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Awards of Attorney's Fees in the Federal Courts

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NOTE

AWARDS OF ATTORNEY'S FEES IN THE FEDERAL COURTS

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I. INTRODUCTION

Although legal fees have been recoverable by successful litigants in the English courts for centuries,¹ the traditional rule in the United States has disallowed such awards.² This policy became

¹ Plaintiffs first were allowed to recover costs in 1275 under the Statute of Gloucester. 1278, 6 Edw. 1, ch. 1. These costs were construed liberally to include fees paid to the court, the solicitor, and counsel, as well as all other necessary expenses, including those paid to expert witnesses. Goodhart, *Costs*, 38 YALE L.J. 849, 856-59 (1929). To discourage "the infinite number of small and trifling suits," a subsequent statute limited awards of costs if the plaintiff recovered less than 40 shillings. See 43 Eliz., ch. 6 (1601). Defendants were first given the right to costs recovery from plaintiffs in 1267. Statute of Marlborough, 1267, 52 Hen. 3, ch. 6. Although the statute of Marlborough applied only to cases involving malicious challenge to a feoffment, see *id.*, defendants' rights to recover costs were broadened considerably in later years to allow recovery in certain actions based upon trespass, case and contract, 23 Hen. 8, ch. 15 (1531), and in cases involving nonsuit, discontinuance and failure to prosecute. 8 Eliz., ch. 2 (1565). Eventually, prevailing defendants were granted the right to receive a costs award in all cases in which plaintiffs, had they prevailed, would have been awarded costs. 4 Jac. 1, ch. 3 (1606).

A major revision of the general English rule was adopted in the Supreme Court of Judicature Act, 1873, 36 & 37 Vict., ch. 66, and the Supreme Court of Judicature Act, 1875, 38 & 39 Vict., ch. 77. The 1875 Act provides that in a jury trial a judge may refuse to grant costs to a prevailing party "for good cause," *id.*, at sched. 1, order LV, thus making modern English attorney fee awards at least partially discretionary. Compare Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 U. COLO. L. REV. 202, 204-05 (1966) and Special Project, *Recent Developments in Attorneys' Fees*, 29 VAND. L. REV. 685, 720 n.238 (1976) [hereinafter cited as Special Project] (cost award unqualifiedly discretionary) with Goodhart, *supra*, at 854 (deprivation of award for good cause only). For a discussion of other western European nations' systems of allowing recovery of legal fees to prevailing parties, see Stoebuck, *supra*, at 206-07.

² *E.g.*, *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967). Under the American rule, attorney's fees generally are not recoverable from an opposing party unless a contract or statute provides otherwise. *Id.* Initially, however, the English system of assigning costs to the defeated party was followed in the American colonies. McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN.

firmly entrenched in American law when the Supreme Court held that a federal statute providing for the assessment of standardized costs³ was the exclusive vehicle for the recovery at law of attorney's fees.⁴ The federal courts, however, exercising their inherent equity powers, have established two exceptions to the American rule against recovery of legal fees.⁵

L. REV. 619, 620 (1931). For examples of pre-Revolutionary statutes permitting recovery of costs, see *id.* at nn.6 & 7. After the Revolution and until 1853, the federal courts deferred to state statutes providing for attorney's fee awards. See *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 165 n.2 (1939); *Henkel v. Chicago, St. Paul, Minneapolis & Omaha Ry.*, 284 U.S. 444, 445-46 (1932); Special Project, *supra* note 1, at 720 n.241. See also note 3 and accompanying text *infra*.

The American rule denying a costs recovery, absent a statute providing otherwise, was set out in *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306, 306 (1796), and, to date, consistently has been followed. See, e.g., *F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 126-31 (1974); *Tulloch v. Mulvane*, 184 U.S. 497, 511 (1902); *Hauenstein v. Lynham*, 100 U.S. 483, 490-91 (1879); *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371-73 (1851). See also 1 S. SPEISER, *ATTORNEYS' FEES* § 12:3, at 463-64 & n.26 (1973). It has been suggested that the American courts' rejection of the English rule arose from a colonial distrust of lawyers and from the belief that the English rule prejudiