribution to the bankrupt's creditors. The Court reasoned that the property and slaves would be unrecoverable if a belated appeal resulted in a reversal. Although perhaps somewhat overbroad, the *Forgay* Court's statement of its holding permitting an immediate appeal, "if, by an interlocutory order or decree, the party seeking an appeal is required to deliver up property which he claims, *or to pay money which he denies to be due,*"[352] together with the impotence of a delayed appeal, support interlocutory review.[353]

2. *Pendent Appellate Jurisdiction for Interim Fees*

Courts have not yet squarely addressed the availability of pendent appellate jurisdiction to review an award of attorney's fees when an interlocutory appeal of some other aspect of the case is sanctioned by one of the exceptions to section 1291.[354] When faced with the more general issue of requests to review an aspect of the case unrelated to the interlocutory matter that conferred appellate jurisdiction, the courts have reached conflicting conclusions without any reconciliation.[355]

The essential tension involves two conflicting concerns. Efficiency is often promoted by reviewing an otherwise unappealable order that may have a substantial impact on the case in the same appellate proceeding with another order of the trial court that is appealable as of right.[356] Yet permitting such review may encourage a party to take an appeal that would not otherwise be taken, in order to obtain pendent review of an unappealable order. Thus, in *Abney v. United States,*[357] the Supreme Court, although permitting interlocutory review of a denial of defendant's double jeopardy claim, refused to permit pendent review of other orders because "[a]ny other rule would encourage criminal de-

352 *Id.* at 205 (emphasis added).

353 *But see* Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 126 (1945) (construing *Forgay* as involving two independent and separable disputes, one involving rights to property and one involving an accounting).

354 Such exceptions would include 28 U.S.C. § 1292(a)(1), (b) (1976); the All Writs Act, 28 U.S.C. § 1651 (1976); and the collateral order doctrine.

355 *Compare* Abney v. United States, 431 U.S. 651 (1977) (sanctioning appeal of challenge to indictment on double jeopardy grounds, but refusing to permit review of other claims that indictment should have been dismissed) *with* Union Tool Co. v. Wilson, 259 U.S. 107 (1922) (permitting review of nonfinal civil contempt finding because contempt was also partly criminal, which is final decision and was appealed) *and* United States v. Spectro Foods Corp., 544 F.2d 1175, 1179 (3d Cir. 1976) (reviewing civil contempt order because preliminary injunction, reviewable pursuant to 28 U.S.C. § 1292(a)(1) (1976), was appealed).

356 Once an interlocutory appeal is permitted, the trial proceedings are disrupted, the expense of prosecuting an appeal is incurred, and an appellate court's study of the case becomes necessary. The marginal additional cost of injecting another issue for review may well be overcome by avoiding otherwise wasted efforts in the trial court or the need for subsequent appellate review of the same issue in a later appeal.

357 431 U.S. 651 (1977).

fendants to seek review of, or assert, frivolous double jeopardy claims in order to bring more serious, but otherwise nonappealable questions to the attention of the courts of appeals prior to conviction and sentence."[358]

On the other hand, in *Deckert v. Independence Shares Corp.*,[359] the Court approved the court of appeals' review of a denial of a motion to dismiss, which was unappealable, in connection with the appeal of a preliminary injunction. After acknowledging the jurisdiction of the court of appeals to review the grant of the preliminary injunction, the Court stated: "However, this power is not limited to mere consideration of, and action upon, the order appealed from. 'If insuperable objection to maintaining the bill clearly appears, it may be dismissed and the litigation terminated.' "[360] At least one court has viewed the pendent appeal issue, probably correctly, as a matter of discretion rather than jurisdictional authority.[361]

In the specific context of attorney's fees, pendent review of the amount of fees already awarded generally would not be desirable because the remaining proceedings would require an additional fees award.[362] However, review of whether fees should be awarded vel non might be desirable,[363] particularly because this determination will often be closely related to review of the appealable interlocutory order, as would be the case, for example, with a preliminary injunction. A reversal on appeal of whether fees should be awarded vel non would save substantial time in assessing fees for future proceedings in the district court.[364]

---

358 *Id.* at 663.

359 311 U.S. 282 (1940).

360 *Id.* at 287 (quoting Mecanno, Ltd. v. John Wanamaker, N.Y., 253 U.S. 136, 141 (1920)).

361 Gaulter v. Capdeboscq, 594 F.2d 127, 129 (5th Cir. 1979). The courts of appeals are authorized after ruling on a "judgment, decree, or order" that is "lawfully brought before it for review" to remand the cause and, in addition to directing the entry of an appropriate order, to "require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106 (1976). Implicit within this power may be the discretion to examine aspects of the case other than those directly bearing on the order or judgment appealed.

362 Gaulter v. Capdeboscq, 594 F.2d 127, 129 (5th Cir. 1979). *But see supra* text accompanying notes 341-45.

363 *But see* Paeco, Inc. v. Applied Moldings, Inc., 562 F.2d 870, 878-80 (3d Cir. 1977).

364 This is precisely what the Supreme Court did in Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970). A § 1292(b) interlocutory appeal on the issue of liability was permitted and subsequently reviewed in the Supreme Court. The Court went on to decide the plaintiff's entitlement to an award of attorney's fees stating: "We believe that the question of reimbursement for these expenses has a sufficiently close relationship to the determination of what constitutes a cause of action under § 14(a) [of the Securities Exchange Act of 1934] that it is appropriate for decision at this time." *Id.* at 390 n.13. Because the Court's jurisdiction pursuant to 28 U.S.C. § 1254 depends on the jurisdiction of the court of appeals, the Court's

D. Defendants Seeking Statutory Fees

Some federal statutes limit fee awards to a successful plaintiff;[365] others, however, do not distinguish between plaintiffs and defendants in sanctioning fee shifting. For example, both the Fees Awards Act and title VII speak generically of the "prevailing party."[366] Such statutes necessitate consideration of the appropriate relationship between appealability and an award of statutory attorney's fees to a defendant.[367]

Where there is statutory authorization for recovery of fees by a defendant, courts have not distinguished between the procedure for consideration of defendants' fees and plaintiffs' fees. Most have treated defendants the same as plaintiffs without discussion.[368] Even those cases that have discussed the difference have concluded that similar treatment is appropriate.[369] Although the party seeking fees in *White* was the plaintiff, the Supreme Court relied heavily on the Eighth Circuit's opinion in *Obin II,* where the defendants sought fees. In prescribing the relationship between statutory fees and the merits, neither court addressed the parameter of which party was seeking fees. A fair reading of *White* indicates that defendants' fees are also collateral and independent from the merits decision.[370] As to the unanswered question of whether the

---

statement necessarily implies that the court of appeals would also have jurisdiction to decide the fees question in the § 1292 appeal of liability.

In *Mills* there was no concern that the § 1292 appeal was merely a pretext to obtain review of attorney's fees: the issue was not raised until after the Supreme Court granted certiorari, and then by the United States in an amicus brief. Brief for the United States as Amicus Curiae at 19-24, Mills v. Electric Auto-Lite, 396 U.S. 375 (1970). Although the Court's "sufficiently close relationship" rationale might be criticized as dissembling in light of Trustees v. Greenough, 105 U.S. 527 (1881), Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939), and the Court's obvious desire to reach out and authorize attorney's fees in shareholder derivative suits, the decision makes good procedural sense. Had the Court declined to address the issue on interlocutory appeal, another independent proceeding in the Supreme Court, with all its attendant expense and delay, would have been required before final resolution of the matter. The same considerations might justify a court of appeals reviewing an attorney's fee issue in conjunction with an interlocutory appeal.

365 *E.g.,* Clayton Act § 4, 15 U.S.C. § 15 (1982); Fair Labor Standards Act § 16, 29 U.S.C. § 216(b) (Supp. V 1981).

366 Civil Rights Attorney's Fees Awards Act of 1976, § 2, 42 U.S.C. § 1988 (Supp. V 1981); Civil Rights Act of 1964, § 706, 42 U.S.C. § 2000e-5(k) (1976); *see also, e.g.,* Securities Exchange Act of 1934, § 9, 15 U.S.C. §§ 78i(e), 78r(a) (1982); Federal Water Pollution Control Act § 505, 33 U.S.C. § 1365(d) (1976); Clean Air Act § 304, 42 U.S.C. § 7604(d) (Supp. V 1981).

367 Of course, even where there is no statutory authority a defendant may still seek an award of attorney's fees based on the equitable "bad faith" exception. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59 (1975); Robinson v. Ritchie, 646 F.2d 147, 148 (4th Cir. 1981).

368 *See* Obin v. District No. 9 of the Int'l Ass'n of Machinists, 651 F.2d 574 (8th Cir. 1981); Jones v. Dealers Tractor & Equip. Co., 634 F.2d 180 (5th Cir. 1981); DuBuit v. Harwell Enters. Inc., 540 F.2d 690 (4th Cir. 1976).

369 *See* Crowder v. Telemedia, 659 F.2d 787, 788-89 (7th Cir. 1981); Glass v. Pfeffer, 657 F.2d 252, 255 (10th Cir. 1981).

370 This is as much a consequence of what the Court failed to say as it is a consequence of

costs provisions of the federal rules should govern fees,[371] rule 54(d) does not distinguish between plaintiffs and defendants in prescribing the procedure for recovering costs.

Severing defendants' fees from the merits produces many of the disadvantages previously discussed in the context of plaintiffs seeking fees. These include enlarging the number of piecemeal appeals;[372] requiring the parties to decide whether to appeal the merits without full knowledge of the scope of financial liability;[373] and creating an even greater danger of unfair surprise.[374] The same effect of reducing procedural barriers to recovery of fees at the cost of foreclosing appellate review of the merits would also exist.[375] Treating attorney's fees sought by defendants as relief would obviate these problems, but there are differences between plaintiffs and defendants that merit examination before one reaches such a conclusion.

Even though the language of title VII and the Fees Awards Act does not distinguish between prevailing plaintiffs and defendants for purposes of awarding fees, the threshold for an award is quite different. The district court has discretion in deciding whether to award fees, but prevailing plaintiffs "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."[376] In *Christiansburg Garment Co. v. EEOC,*[377] however, the Supreme Court limited defendants' recovery of fees in title VII cases to those situations where

---

what the Court did say. The failure to mention that the defendants were seeking fees in *Obin II,* while embracing its holding, suggests that the Court found no significance in the difference. The Court also cited Glass v. Pfeffer, 657 F.2d 252 (10th Cir. 1981), without mentioning that the issue in that case involved defendants seeking fees. *White,* 455 U.S. at 450 n.9.

371 *See supra* text accompanying notes 268-73.

372 *See supra* text accompanying notes 145-93.

373 *See supra* text accompanying notes 194-206. To the extent that the plaintiff is successful in obtaining appellate review of the trial court's determination that her case was sufficiently meritless to justify imposing attorney's fees on her, this concern is substantially ameliorated.

374 *See supra* note 194. This risk is considerably more substantial when a defendant is seeking attorney's fees. Because of the more restrictive threshold, *see infra* text accompanying notes 376-80, a plaintiff would be less likely to anticipate defendant's request for fees, although in some cases a defendant may have used the possibility of seeking fees as a strategic device during the litigation process. Although the *White* Court noted that fees might be properly denied where the request results in unfair surprise or prejudice, 455 U.S. at 454, imposing such a draconian sanction, particularly given the lack of any clear guidance on appropriate time limitations, appears less than desirable. *But see* Gary v. Spires, 634 F.2d 772, 773 (4th Cir. 1980).

375 *See* Terket v. Lund, 623 F.2d 29, 32-33 (7th Cir. 1980); *supra* text accompanying notes 133-39.

376 Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968) (decided under the Civil Rights Act of 1964, § 204, 42 U.S.C. § 2000a-3(b) (1976)); *accord* Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975) (decided under Civil Rights Act of 1964, § 706, 42 U.S.C. § 2000e-5(k) (1976); S. REP. NO. 1011, 94th Cong., 2d Sess. 4-5, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5908, 5912 (Civil Rights Attorney's Fees Awards Act of 1976, § 2, 42 U.S.C. § 1988 (Supp. V 1981)); *see supra* note 158.

377 434 U.S. 412 (1978).

the plaintiff had proceeded with a "frivolous, unreasonable, or groundless" claim.[378] Carefully explaining that this standard was not as stringent as the equitable bad faith standard, the Court nevertheless cautioned against Monday-morning quarterbacking in assessing the lack of foundation in the plaintiff's claim and required that the district courts assess the validity of the plaintiff's case as of the time of filing.[379] Subsequently, in *Hughes v. Rowe,*[380] the Court adopted the *Christiansburg* standard to govern fee awards to prevailing defendants under the Fees Awards Act.

The generally higher threshold for recovery of fees by a defendant suggests that different procedural treatment may be appropriate. The overlap between the merits and the inquiry into whether the defendant may recover fees is more attenuated than when a successful plaintiff seeks fees.[381] It might also be contended that it is difficult to conceptualize attorney's fees as relief when awarded to a defendant,[382] because the defendant is asserting no claim other than one based on the plaintiff's pursuit of a frivolous claim. Finally, even if the functional similarity between attorney's fees and other monetary relief outweighs these differences,[383] in the case of a defendant asserting no claim other than one for attorney's fees there is no explicit corollary to the requirement of rule 8(a)(3) of the Federal Rules of Civil Procedure that a claim for relief contain "a demand for judgment for the relief to which [the party] deems himself entitled."

Despite these differences, the case for tying defendants' fees to the merits is strong. The connection between the inquiry on fees and the merits may be attenuated, but there is still considerable overlap. The defendant, of course, must prevail on the merits. Although the inquiry into whether the plaintiff's claim was sufficiently meritless to justify the defendant's fee request may require consideration beyond that necessary to decide the merits, the court still must parse the plaintiff's claim to some extent. Frequently the inquiry necessary to resolve the merits will be sufficient to decide whether defendant has satisfied the threshold for recovery of fees.[384] In addition, the standards for setting the amount of fees do not vary based on which party obtains the award.[385] Despite the

---

378 *Id.* at 422.

379 *Id.* at 421-22.

380 449 U.S. 5 (1980).

381 *See supra* note 163.

382 This problem did not phase the Seventh Circuit in Hairline Creations, Inc. v. Kefalas, 664 F.2d 652 (7th Cir. 1981). In *Kefalas,* the court relied on the remedial nature of attorney's fees awarded to a plaintiff who has established a trademark violation pursuant to the Lanham Act in holding that fee requests pursuant to that statute be made by rule 59(e) motion, even though it was the *defendant* who was seeking fees.

383 *See supra* text accompanying notes 145-63.

384 *See, e.g.,* Glass v. Pfeffer, 657 F.2d 252, 256-57 (10th Cir. 1981).

385 *See, e.g.,* Jones v. Dealers Tractor & Equip. Co., 634 F.2d 180, 182 (5th Cir. 1981);

lack of an explicit device by which a defendant may assert a prejudgment claim for fees, either a flexible reading of the Federal Rules,[386] or the adoption of a local rule, could be used to require that a defendant make a prejudgment request for statutory attorney's fees or seek fees after judgment by way of rule 59(e).

III
BAD FAITH FEES

The bad faith exception to the American rule traces its genesis to the power of the Chancellor to tax costs in equity cases. Although there is some dispute whether this power was conferred by statute[387] or derived from the inherent power of the court,[388] federal jurisprudence has accepted the doctrine as another arrow in the court's quiver to manage litigation in an efficient and just manner.[389]

The accepted standard for awarding bad faith attorney's fees re-

---

Whiten v. Ryder Truck Lines, 520 F. Supp. 1174, 1177 (M.D. La. 1981). In Durrett v. Jenkins Brickyard, Inc., 678 F.2d 911, 917 (11th Cir. 1982), the Eleventh Circuit reaffirmed that the standards for awarding fees to defendants are the same as for plaintiffs, although a court could also consider additional factors, such as the plaintiff's limited financial resources. *See also* Faraci v. Hickey-Freeman Co., 607 F.2d 1025 (2d Cir. 1979) (reducing district court's award in light of plaintiff's impoverished circumstances); Sek v. Bethlehem Steel Corp., 463 F. Supp. 144 (E.D. Pa. 1979) (reducing lodestar based on plaintiff's ability to pay).

386 Several possibilities, none completely satisfactory, exist. First, a defendant seeking fees might be viewed as asserting a counterclaim, which would then be subject to Federal Rule of Civil Procedure 8(a)(3). *Cf.* Varnes v. Local 91, Glass Bottle Blowers Ass'n, 674 F.2d 1365 (11th Cir. 1982) (amendment of complaint to seek attorney's fees on equitable theory constituted a new "claim for relief" for purposes of rule 5). *But see* Durrett v. Jenkins Brickyard, Inc., 678 F.2d 911, 914 n.3 (11th Cir. 1982). Second, although rule 8(a)(3) does not explicitly apply to a defendant's answer, its applicability might be implied, thus permitting a defendant to raise and preserve a statutory fee claim in her answer. *See, e.g.,* Glass v. Pfeffer, 657 F.2d 252 (10th Cir. 1981); EEOC v. St. Louis-San Francisco Ry., 651 F.2d 718 (10th Cir. 1981). Finally, a defendant might assert such a claim in a prejudgment motion.

387 Stallo v. Wagner, 245 F. 636, 638 (2d Cir. 1917) (citing 17 Rich. 2, ch. 6 (1393), as authorizing recovery of attorney's fees from persons who brought groundless suits in Chancery).

388 Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 164 (1939).

389 The first clear expression of the bad faith exception by the Supreme Court was in Newman v. Piggie Park Enters., 390 U.S. 400, 402 n.4 (1968), where the Court stated: "[I]t has long been held that a federal court may award counsel fees to a successful plaintiff where a defense has been maintained 'in bad faith, vexatiously, wantonly, or for oppressive reasons.' " (citations omitted). Some authorities cite even earlier Supreme Court cases as sanctioning bad faith fees. *See* Comment, *Theories of Recovering Attorney's Fees: Exceptions to the American Rule,* 47 UMKC L. REV. 566, 569-70 (1979) (citing Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939) and Vaughan v. Atkinson, 369 U.S. 427 (1962)); *see also* Pennywit v. Eaton, 82 U.S. (15 Wall.) 382 (1872) (awarding 10% damages for taking an appeal for delay purposes). Decisions subsequent to *Newman* have reaffirmed this power, including the power to require an attorney to pay counsel fees. Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980); Hutto v. Finney, 437 U.S. 678 (1978); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975). For a survey of cases in which courts have applied the bad faith exception, see Note, *Attorney's Fees and the Federal Bad Faith Exception,* 29 HASTINGS L.J. 319 (1977); Note, *supra* note 148, at 351-54; Comment, *supra,* at 569-73.

quires that the party or attorney[390] against whom fees are imposed acted in "bad faith, vexatiously, wantonly, or for oppressive reasons,"[391] or with that classic onomatopoeic redundancy, "obdurate obstinacy."[392] This standard is not dissimilar to the *Christiansburg* standard for awarding fees to a prevailing defendant when the plaintiff's claim is "frivolous, unreasonable or groundless."[393] Both require something more than that the party against whom fees are assessed was ultimately unsuccessful.[394]

There are, however, some differences between statutory fees and bad faith fees that are relevant to an analysis of the appropriate procedural treatment of the latter. The bad faith standard includes a scienter requirement not present in *Christiansburg,*[395] and probably requires a demonstration of somewhat more egregious circumstances as well.[396] Thus, bad faith fees require yet a more stringent threshold finding than statutorily authorized defendants' fees.

More significantly, the circumstances justifying such fees vary considerably from those underlying the award of statutory fees. Bad faith fees are applicable in a wide variety of situations and may be recoverable by either party based on conduct that occurs before litigation begins, or for conduct wholly unrelated to the merits that does not begin until well after litigation is underway.[397] Indeed, bad faith fees may be awarded against a *prevailing* party who asserted a separate claim or defense that had sufficient indications of harassment or oppression for a court to find willful abuse of the judicial process.[398] The bad faith exception is ultimately a collection of several different rationales and justifications for shifting fees from one party to another, all of which have in common circumstances sufficiently egregious to impose attorney's fees on the wrongdoer.[399] Thus, unlike the case with statutory fees, when the

---

390 *See* Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980).

391 F.D. Rich Co. v. United States *ex rel.* Industrial Lumber Co., 417 U.S. 116, 129 (1974).

392 Bradley v. School Bd., 345 F.2d 310, 321 (4th Cir. 1965).

393 Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978).

394 *See id.* at 421-22; Runyon v. McCrary, 427 U.S. 160, 182-84 (1976).

395 *Compare Christiansburg,* 434 U.S. at 421 (district court may award attorney's fees to prevailing defendant in title VII case even though plaintiff's action not brought in subjective bad faith) *with* Roadway Express, Inc. v. Piper, 447 U.S. 752, 766-67 (1980) (bad faith exception applies where party or attorney willfully abuses the judicial process).

396 *See* Durrett v. Jenkins Brickyard, Inc., 678 F.2d 911 (11th Cir. 1982).

397 *See* Hall v. Cole, 412 U.S. 1, 15 (1973); Wright v. Jackson, 522 F.2d 955, 958 (4th Cir. 1975).

398 McEnteggart v. Cataldo, 451 F.2d 1109, 1112 (1st Cir. 1971) (fees awarded against prevailing party), *cert. denied,* 408 U.S. 943 (1972).

399 *See supra* note 389. *Compare* Hutto v. Finney, 437 U.S. 678, 691-92 (1978) (comparing bad faith award to fine for contempt of court designed to "vindicate the District Court's authority over a recalcitrant litigant") *with* Vaughan v. Atkinson, 369 U.S. 527 (1962) (attorney's fees awarded to compensate seaman who brought suit to collect maintenance and cure from employer, where employer made no investigation of claim and neither accepted nor rejected it).

propriety of a bad faith fee award is at issue, the inquiry will focus primarily on the conduct and motive of a party,[400] rather than on the validity of the case.[401] In this regard, awards of attorney's fees for discovery abuse are much more analogous to bad faith fees than statutory fees, although fees for discovery abuse are explicitly authorized by the Federal Rules of Civil Procedure.[402]

The argument for tying bad faith fees to the merits is thus less compelling than that for statutory fees. To some extent the threshold determination of whether bad faith fees are recoverable will be independent of the merits. This leads to two conclusions: first, requiring simultaneous consideration in the trial and appellate courts will not greatly advance judicial efficiency; second, fee issues will not affect the decision whether to appeal the merits, because a reversal of the merits will have no impact on fees. Furthermore, the basis of a claim for bad faith fees may not arise until well into the case. Thus, unlike statutory fees, it may be impracticable for parties to request bad faith fees in their pleadings, although the liberal provisions for amending pleadings in the Federal Rules of Civil Procedure largely ameliorate this problem.[403]

Current judicial treatment of appealability where bad faith fees are involved is largely unsatisfactory. Contrary to the implications of the above analysis, the Fifth Circuit, for example, ties bad faith fees to the merits by requiring a petitioner to utilize rule 59(e), yet uncouples statutory fees from the merits by treating them as costs. The Fifth Circuit's explanation in *Knighton v. Watkins,*[404] that bad faith fees are not part of the costs "but should be sought as part of the litigation itself,"[405] is as conclusory as it is unenlightening. In the vast majority of cases, the stat-

---

400 Alternatively, the attorney's conduct may justify an award of bad faith fees. Because of the multiple party provision in Federal Rule of Civil Procedure 54(b), the trial judge could probably sever the remainder of the case from the fee claim against the attorney. *See generally infra* text accompanying notes 462-68. *But see, e.g.,* Reygo Pac. Corp. v. Johnston Pump Co., 680 F.2d 647 (9th Cir. 1982) (permitting appeal by attorney of fee award for discovery abuse); David v. Hooker, Ltd., 560 F.2d 412 (9th Cir. 1977) (permitting immediate appeal by nonparty of attorney's fees award against him for discovery abuse).

The rationale of *Reygo* and *Hooker* that denying immediate appeal would result in no review because a nonparty may not appeal from the final decision in a case is suspect in light of the cases permitting attorneys to intervene and appeal to protect their interest in a fee award. *See, e.g.,* Lipscomb v. Wise, 643 F.2d 319 (5th Cir. 1981).

401 Due process concerns will require a hearing more frequently when bad faith fees are at issue than when statutory fees are sought. *Compare* Roadway Express, Inc. v. Piper, 447 U.S. 752, 766-67 & n.14 (1980) (bad faith fees imposed as sanction should not be assessed without affording opportunity for hearing) *with* National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1330 (D.C. Cir. 1982) (hearing necessary on statutory fee request only where "material issues of fact that may substantially affect the size of the award remain in well-founded dispute").

402 FED. R. CIV. P. 37.

403 FED. R. CIV. P. 15(d).

404 616 F.2d 795 (5th Cir. 1980).

405 *Knighton,* 616 F.2d at 797.

utory fee seeker can anticipate at the genesis of legal proceedings that she will seek to recover fees, even if such recovery is contingent on that party prevailing. By contrast, the bad faith fee seeker typically will not consider requesting fees until after the opponent has begun to engage in conduct that will justify such an award. Often this behavior occurs well into the litigation.[406]

In *Wright v. Jackson,*[407] the Fourth Circuit expressed concern about minimizing piecemeal appeals involving related issues. The court distinguished between bad faith fees dependent on the lower court's assessment of the merits and bad faith fees unrelated to the merits, requiring that the former be decided before an appeal, but sanctioning severing the latter from the merits.[408] Despite its concern about piecemeal appeals, the court illogically also stated that a district court could defer consideration of bad faith fees dependent on the merits until *after* resolution of the appeal of the merits, thereby assuring dual appeals if the parties exercise their right to appeal.

The *Wright* court's distinction based on the relatedness of the grounds for fees and the merits is logically defensible. It ignores, however, the advantages of consolidating all grounds, even unrelated ones, in a unitary appeal. Perhaps more importantly, it may result in greater uncertainty and increased litigation over the category in which a particular bad faith award belongs. Finally, a party may often assert more than one ground as justification for a fee award.[409] Permitting consolidated consideration of such requests would seem sensible, even if the

---

406 A court may award bad faith fees against a party who willfully fails to comply with a court order, Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 426-28 (1923). This raises the possibility that the conduct justifying a bad faith fee award would not occur until after a final decree; separate appeals of the merits and fees would then be a matter of necessity.

407 522 F.2d 955 (4th Cir. 1975).

408 *Id.* at 957-58. The issue in *Wright* arose in the context of the appellate court's sua sponte consideration of whether the district court had jurisdiction to award attorney's fees after a notice of appeal of the merits had been filed. The merits appeal had already been resolved without any explicit consideration of appellate jurisdiction. However, to the extent a party seeks to modify or alter a final judgment, the time limitations of rule 59(e) work in tandem with the judicial doctrine ousting the lower court of jurisdiction after a notice of appeal is filed. *See supra* note 119. For the district court to modify a final judgment, a rule 59(e) motion must be made within 10 days of entry of judgment. Any notice of appeal filed before the disposition of a timely rule 59(e) motion is of no effect, FED. R. APP. P. 4(a)(4); Griggs v. Provident Consumer Discount Co., 103 S. Ct. 400 (1982) (per curiam), and therefore would not affect the district court's jurisdiction.

409 *E.g.,* Hutto v. Finney, 437 U.S. 678, 689 n.13 (1978); Obin v. District No. 9 of the Int'l Ass'n of Machinists, 651 F.2d 574 (8th Cir. 1981); Wright v. Jackson, 522 F.2d 955 (4th Cir. 1975).

Because Congress legislatively overruled the Supreme Court's decision in *Roadway Express* by amending 28 U.S.C. § 1927 (1976) to permit recovery of attorney's fees from a lawyer who "unreasonably and vexatiously" "multiplies the proceedings," Antitrust Procedural Improvements Act of 1980, § 3, 28 U.S.C. § 1927 (Supp. V 1981), it is quite likely that parties will assert both statutory and bad faith grounds to justify a fee award against counsel.

standards for recovery of fees are not identical.[410] Thus, despite the differences between bad faith fees and statutory fees,[411] according the same procedural treatment to both would promote consistency and certainty and appears the most reasonable resolution of the question.

IV
COMMON FUND ATTORNEY'S FEES

Over one hundred years ago, in *Trustees v. Greenough,*[412] the Supreme Court announced the power of an equity court to reimburse a litigant whose efforts on his own behalf had incidentally produced a fund that benefited others. The Court has substantially expanded this power over the last century, and it is widely relied on today in a variety of contexts including, most notably, class actions and shareholder derivative suits.[413] The pervasiveness and impact of common fund attorney's fees, heightened by modern procedural developments such as the class action, have been both roundly condemned and vigorously applauded.[414]

The Supreme Court could not possibly have foreseen the impact of its decision in *Greenough* to reimburse Frederick Vose for attorney's fees and expenses incurred in successfully litigating a claim against the trustees of a fund created to secure the interest and principal on certain railroad bonds of which Vose owned a substantial number. Vose established that the trustees had wasted assets in the fund, and succeeded in having the trustees removed and a receiver appointed, thereby preserving a substantial portion of the fund for the benefit of all bondholders.

Recognizing that it would be unfair for Vose to shoulder all of the litigation expenses, the Court approved recovery of those expenses from the other bondholders. Because the trial court was still administering the fund, payment from the fund represented a convenient method of enforcing Vose's claim. The Court clearly understood that the claim for reimbursement by Vose was asserted against his cobondholders; the existence of the fund simply provided a readily available method of asserting and enforcing that claim.[415]

---

410 *See* Obin v. District No. 9 of the Int'l Ass'n of Machinists, 651 F.2d 574, 579 n.5 (8th Cir. 1981).

411 *See supra* text accompanying notes 395-406.

412 105 U.S. 527 (1881).

413 Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation,* 88 HARV. L. REV. 849, 854-81, 915-29 (1975); Dawson, *supra* note 18, at 1601-12.

414 *See generally, e.g.,* Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review,* 71 COLUM. L. REV. 1 (1971); Miller, *supra* note 20; Simon, *Class Actions—Useful Tool or Engine of Destruction,* 7 LINCOLN L. REV. 20 (1971).

415 It would not only be unjust to him, [to deny reimbursement of fees and expenses beyond taxable costs,] but it would give to the other parties entitled to

After concluding that Vose was entitled to recover from the fund, the Court addressed the issue of determining the proper amount. By comparison with the detailed standards for calculating attorney's fees employed today,[416] the Court's approach was quite simple. The task was made easier still because the claim was asserted by a client who had already incurred and paid the lawyer's fees: Vose was allowed to recover his actual payments.[417]

Unlike the issue of the appropriate procedural relationship between statutory fees and the merits, which festered in the lower courts for a number of years, the Court faced that question head-on in its first common fund decision.[418] At the time of the appeal, the trial court was still administering Vose's lawsuit, and no final decree had been entered. Prior to the Evarts Act,[419] appeals to the Supreme Court required a final decision.[420] The Court began by noting that the circuit court's orders were intended to conclude the issue of Vose's reimbursement, but recognized that this was not sufficient for appealability. The Court continued: "Though incidental to the cause, the inquiry was a collateral one, having a distinct and independent character . . . . [U]nder all the circumstances, we think that the proceeding may be regarded as so far independent as to make the decision substantially a final decree for the purpose of an appeal."[421] Thus the Court established the proposition that a plaintiff's claim for reimbursement of attorney's fees from a common fund was sufficiently independent of the merits to justify a separate appeal.

Four years later, the Court "leaped across a gulf"[422] in *Central Railroad & Banking Co. v. Pettus,*[423] and approved a request for fees made not by the party, but by his attorneys. The suit established a lien on railroad property to secure repayment of bonds owned by clients of the petitioning lawyers and by other unsecured creditors. The attorneys had

---

> participate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself; and if he cannot be reimbursed out of the fund itself, they ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution.

Greenough, 105 U.S. at 532.

416 *See supra* note 167.

417 *Greenough,* 105 U.S. at 537.

418 At that time, the Supreme Court had no discretion over its appellate docket, and it was the only court of review for final decisions in the circuit courts. 1 J. MOORE, J. LUCAS, H. FINK, D. WECKSTEIN & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 0.3[2] (2d ed. 1983).

419 Ch. 517, 26 Stat. 826.

420 The Judiciary Act of 1789 required a final decree or judgment as a prerequisite for Supreme Court review by writ of error of a circuit court decision. Ch. 20, § 22, 1 Stat. 73, 84. That requirement was retained until enactment of the Evarts Act in 1891. *See supra* note 38.

421 *Greenough,* 105 U.S. at 531.

422 Dawson, *supra* note 18, at 1603.

423 113 U.S. 116 (1885).

entered into a fee arrangement with their clients that allowed them to seek additional compensation from any fund established to benefit the other unsecured creditors. The attorneys then reduced the amount of fees they would have otherwise charged their clients. The case was brought as a class action on behalf of all similarly situated unsecured creditors "who should come in and . . . contribute to the expenses of the suit."[424] Because of the undisputed facts regarding the fee agreement, the Court viewed the situation as essentially one in which the client had assigned his right to seek fees to his lawyers in exchange for a reduced fee, thus placing the attorney's fee petition squarely within the perimeters of *Greenough.*

The second leap across the gulf taken by the *Pettus* Court, although largely masked because of the existence of a contingent fee arrangement between attorney and client, was to make a determination of the appropriate compensation for the attorneys. Whereas in *Greenough* the benchmark for determining the amount of the award was established by the fees that the client had actually incurred, no such standard based on a good faith arm's length transaction existed in *Pettus;* the contract between attorney and client was limited to compensating the attorneys for their services on behalf of their clients only. Thus, the task of determining "reasonable compensation," the only standard provided by the Court for valuing the attorneys' efforts on behalf of the class, fell to the Court. Because the attorneys' contract with their clients provided for a fee of five percent of the amount recovered on behalf of the client,[425] the Court simply adopted that formula for the entire recovery, without explaining why the class should be bound by that arrangement,[426] or why it represented "reasonable compensation."[427]

The question of appealability did not arise in *Pettus.* The suit to establish a lien had been brought in state court; when the attorneys petitioned for fees, their petition was removed to federal court. The only issue in the removed proceeding was recovery of attorney's fees.[428]

---

424 *Id.* at 119.

425 The fee agreement also provided for a small retainer that the Court ignored in setting the amount of fees to be paid by the class. *Id.* at 127-28.

426 Such fee arrangements between client and attorney are routinely ignored today in determining common fund fees, Dawson, *supra* note 18, at 1608 & n.34, largely because of the possibility of abuse.

427 As Professor Dawson has remarked, "[r]eports of earlier cases gave few clues as to the standards used in fixing fees in . . . 'common fund' cases . . . ." Dawson, *supra* note 413, at 870.

428 An issue that did arise in the circuit court was whether the attorney's petition was removable. The removal statute at that time, Act of Mar. 3 , 1875, ch. 137, 18 Stat. 470, changed the prior practice of permitting removal of separate controversies and required instead that the entire suit be removed to federal court. Barney v. Latham, 103 U.S. 205, 212-13 (1881). The defendants in *Pettus* moved to dismiss the removed federal action arguing that it was not separately removable. The circuit court denied the motion on the ground that the attorneys' petition was a distinct and separate suit in equity that could be prosecuted inde-

The last and probably most important case in the trilogy that forms the backdrop for the common fund exception to the American rule is *Sprague v. Ticonic National Bank.*[429] Lottie Sprague had established a trust with the defendant bank. Because the bank had use of the principal of the trust, bonds owned by the bank were segregated to secure the trust res. The bank followed the same procedure with fourteen other similar trusts that it administered. The defendant bank was acquired by a second bank, which was subsequently placed in receivership. Sprague brought suit to establish a lien on the proceeds of the sale of the bonds to ensure recovery of the trust funds. After obtaining a favorable decree in the district court, which was ultimately affirmed by both the court of appeals and the Supreme Court, Sprague returned to the district court, seeking reimbursement of the attorney's fees she had paid. She claimed she was entitled to an award of fees because her suit had established the rights of the other trusts to share in the proceeds of the bonds, which were more than sufficient to satisfy all fourteen claims. Both lower courts denied the petition. Justice Frankfurter, however, in a sweeping opinion that has been cited to authorize bad faith fees,[430] as well as a broader power to create exceptions to the American rule in the interest of justice,[431] upheld Sprague's right to recover counsel fees from the other trusts. Although the suit had not established a fund within the trial court's jurisdiction, the benefit conferred on the other trust beneficiaries was sufficient to entitle Sprague to reimbursement. Perhaps unknowingly, Justice Frankfurter sowed the seeds for the common benefit exception, one that is only a short analytical step from the common fund doctrine, but which when extended to its extreme, is almost unlimited.[432] The question of determining the appropriate amount of fees required no scrutiny; only the issue of the power to award fees was before the Court.

After broadly resolving the power of a court of equity to shift the expenses of litigation, Justice Frankfurter addressed the procedural details of the case. The district court had denied the petition for fees on

---

pendently of the underlying state action. Pettus v. Georgia R.R. & Banking Co., 19 F. Cas. 396 (C.C.M.D. Ala. 1879) (No. 11,048).

429 307 U.S. 161 (1939).

430 *See* Comment, *supra* note 389, at 569-70.

431 Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 274-75 (1975) (Marshall, J., dissenting); Doe v. Poelker, 515 F.2d 541, 546 (8th Cir. 1975), *rev'd on other grounds,* 432 U.S. 519 (1977) (per curiam); Wilderness Soc'y v. Morton, 495 F.2d 1026, 1029 (D.C. Cir. 1974), *rev'd,* 421 U.S. 240 (1975); Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281, 1309 (2d Cir. 1973).

432 *E.g.,* La Raza Unida v. Volpe, 57 F.R.D. 94, 101 (N.D. Cal. 1972) (partially relying on common benefit exception to justify award of attorney's fees against several state agencies in a case where plaintiffs obtained injunction precluding construction of state highway project), *aff'd,* 488 F.2d 559 (1973); NAACP v. Allen, 340 F. Supp. 703, 708-09 (M.D. Ala. 1972) (common benefit theory used to justify award of attorney's fees against state officials who had been enjoined from engaging in racially discriminatory practices in hiring state troopers).

the sole ground that because a final judgment on the merits had been entered and appealed, the court lacked jurisdiction to consider the fee petition.[433] The court of appeals affirmed, pointing out the additional ground that the petition for fees was filed at a different term of court than the one in which the district court had rendered its decree.[434] The issue was quite narrow: did the failure of Sprague to seek fees before judgment on the merits foreclose an award? The answer was no:

> We, therefore, hold that the issue in the instant case is sufficiently different from that presented by the ordinary questions regarding taxable costs that it was impliedly covered neither by the original decree nor by the mandates, and that neither constituted a bar to the disposal of the petition below on its merits.[435]

Courts have regarded the result in *Sprague,* that common fund fee requests are collateral to and independent of the merits, and may properly be sought after final judgment, as resolving the procedural relationship between common fund fee requests and the underlying merits.[436] Largely because of that decision, there has been substantially less confusion and litigation over appealability when common fund fees are involved than when statutory or bad faith fees are at issue.[437] Indeed,

---

433 Sprague v. Picher, 23 F. Supp. 59 (S.D. Me.), *aff'd sub nom.* Sprague v. Ticonic Nat'l Bank, 99 F.2d 583 (1st Cir. 1938), *rev'd,* 307 U.S. 161 (1939).

434 Sprague v. Ticonic Nat'l Bank, 99 F.2d 583 (1st Cir. 1938), *rev'd,* 307 U.S. 161 (1939). Before adoption of the Federal Rules of Civil Procedure, the trial courts were only authorized to modify judgments and decrees during the same term of court in which the judgment or decree had been entered. Buckeye Coal & Ry. v. Hocking Valley Ry., 269 U.S. 42, 48 (1925); Cameron v. McRoberts, 16 U.S. (3 Wheat.) 591, 593 (1818).

435 *Sprague,* 307 U.S. at 169.

436 White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445, 451 n.13 (1982); Swanson v. American Consumer Indus., 517 F.2d 555, 561 (7th Cir. 1975); Union Tank Car Co. v. Isbrandtsen, 416 F.2d 96, 97 (2d Cir. 1969); Angoff v. Goldfine, 270 F.2d 185, 186 (1st Cir. 1959); *see* Boeing Co. v. Van Gemert, 444 U.S. 472, 484-85 & n.2 (1980) (Rehnquist, J., dissenting).

437 *See* Boeing Co. v. Van Gemert, 444 U.S. 472, 485-86 & n.3 (1980) (Rehnquist, J., dissenting). *But see* Swanson v. American Consumer Indus., 517 F.2d 555 (7th Cir. 1975).

Another reason for the dearth of litigation is that in the typical common fund case, fees are sought from a fund in which a large number of persons who are not parties have small interests, and there is effectively no one representing their interests in minimizing incursions on the fund. *See, e.g.,* Cherner v. Transitron Elec. Corp., 221 F. Supp. 55, 61 (D. Mass. 1963). Those cases in which there has been litigation over this question have primarily been common benefit cases where payment of the fee is sought from the defendant who is viewed as the repository for charging each of the beneficiaries her pro rata share of the fees. In these instances, the defendant very likely has an independent interest in reducing (or avoiding) such payment. *See, e.g.,* National Council of Community Mental Health Centers v. Mathews, 546 F.2d 1003 (D.C. Cir. 1976), *cert. denied,* 431 U.S. 954 (1977); Angoff v. Goldfine, 270 F.2d 185 (1st Cir. 1959); Sprague v. Ticonic Nat'l Bank, 110 F.2d 174 (1st Cir. 1940). At this point, the common benefit exception is virtually indistinguishable, except theoretically, from statutory fee exceptions. *See infra* text accompanying notes 498-509. *See generally* Dawson, *supra* note 413, at 859-61.

courts have relied on *Sprague* in the statutory fee context,[438] despite the obvious difference: in a common fund case the dispute is between the plaintiff (or more often the plaintiff's attorney) and other members of the benefited class; in a statutory or bad faith fee case, the plaintiff and the defendant are directly at odds over an additional monetary obligation of the defendant.[439] Recognizing this difference, Justice Powell properly declined the appellant's invitation in *White* to hold that *Sprague* controlled the outcome of the issue.[440]

The *Sprague* holding, misguided in its genesis, has become moribund by the development of the Federal Rules of Civil Procedure,[441] and by evolving standards and procedures for determining an appropriate attorney's fee. Justice Frankfurter's opinion sweepingly, albeit unnecessarily, discussed the authority of a court of equity to award counsel fees, but unfortunately was deficient when it addressed the finer details in the case. In reversing the First Circuit on those procedural details,[442] Justice Frankfurter relied on *Greenough* for three essential propositions. First, a request for common fund fees is collateral to the underlying dispute between plaintiff and defendant, "having a distinct and independent character."[443] Second, attorney's fees may be sought after judgment is entered on the underlying dispute.[444] Third, resolution of the claim for fees should await a final conclusion, including appeals, of the main controversy.[445]

On the first point, Justice Frankfurter justifiably relied on *Greenough:* a claim that attorney's fees should be paid out of a fund under the jurisdiction of the court is distinct from the dispute between the plaintiff and defendant that produced the fund.[446]

On the second point, however, Justice Frankfurter was on less solid ground. His reliance on *Greenough* as authority for the proposition that Sprague's postjudgment request for fees was timely was simply incor-

---

438 *See* Obin v. District No. 9 of the Int'l Ass'n of Machinists, 651 F.2d 574, 582 (8th Cir. 1981).

439 *See* Fase v. Seafarers Welfare & Pension Plan, 589 F.2d 112, 114 n.3 (2d Cir. 1978); Cinerama, Inc. v. Sweet Music, S.A., 482 F.2d 66, 70 n.2 (2d Cir. 1973).

440 White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445, 451 n.13 (1982).

441 *Sprague* was decided in the Supreme Court on April 24, 1939. The Federal Rules of Civil Procedure became effective on September 16, 1938. 308 U.S. 645, 645-766. The district court's decision in *Sprague* was made before the effective date, and therefore was governed by the then-existing equity rules. By their terms, the Federal Rules of Civil Procedure were inapplicable to the Supreme Court's decision. FED. R. CIV. P. 86(a).

442 *See supra* text accompanying notes 433-35.

443 *Sprague,* 307 U.S. at 169 (quoting Trustees v. Greenough, 105 U.S. 527, 531 (1882)).

444 *Sprague,* 307 U.S. at 169.

445 *Id.* at 168.

446 Justice Frankfurter need not have relied solely on *Greenough;* a number of cases had held that where a distinct dispute between parties other than those who were at odds in the main controversy was finally concluded it could be separately appealed. *See infra* note 475.

rect. The petition for fees in *Greenough* was made before judgment.[447] As further justification for the propriety of postjudgment fee petitions, Justice Frankfurter asserted that a decision on fees should await disposition of the central controversy including all appeals. Once again Justice Frankfurter relied on *Greenough;* once again his reliance was incorrect. The merits had not been concluded or appealed in *Greenough* when fees were sought and awarded.[448]

Although Justice Frankfurter's dogma on the appropriate point to determine common fund fees has been embraced by courts[449] and commentators,[450] it is belied by a retrospective examination of the course of events in *Sprague.* By the time the district court first addressed the question of how much Lottie Sprague could recover for litigation expenses, two separate appeals to the Supreme Court had been prosecuted and concluded. The second appeal, which concerned only whether fees and expenses could be recovered, consumed over thirteen months.[451] Yet, plaintiff's petition for fees could have been decided just as easily (and far more efficiently) in the district court in the same proceeding as the merits, thereby eliminating an entire layer of appeals. Although it may have been desirable for the district court to know the extent of the benefit conferred before determining the appropriate fee, entry of judgment and appellate review were hardly essential. A change in the judgment on appeal may, no doubt, have an impact on the attorney's fee,[452] but the burden of reconsideration and adjustment on remand hardly justifies the *Sprague*-sanctioned alternative, which interjects an additional

---

447 *See supra* text accompanying notes 419-21.

448 "The administration of the fund for the benefit of the bondholders may continue in the court for a long time to come, dividends being made from time to time in payment of coupons still unsatisfied." *Greenough,* 105 U.S. at 531.

449 Cinerama, Inc. v. Sweet Music, S.A., 482 F.2d 66 (2d Cir. 1973); National Council of Community Mental Health Centers v. Weinberger, 387 F. Supp. 991 (D.D.C. 1974), *rev'd on other grounds sub nom.* National Council of Community Mental Health Centers v. Mathews, 546 F.2d 1003 (D.C. Cir. 1976), *cert. denied,* 431 U.S. 954 (1977); *see* Union Tank Car Co. v. Isbrandtsen, 416 F.2d 96 (2d Cir. 1969). *Contra* Fase v. Seafarers Welfare & Pension Plan, 79 F.R.D. 363 (E.D.N.Y.), *aff'd,* 589 F.2d 112 (2d Cir. 1978).

450 6 J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 54.77[9] (2d ed. 1976).

451 The Supreme Court rendered its decision on the merits on March 7, 1938. Sprague v. Ticonic Nat'l Bank, 303 U.S. 406 (1938). Justice Frankfurter's opinion sanctioning the petition for fees was handed down on April 24, 1939. Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939).

452 The Court may also have been suggesting that final resolution of the merits is crucial to determining whether or not fees will be awarded. In addition to the "better perspective" statement, the opinion contains the enigmatic suggestion that "in any event such allowances are appropriate only in exceptional cases and for dominating reasons of justice." *Sprague,* 307 U.S. at 167. Probably intended to refer to fees awarded in all cases and not contemplated as a limitation on cases in which a common fund is created, the latter interpretation has been ignored in common fund cases where awards of fees are de rigueur. *See also* Mills v. Electric Auto-Lite Co., 396 U.S. 375, 390 n.13 (1970) (fees justified in common benefit case before the scope of relief is determined).

layer of appeals.[453]

As courts have refined the standards for awarding attorney's fees, the precise contours of the recovery have become less significant in assessing fees.[454] The development of criteria for determining an appropriate fee, a number of which require scrutiny of the substantive claims asserted in the case and the attorney's efforts in connection with those claims, generally makes it desirable to resolve the fees issue in close proximity with the merits, rather than years later as occurred in *Sprague.*[455] The implication of such a conclusion is that common fund fees should be sought before judgment or within the time to alter or amend the judgment.[456] This is not to suggest that there are never disputes in an equity case that are appropriately or necessarily resolved after judgment. Indeed, there are.[457] In the vast run of common fund cases, however, consideration of attorney's fees need not be delayed.

The fact that many cases in which common fund fees are sought result in a settlement on the merits does not alter this conclusion. Although consent judgments generally are not appealable,[458] thus obviating concerns about reducing unnecessary appeals, Justice Frankfurter's ground for delaying resolution of a request for fees completely disap-

---

453 *See* Blanc v. Spartan Tool Co., 178 F.2d 104, 105 (7th Cir. 1949) ("It would no doubt have been better procedure for the [district] court to have determined the amount it deemed proper in the earlier proceeding so that the case could have come up to this court on the one appeal including that from a specific award of fees instead of the general allowance of 'reasonable fees' with the amount left for later consideration.").

The Court's decision in Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), also discredits its *Sprague*'s fees-after-final-judgment rationale. In *Mills,* the Court held that the plaintiffs had established the defendant's liability for material misstatements in a proxy solicitation. The plaintiffs took an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (1976), and thus the extent of the benefit conferred on the plaintiff class remained unknown. Nevertheless, the Court held that the plaintiffs were entitled to an award of attorney's fees based on their establishing the defendant's securities violations. 396 U.S. at 389-97.

454 This may explain why the Court in *White* implicitly, albeit quite clearly, rejected the fees-after-appeal aspect of *Sprague. White,* 455 U.S. at 454; *see also, e.g.,* Obin v. District No. 9 of the Int'l Ass'n of Machinists, 651 F.2d 574, 583 (8th Cir. 1981). *But see* Memphis Sheraton Corp. v. Kirkley, 614 F.2d 131, 133 (6th Cir. 1980).

455 The district court entered a final decree establishing plaintiff's lien on the proceeds of the bonds on June 6, 1936. Sprague v. Picher, 23 F. Supp. 59, 59 (D. Me.), *aff'd sub nom.* Sprague v. Ticonic Nat'l Bank, 99 F.2d 583 (1st Cir. 1938), *rev'd,* 307 U.S. 161 (1939). The district court's decision to award plaintiff fees came over three years later on June 29, 1939. Sprague v. Ticonic Nat'l Bank, 28 F. Supp. 229 (D. Me. 1939), *aff'd in part and rev'd in part,* 110 F.2d 174 (1st Cir. 1940). Further proceedings in both the court of appeals and the district court were necessary to award plaintiff attorney's fees incurred in the proceedings that established her right to fees. Sprague v. Ticonic Nat'l Bank, 110 F.2d 174 (1st Cir. 1940).

456 Because I would also tie resolution of the question of statutory fees to the merits, this conclusion would mean that where plaintiff seeks recovery of fees on both a statutory and common fund basis, the same procedural constraints would be applicable. *Cf.* Fase v. Seafarers Welfare & Pension Plan, 79 F.R.D. 363 (E.D.N.Y.) (denying fees on both statutory and common benefit bases), *aff'd,* 589 F.2d 112 (2d Cir. 1978); Keith v. Volpe, 501 F. Supp. 403 (C.D. Cal. 1980) (awarding fees alternatively on statutory and common benefit bases).

457 *See, e.g., In re* Farmers' Loan & Trust Co., 129 U.S. 206 (1889).

458 *See supra* note 145.

pears: a consent judgment once and for all fixes the rights and obligations of the parties with respect to the underlying claim. Thus, no reason to delay remains; given the requirement of notice to class members or shareholders of the settlement in either a class action or a shareholder derivative suit,[459] deciding attorney's fees at the same time the court performs its obligatory review and approval of the settlement[460] would provide a convenient unitary proceeding in which to resolve the fairness of the settlement and the appropriate attorney's fees award.[461]

Even after the *Sprague* justification for seeking and awarding common fund fees after judgment and appeal is rejected, the question of coupling vel non the merits and fees for purposes of appeal still remains. *Sprague* sanctioned separate appeals of the merits and fees as a matter of necessity, not because distinct appeals were inherently desirable. Once Justice Frankfurter sanctioned fee requests after judgment on the merits and appeal, no choice remained save dual appeals. The Federal Rules of Civil Procedure, in their infancy when *Sprague* was decided, provide guidance in answering this remaining question.

The adoption of the Federal Rules of Civil Procedure with its liberal provisions for joinder of claims and parties wrought a fundamental change in the scope of a dispute involving multiple parties or claims. In its initial formulation, rule 54(b) permitted, but did not require, entry of judgment upon the final adjudication of any single claim and any compulsory counterclaims to the original claim.[462] This gave the district courts flexibility to partition off distinct disputes for separate appeal.[463] Although the rule was well conceived, confusion developed over when the district court had made a rule 54(b) disposition. The resultant uncertainty led to unnecessary protective appeals and lost opportunities for

---

459 FED. R. CIV. P. 23(e), 23.1.

460 *Id.*

461 Where the parties settle, the court should be able to determine most of the attorney's fees issues at the same time it passes on the adequacy of the settlement. Remaining administrative work may necessitate a supplementary award. *See, e.g., In re* Penn Cent. Sec. Litig., 416 F. Supp. 907 (E.D. Pa. 1976), *rev'd on other grounds,* 560 F.2d 1138 (3d Cir. 1977).

462 FED. R. CIV. P. 54(b), 308 U.S. 732 (1939). As initially promulgated, the rule provided:

> When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

463 *See* FED. R. CIV. P. 54(b) advisory committee notes to 1946 amendments of Federal Rules of Civil Procedure, *reprinted in* 5 F.R.D. 433, 472-73 (1946).

appellate review.[464]

The rule was amended in 1948 to avoid this uncertainty. No disposition of less than all claims would be final and appealable unless the trial court explicitly found that "there is no just reason for delay" and directed entry of judgment on the concluded claim or claims.[465] This explicit direction would, like the formalities required for entry of judgment,[466] make it evident to all parties that the period in which to appeal had commenced.[467] Rule 54(b) was again amended in 1961 to make clear that it not only permitted separate appeals where there were multiple claims but also where there were multiple parties.[468] In its current form, rule 54(b) has changed fundamentally the appealability of decisions involving less than all claims or parties that existed when *Greenough, Pettus,* and *Sprague* were decided.

Before the Federal Rules of Civil Procedure were adopted, joinder of multiple claims and parties at law was substantially limited. The "static" conformity specified in the Process Act of 1789[469] limited the federal courts to joinder of claims that were governed by the same

---

464 J. MOORE, COMMENTARY ON THE UNITED STATES JUDICIAL CODE 512-15 (1949).

465 After amendment in 1946, the rule provided:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.

466 *See supra* note 89.

467 As with entry of final judgment, this signifies the district court's belief that the prerequisites for an appeal have occurred. Obviously, when the appellate court determines the trial judge was wrong, no appellate jurisdiction will lie. *E.g.,* Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1976); Cinerama, Inc. v. Sweet Music, S.A., 482 F.2d 66 (2d Cir. 1973).

468 Rule 54(b) currently provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

469 Act of Sept. 29, 1789, § 2, 1 Stat. 93, 93-94; *see* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 14-15 (1825). The Act adopted state practice as it existed in September 1789. The Conformity Act of June 1, 1872, 17 Stat. 196, ended the principle of static conformity and provided for conformance to then-existing state practice. *See* H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 663-76 (2d ed. 1973).

writ.[470] Joinder of plaintiffs was permitted only where they were asserting a joint right.[471] In equity the joinder situation was somewhat more liberal,[472] but still more restrictive than under the federal rules. Moreover, legal and equitable claims could not be joined.[473]

Despite the restrictive joinder provisions, the courts occasionally confronted questions of appealability when less than all claims among less than all parties were resolved. Occasionally this problem arose as a matter of necessity, where a largely unanticipated matter was asserted after entry of an apparently final judgment or decree.[474] More often the question arose before entry of judgment and concerned the appealability of a final resolution of a distinct claim between less than all parties. Throughout the latter portion of the nineteenth century and the pre-Federal Rules era of the twentieth, these distinct adjudications were separately appealable.[475] In discussing this exception, which permitted appeal before final resolution of the case, one commentator in the early part of the twentieth century wrote:

> Where a person, incidentally interested in some branch of a case, has been allowed to intervene for the purpose of protecting his interest

---

470 B. SHIPMAN, COMMON LAW PLEADING 201-03 (3d ed. 1923); Blume, *A Rational Theory for Joinder of Causes of Action and Defenses, and for the Use of Counterclaims,* 26 MICH. L. REV. 1, 4-7 (1927); Sunderland, *Joinder of Actions,* 18 MICH. L. REV. 571, 575-82 (1920).

471 Ryder v. Jefferson Hotel Co., 121 S.C. 72, 113 S.E. 474 (1922); C. CLARK, CODE PLEADING 241-49 (1928); J. POMEROY, CODE REMEDIES 161-69 (4th ed. 1904).

472 Equity Rules 26, 30, 226 U.S. 649, 655-57 (1912); *see* Blume, *supra* note 470, at 10-17; Moore & Clark, *A New Federal Civil Procedure,* 44 YALE L.J. 1291, 1319-20 (1935).

473 Scott v. Neely, 140 U.S. 106, 111 (1891). The clean-up doctrine permitted a court in equity to consider legal claims arising in a case otherwise within the equity court's jurisdiction. *See generally* Levin, *Equitable Clean-up and the Jury: A Suggested Orientation,* 100 U. PA. L. REV. 920 (1951).

474 *E.g., In re* Farmers' Loan & Trust Co., 129 U.S. 206 (1889). Federal Rule of Civil Procedure 60(b) now governs postjudgment motions. A final decision on such a motion is appealable. 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2871 (1973).

475 United States v. River Rouge Improvement Co., 269 U.S. 411, 414 (1926) (condemnation compensation award appealable despite existence of another land owner's unresolved claim); Williams v. Morgan, 111 U.S. 684, 699 (1883) (order setting compensation to be paid trustees appealable despite ongoing proceedings); Withenbury v. United States, 72 U.S. (5 Wall.) 819 (1866) (dismissal of claim in consolidated admiralty libel case held separately appealable); *see* Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 442 (1956) (Frankfurter, J., concurring).

Some courts permitted an appeal following the resolution of an independent claim despite the existence of unresolved claims between the same parties. Other courts, however, would not permit a separate appeal in such circumstances. *Compare* Historical Publishing Co. v. Jones Bros. Publishing Co., 231 F. 784 (3d Cir. 1916) (in suit for infringement of two copyrights, decree as to one is appealable) *and* Scriven v. North, 134 F. 366 (4th Cir. 1904) (in suit for patent and trademark infringement and two unfair competition claims, decree as to three of the four causes of action is appealable) *and* Klever v. Seawall, 65 F. 373 (6th Cir. 1894) (in suit involving three causes of action, decree as to one is appealable) *with* Sheppy v. Stevens, 200 F. 946 (2d Cir. 1912) (decision sustaining demurrer to one cause of action not appealable where another cause of action remained unresolved).

> and a decretal order entered, which finally disposes of his right or claim, such order is final for purposes of an appeal and may be reviewed before the actual termination of the litigation in the main case.
>
> The ground upon which the courts place their decisions, holding orders of this sort to be appealable, is that the intervening proceedings constitute a separate controversy, arising incidentally in the main cause, but presenting an independent and distinct issue to be determined between the parties to it. When the court makes a decretal order finally disposing of that controversy, as between all the parties to be affected by it, it is a final decree from which an appeal will lie.[476]

In this respect, the result in a case like *Greenough,* sanctioning separate appeals of the central controversy between plaintiff and defendant and the issue of award of common fund fees, is consistent with the pre-Federal Rules conception of finality: the dispute over attorney's fees between the plaintiff's attorney and the beneficiaries of the fund is distinct from the dispute between plaintiff and defendant, and a resolution of either constituted an appealable decision of the rights and obligations of the parties to that distinct dispute.

Rule 54(b), however, although substantially expanding the number of potentially appealable decisions, also imposed a restriction on the appealability of decisions such as those discussed above.[477] Although before adoption of rule 54(b) final decisions of less than all claims or as to less than all parties were appealable immediately as of right, after adoption of the rule they were appealable only upon an express determination by the district court to "dispatch" the separate matter for appellate review.[478] Absent a certification under rule 54(b), appeal is deferred

---

476 F. LOVELAND, THE APPELLATE JURISDICTION OF THE FEDERAL COURTS 150 (1911) (footnote omitted). Although the quoted passage refers to distinct disputes engendered because of intervention, the principle is not so limited. Thus, Trustees v. Greenough, 105 U.S. 527 (1881) was cited in the omitted footnote as an example of this type of exception to the final decision requirement. *See* Collins v. Miller, 252 U.S. 364, 370-71 (1920); R. MARKER, FEDERAL APPELLATE JURISDICTION AND PROCEDURE 37-38 (1935); Boskey, *supra* note 38, at 1011.

When the claim related to a party jointly charged or jointly asserting a claim with another person still a party to the action, the joint aspect of the claim prevented separate appeals. Hohorst v. Hamburg-American Packet Co., 148 U.S. 262 (1893).

477 The validity of the "positive" aspect of the rule, permitting appeal of formerly nonfinal decisions, was a highly controversial matter in the courts of appeals until the Supreme Court resolved the issue in Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 (1956). In contrast, the "negative" aspect of the amended rule was generally accepted on the theory that it was merely an extension of the trial court's intention as to whether any decision was "final." *See* Note, *Federal Procedure—Federal Rule 54(b) and the Final Judgment Rule,* 28 N.Y.U. L. REV. 203, 208-15 (1953); Note, *Separate Review of Claims in Multiple Claims Suits: Appellate Jurisdiction Under Amended Federal Rule 54(b),* 62 YALE L.J. 263, 265-72 (1953).

478 A possible exception to this rule is that a refusal to permit intervention as of right is appealable without a rule 54(b) determination. *See* Huckeby v. Frozen Foods Express, 555 F.2d 542, 549 (5th Cir. 1977). A less than completely satisfactory explanation for this excep-

until resolution of all claims. Thus, although a dismissal of the merits of an intervenor's claim was final and appealable before adoption of the Federal Rules, such a decision would not be final under rule 54(b), unless the district court made the express determination that the rule requires.[479]

An objection to the foregoing analysis might proceed on the basis that rule 54(b) is inapplicable to common fund fee requests.[480] Professor Moore has argued vigorously that rule 54(b) is inapplicable to decisions that qualify for appeal under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*[481] That argument is reasonable enough: if delaying appellate review would render the appeal ineffective in preserving the appellant's rights, there is little reason to require that the district court also give its sanction to an appeal by making the rule 54(b) certification that there is "no just reason for delay."[482] However, a few courts have carried this argument one step further to conclude that the collateral order doctrine sanctions separate appeals of the merits and common fund fee requests, thereby rendering rule 54(b) inapplicable.[483]

Under this view, *Greenough* was merely a precursor of the "collateral order" doctrine of *Cohen.* Although such a view is plausible,[484] it ignores

---

tion is that such a refusal does not resolve a distinct dispute, but simply declines to hear it. Note, *Federal Rule 54(b): The Multiple Claims Requirement,* 43 VA. L. REV. 229, 247 n.110 (1957).

479 *See* Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 512 (1950); Republic of China v. American Express Co., 190 F.2d 334 (2d Cir. 1951). *But cf.* Pabellon v. Grace Line, 191 F.2d 169, 176 n.1a (2d Cir.) (Frank, J., concurring) (suggestng that mandamus or collateral order doctrine may sanction appeal of order denying leave to intervene as of right), *cert. denied,* 342 U.S. 893 (1951).

480 Swanson v. American Consumer Indus., 517 F.2d 555, 560-61 (7th Cir. 1975); *cf.* Fase v. Seafarers Welfare & Pension Plan, 79 F.R.D. 363, 366 n.6 (E.D.N.Y.) (judgment treated as final on appeal, even though judgment was silent as to claim for common benefit and statutory attorney's fees and made no rulc 54(b) determination), *aff'd,* 589 F.2d 112 (2d Cir. 1978).

481 6 J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE ¶¶ 54.04[3.-5], 54.31 (2d ed. 1983).

482 *See, e.g.,* Redding & Co. v. Russwine Constr. Corp., 417 F.2d 721 (D.C. Cir. 1969).

One might take issue with Professor Moore even on this point. If district court review of appeals based on the collateral order doctrine screened out more improper appeals than the number of proper appeals that it incorrcctly refused to certify, the additional effort by the district court might well be worthwhile. In making this assessment, one would also havc to consider the relative costs of preventing a proper appeal as opposed to permitting an improper appeal. The availability of the "relief valve" of mandamus might minimize the instances where a district court's refusal to certify pursuant to rule 54(b) frustrates a legitimate appeal. *See* Hackett v. General Host Corp., 455 F.2d 618, 624 (3d Cir.), *cert. denied,* 407 U.S. 925 (1972); 28 U.S.C. § 1651 (1976).

483 Swanson v. American Consumer Indus., 517 F.2d 555, 560 (7th Cir. 1975); *see* Angoff v. Goldfine, 270 F.2d 185, 186 (1st Cir. 1959); *cf.* Lowe v. Pate Stevedoring Co. 595 F.2d 256, 257 (5th Cir. 1979) (attorney's fec award collateral order and separately appealable despite pending petition seeking job reinstatement). *But see* West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710, 748 (S.D.N.Y. 1970), *aff'd,* 440 F.2d 1079 (2d Cir.), *cert. denied,* 404 U.S. 871 (1971).

484 It is difficult to find in the *Greenough* opinion any notion of the necessity for immediate review to preserve the rights of the appealing party. The Court did note that the challenged

a significant difference between collateral orders and common fund fee requests. The collateral order doctrine permits an appeal, before judgment, of a subsidiary dispute that arises in a case involving a single bilateral claim between plaintiff and defendant. The collateral matter does not involve a claim for relief, but rather concerns a procedural aspect involved in adjudication of the claim.[485] The significance of the collateral rights and obligations at stake and the likelihood that delayed appellate review would be ineffective in preserving the rights asserted justify interlocutory appeal.[486]

By contrast, a common fund fee petition involves a claim either by the plaintiff for partial reimbursement of attorney's fees from his cobeneficiaries or, more frequently,[487] a claim by the attorneys against nonclient beneficiaries for compensation for producing the fund that will ultimately benefit them. Although the precise legal and equitable bases upon which these claims arise are less than clear,[488] they do involve claims for monetary relief. In an analogous area, claims by a defendant for contribution or indemnity from a third party defendant, even when limited to the expenses of litigation[489] or asserted as cross-claims between two defendants, are distinct claims subject to rule 54(b) and not appealable under the collateral order doctrine established by the Court in *Cohen.*

Moreover, in most cases the collateral order doctrine would not sanction separate appeals of a final determination of common fund fees in the absence of a final determination of the remainder of the case. Even more clearly, the collateral order doctrine would not sanction an

---

orders provided for immediate payment to Vose, but Vose was a substantial bondholder who had advanced the costs of litigation to that point. There was no suggestion and little reason to believe that delaying appeal until the lower court had completed administration of the fund might have resulted in an inability to recoup the funds paid to Vose if the award was reversed on appeal. Rather, the Court's opinion, although oblique, suggests that the distinct nature of the claim, coupled with the unfairness to the parties of delaying review for a substantial period of time, led the Court to sanction a separate appeal. *But see* F. LOVELAND, *supra* note 476, at 154 (appeal in such situations justified because once money is paid, it is beyond court's jurisdiction). Those are the same concerns that led to the enactment of Federal Rule of Civil Procedure 54(b). *See supra* note 463; *see also* Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 (1956).

485 10 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2658.4 (1983); *see* Swift & Co. v. Compania Caribe, 339 U.S. 684 (1950); Roberts v. United States District Court, 339 U.S. 844 (1950). *But cf.* Nixon v. Fitzgerald, 457 U.S. 731 (1982) (appeal of denial of absolute immunity defense).

486 *See supra* text accompanying notes 347-51.

487 *See* Dawson, *supra* note 18, at 1614 (estimating that lawyers, rather than clients, seek common fund fees in 98% of cases); Dawson, *supra* note 413, at 851-52.

488 The derivation of the common fund and common benefit exceptions from the law of restitution and unjust enrichment has been extensively discussed by Professor John Dawson. *See* Dawson, *supra* note 18; Dawson, *supra* note 413. Others have analogized such fees to "maritime salvage." *In re* Osofsky, 50 F.2d 925 (S.D.N.Y. 1931); Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards,* 69 HARV. L. REV. 658 (1956).

489 Hooks v. Washington Sheraton Corp., 642 F.2d 614 (D.C. Cir. 1980).

appeal of the merits while the fees remain to be decided, which is the typical chronology in which the issues are resolved.[490] The necessity of immediate appeal, a crucial factor in *Cohen,* simply is not present in common fund attorney's fee cases.[491]

Thus, rejecting the mandatory separate appeal aspect of *Sprague* while recognizing the flexibility afforded by rule 54(b) would reduce the number of appellate considerations of the same case and overlapping issues. It would also provide the district court with room to maneuver in the complex and various cases in which common fund fees are sought.[492]

A recent Supreme Court common fund case, *Boeing Co. v. Van Gemert,*[493] illustrates this point. After the trial court determined the extent of Boeing's liability to the class, it declared that each individual recovery would bear a proportionate share of any fees awarded to the class's lawyer from the fund. Boeing appealed only the last aspect of the judgment, on the ground that class members who did not claim their share of the fund would have received no benefit. Boeing argued that

---

490 Although *Sprague* provides support for separate appeals in this situation, its rationale is unrelated to the reasoning behind the collateral order doctrine. *See supra* text accompanying notes 461-62.

491 Unusual circumstances might justify an appeal of a common fund fee award under the collateral order doctrine. One might even argue that whether such an interlocutory appeal is governed by rule 54(b) or *Cohen* is unimportant, as long as an appeal is permitted in the proper situation. Under this view, the provisions permitting appeal under these two doctrines would be largely coextensive, with rule 54(b) requiring the additional condition of approval by the district court.

Aside from the doctrinal questions of whether *Cohen* applies to "claims for relief" and whether rule 54(b) applies to less than a claim for relief, *see* Hooks v. Washington Sheraton Corp., 642 F.2d 614 (D.C. Cir. 1980); Redding & Co. v. Russwine Constr. Corp., 417 F.2d 721 (D.C. Cir. 1969), it does appear that the provisions of rule 54(b) are more flexible and potentially more encompassing than *Cohen. Compare* Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 10 (1980) (district court has discretion to grant rule 54(b) requests in interest of sound judicial administration; court of appeals should give such decision "substantial deference") *with* Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978) ("To come within the 'small class' of decisions excepted from the final-judgment rule by *Cohen,* the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment."). *But see* Nixon v. Fitzgerald, 457 U.S. 731 (1982) (sanctioning *Cohen* appeal of claim of absolute immunity without addressing whether it was collateral to merits or effectively unreviewable if delayed until final judgment). In any case, it is difficult to conceive of a *Cohen* sanctioned appeal of a decision on the merits while the attorney's fee issue remains in the trial court. Yet rule 54(b) would clearly afford discretion to enter judgment in such a situation. *See* Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1 (1980); Hooks v. Washington Sheraton Corp., 642 F.2d 614 (D.C. Cir. 1980).

492 *See The Supreme Court, 1955 Term,* 70 HARV. L. REV. 83, 144 (1956).

In re Fine Paper Antitrust Litig., 98 F.R.D. 48 (E.D. Pa. 1983), presents a stunning example of this complexity. The district court required two years and a 190 page opinion to sort through the petitions of 41 law firms and state attorneys general for over $20 million in attorney's fees. Where the fee proceedings take on such a massive character, permitting a defendant appellate review of an unfavorable judgment before resolution of the fee request, which might cloud financial statements, business opportunities and the like, would seem essential.

493 444 U.S. 472 (1980).

the court, therefore, should not charge fees against the allocable share of the nonclaiming class members. Because Boeing claimed that it was entitled to any unclaimed portion of the fund, it objected to the pro rata assessment, which would reduce the amount of the unclaimed funds. Regardless of the outcome of Boeing's appeal, other potential appeals remained. The amount of fees awarded as well as the issue of Boeing's ownership of the unclaimed funds still might engender an appeal. Requiring final resolution of all these matters might well have advanced the ultimate conclusion of the case and reduced the number of appellate considerations of related matters. At the same time, rule 54(b) would afford the district court discretion to render a final decision on Boeing's liability to the class if the particular circumstances made it appropriate.[494]

V

COMMON BENEFIT ATTORNEY'S FEES

A logical outgrowth of the common fund doctrine, the common benefit exception authorizes a court to reimburse fees despite the absence of a monetary fund against which to assess fees. The theoretical underpinnings of the common fund exception justify its extension to those situations where no money or property is brought within the jurisdiction of the court: those who benefit from the litigation in some reasonably direct way[495] should contribute to the costs of producing those benefits. In the absence of a discrete fund or asset against which to assess fees, courts have substituted the defendant as a proxy where there is

---

494 In addition to the "multiple party" provision of rule 54(b), a common fund fee request arguably might constitute a "claim for relief" within the meaning of that rule. *See infra* text accompanying note 512.

Logically, seeking recovery from an entity other than the defendant suggests that a separate claim for relief is being asserted. Yet a common fund fee request is not a classical cause of action; the claim for fees is dependent not only on the transaction or occurrence that forms the basis for the plaintiff's claim, but also on the successful litigation and consequent establishment of a fund. There is little precedent on the question of whether a common fund fee request can be asserted in a separate action against the beneficiaries. *See* Pettus v. Georgia R.R. & Banking Co., 19 F. Cas. 396 (C.C.M.D. Ala. 1879) (No. 11,048) (petition for common fund fees treated as separate suit for removal purposes), *rev'd on other grounds,* 113 U.S. 116 (1885); *cf.* Swanson v. American Consumer Indus., 517 F.2d 555, 560-61 (7th Cir. 1975) (common benefit fee petition does not constitute a separate "cause of action" for rule 54(b) purposes). The tendency toward expanding the scope of a cause of action for res judicata purposes in the interest of efficiency suggests that the common fund fee request should be asserted in the same proceeding in which the fund is established. *See infra* note 512.

495 The "reasonably direct way" qualification is intended to address the question raised by Professor Dawson: should a lawyer who establishes a legal principle that through stare decisis enables another person to recover against an unrelated party on an unrelated claim many years later be entitled to assert a claim for attorney's fees against the plaintiff in the second case? *See* Dawson, *supra* note 413, at 917-18. The obvious answer is no, although the gradations of degree from the hypothetical to a *Sprague*-type situation are substantial. Ultimately, a point must be selected to decide which claims should be recognized. *See, e.g.,* Dorfman v. First Boston Corp., 70 F.R.D. 366, 369-73 (E.D. Pa. 1976).

some basis for passing the fees along to those ultimately benefiting.[496]

Sprague v. Ticonic National Bank[497] illustrates the easy transition from common fund to common benefit theory.[498] Although no specific fund had been established against which the other trust beneficiaries could assert claims, the outcome of the suit entitled those bondholders, through stare decisis at least,[499] to recovery from the proceeds of the bonds under the control of the defendants. Despite the absence of a fund within the court's jurisdiction,[500] the plaintiff sought counsel fees from the defendant receiver,[501] who presumably would then deduct the pro rata share of each beneficiary for the fees from each beneficiary's claim. In this scenario, the defendant acts merely as a conduit to channel fees from the beneficiaries to the plaintiff[502] and thus should be indifferent about an award of fees.[503]

Where no monetary benefits are produced or where the connection

---

496 For a discussion of what constitutes a "benefit" sufficient to invoke the common benefit-attorney's fee machinery, see Dawson, *supra* note 413, at 863-70.

497 307 U.S. 161 (1939).

498 Although difficult to divine from the Court's opinion, Central R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885), contained elements of a common benefit theory. The attorneys were proceeding against the defendants to establish a lien on property that remained after satisfying the claims of the underlying suit. *See* Pettus v. Georgia R.R. & Banking Co., 19 Fed. Cas. 396 (C.C.M.D. Ala. 1879) (No. 11,048). In this respect, the situation in *Pettus* very much resembles that in *Sprague.*

499 Professor Dawson has contended that because of the express trust established on behalf of all of the beneficiaries, it would have been a violation of the defendant's fiduciary obligation to treat them differently. Dawson, *supra* note 413, at 917 n.285.

500 Sprague v. Ticonic Nat'l Bank, 28 F. Supp. 229, 230 (D. Me. 1939), *rev'd in part and aff'd in part,* 110 F.2d 174 (1st Cir. 1940).

501 Sprague v. Picher, 23 F. Supp. 59 (D. Me.), *aff'd sub nom.* Sprague v. Ticonic Nat'l Bank, 99 F.2d 583 (1st Cir. 1938), *rev'd,* 307 U.S. 161 (1939).

Justice Frankfurter characterized the source from which the fees were sought by the plaintiff as "the proceeds of the bonds." *Sprague,* 307 U.S. at 163.

502 *See* Mills v. Electric Auto-Lite Co., 396 U.S. 375, 393 (1970) (beneficiaries "could be forced to contribute to the costs of the suit by an order reimbursing the plaintiff from the defendant's assets out of which their recoveries later would have to come").

Remarkably, this escaped the district court in *Sprague* on remand. The proceeds of the sale of the bonds were in excess of the 14 trust beneficiaries' claims and thus the excess was subject to the unsecured creditors' claims. The district court, rather than imposing the fees pro rata on each trust beneficiary, directed that the fees be reimbursed from the excess, thereby imposing plaintiff's attorney's fees on the unsecured creditors, who, if anything, had been detrimentally affected by the suit. Sprague v. Ticonic Nat'l Bank, 28 F. Supp. 229, 231 (D. Me. 1939), *rev'd in part and aff'd in part,* 110 F.2d 174 (1st Cir. 1940). The court of appeals affirmed this aspect of the decision based on the "trivial disadvantage" to the unsecured creditors and some ambiguous language in the Supreme Court's opinion about the "interest of the common creditors where the funds of the bank are not sufficient to pay them in full." Sprague v. Ticonic Nat'l Bank, 110 F.2d 174, 176-77 (1st Cir. 1940) (quoting Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 167 (1939)). This language was probably intended to address whether equity would warrant an award of attorney's fees rather than their allocation once the award had been made.

503 Other motivations beyond a concern with the financial bottom line may affect the defendant's response to a common benefit fee request. In *Sprague,* for example, the defendant may have had obligations to protect the interests of the other trust beneficiaries, *see supra* note

between the defendant's control over the assets and the beneficiary's claim to them is less direct, the defendant is less able to function as a conduit. Thus, in *Mills,* the benefit produced, detecting and identifying a violation of section 14(a) of the Securities Exchange Act of 1934,[504] was a sufficient advantage to the stockholders of the acquired corporation to justify payment of fees by the defendant, the merged corporation.[505] But surely the stockholders of the acquiring corporation did not benefit from the suit, yet they were also required to absorb their pro rata share of the fee award.[506] The general deterrent value of such shareholder derivative suits may also benefit stockholders of other corporations,[507] yet they are not required to share in the expenses of litigation.

The crucial point is that when the conduit function of the defendant becomes less than perfect,[508] as it has in many common benefit cases,[509] the attorney's fees issue becomes a controversy between the plaintiff (or counsel) and the defendant. This situation more closely resembles the statutory fee model: additional monetary liability is asserted against the defendant. The applicability of rule 54(b) becomes more doubtful because the fee question in this situation is less separate and distinct from the main controversy.

Nevertheless, there remain valid grounds for retaining the discretion afforded by rule 54(b) in common benefit cases. Because of the uncertain point at which common fund requests turn the corner and become common benefit requests,[510] uniformity in procedural treatment of the two will reduce confusion and attendant litigation. The language of rule 54(b) requires multiple parties, a requirement that is satisfied when the attorney rather than the plaintiff makes the fee request.[511]

499, as well as the unsecured creditors of the bank, who ultimately bore the brunt of Lottie Sprague's attorney's fees. *See supra* note 502.

504 15 U.S.C. § 78n(a) (1982).

505 An alternative explanation for charging fees to a defendant corporation in a shareholders' derivative suit is that the plaintiff is merely doing what the corporation should be doing. If the corporation had fulfilled its obligation, it would have borne the costs of suit. This alternative better justifies charging fees to the corporation, especially where, as in *Mills,* the lawsuit benefited only a portion of the stockholders. *See* Dawson, *supra* note 413, at 865-70; Comment, *The Allocation of Attorney's Fees After* Mills v. Electric Auto-Lite Co., 38 U. CHI. L. REV. 316, 333 (1971).

506 *See* Fase v. Seafarers Welfare & Pension Plan, 589 F.2d 112, 116 n.5 (2d Cir. 1978); Angoff v. Goldfine, 270 F.2d 185, 191-92 (1st Cir. 1959).

507 *See The Supreme Court, 1969 Term,* 84 HARV. L. REV. 1, 215-18 (1970).

508 Even when the defendant can identify and isolate assets against which to charge an award of fees, there may be instances where the defendant is not indifferent to the allocation of monetary benefits between the plaintiff and beneficiaries of the litigation. In that situation, the defendant may vigorously contest the fee claim. *See, e.g.,* National Council of Community Mental Health Centers v. Mathews, 546 F.2d 1003 (D.C. Cir. 1976), *cert. denied,* 431 U.S. 954 (1977).

509 *See supra* note 432.

510 *See* Dawson, *supra* note 18, at 1615-20.

511 A skeptic might assert that the attorney is not a party and therefore the rule 54(b)

Whether a claim for fees from a defendant based on the common benefit rationale is a distinct "claim for relief" within the terms of rule 54(b) is a rather metaphysical matter.[512] In a theoretical sense the common benefit claim differs from the statutory fee claim; a statutory claim arises because of the defendant's liability for some invasion of plaintiff's substantive right, the justification for common benefit fees results from the benefit conferred on a class. That distinction is a slender reed for concluding that common benefit fees constitute a claim for relief even though statutory fees do not.

Ultimately, the complexity and diversity of cases in which a common benefit fee request might be made provide the most persuasive ground for leaving discretion in the trial court to enter separate, appeal-

---

requirement that "multiple parties are involved" is not met. In a formalistic sense there is some truth to this assertion. The attorney's name does not appear as a party in the pleadings. *See* FED. R. CIV. P. 10(a). Once an attorney makes a request for an award of attorney's fees, however, she surely has the sort of interest in the proceeding that is congruent with that of a party. A number of cases permitting attorneys to intervene and appeal recognize this economic reality. *E.g.,* Lipscomb v. Wise, 643 F.2d 319 (5th Cir. 1981).

512 The meaning of the term "claim for relief" contained in rule 54(b) has engendered substantial controversy and confusion. A number of theories have been proposed. The transaction test focuses on whether the claims arise from distinct factual transactions or occurrences, RePass v. Vreeland, 357 F.2d 801, 805 (3d Cir. 1966). The separate legal claim theory on the other hand gives primacy to the asserted substantive legal claim. School Dist. No. 5 v. Lundgren, 259 F.2d 101, 104 (9th Cir. 1958); Gold Seal Co. v. Weeks, 209 F.2d 802, 807 (D.C. Cir. 1954). For a discussion of these theories, see C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 127-48 (2d ed. 1947). Adoption of one of the theories does not resolve all questions because there is disagreement as to the correct interpretation of them. *See, e.g.,* Note, *Federal Procedure—Federal Rule 54(b) and the Final Judgment Rule,* 28 N.Y.U. L. REV. 203, 210 n.47 (1953); Note, *Separate Review of Claims in Multiple Claims Suits: Appellate Jurisdiction Under Amended Federal Rule 54(b),* 62 YALE L.J. 263, 265 (1953).

Before the 1948 amendment to rule 54(b) that deleted the "arising out of the transaction or occurrence" language, the Supreme Court sanctioned a transaction test in Reaves v. Beardall, 316 U.S. 283, 285 (1942). After the amendment, however, the Court, in permitting rule 54(b) certification of two claims that had a factual overlap with two unresolved claims, rejected the transaction theory and appcared to move toward the separate legal claim theory. Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 (1956). Nevertheless, the lower courts have been grudging in their acceptance of the implications of *Mackey,* which would permit far broader use of rule 54(b). *See, e.g.,* McIntyre v. First Nat'l Bank, 585 F.2d 190, 192 (6th Cir. 1978); Wheeler v. American Home Prods. Corp., 582 F.2d 891, 896 (5th Cir. 1977); Arnold v. Bache & Co., 377 F. Supp. 66 (M.D. Pa. 1973).

One commentator has suggested that "claim for relief" should be treated as equivalent to "ease of action" for res judieata purposes. 10 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE & PROCEDURE § 2657 (2d ed 1983). Thus, if claims that could have been separately asserted are voluntarily joined together in one suit, the option of separate judgments and appeals should be afforded. In the attorney's fee context, this would make rule 54(b) available only if the fee petition could be asserted in a separate lawsuit, a result that is undesirable because of its inefficiency. *See supra* text accompanying notes 449-71; *see also* Van Horne v. Treadwell, 164 Cal. 620, 130 P. 5 (1913); Leslie v. Carter, 268 Mo. 420, 187 S.W. 1196 (1916). *Contra* Ritter v. Ritter, 308 Ill. App. 337, 32 N.E.2d 185 (1941); *see supra* note 428; *cf.* Varnes v. Local 91, 674 F.2d 1365 (11th Cir. 1982) (bad faith fee request constitutes "new or additional claim for relief" for purposes of service pursuant to Federal Rule of Civil Procedure 5(a)).

able judgments on the merits and with regard to attorney's fees. The need for a determination under rule 54(b) of "no just reason for delay" requires the trial judge to consider whether separate judgments are desirable. With appellate review of that discretion available, sufficient flexibility would exist to sever claims in the unusual case, but ordinarily resolution of all matters before entry of judgment and appeal would occur.

CONCLUSION

In decisions a hundred years apart, the Supreme Court classified attorney's fees as a remote orphan divorced from the nuclear family of relief for appealability purposes. With the increasing importance of attorney's fees to parties asserting federal statutory and constitutional claims, and the concomitant burden placed on the courts to resolve disputed claims over entitlement to fees, it is time to reexamine whether the "collateral and independent" status of attorney's fees for procedural purposes can peacefully coexist with efficient judicial administration and still ensure fairness to the parties.

For the reasons identified, particularly in the statutory fee arena, I believe the collateral and independent approach is an anachronism. Time and empirical study may prove me wrong; prompt resolution of fee requests and consolidation where both the merits and fees are appealed may turn out to be an adequate alternative.

In any case, providing clear and certain rules to govern the multifaceted procedural problems raised by the relationship among the merits, attorney's fees, and appeals is of paramount importance. The *White* decision is a step, albeit small and halting, in that direction. As the federal courts travel further down this highway, I modestly offer the thoughts presented in this article as a signpost, or perhaps a guardrail, for their guidance.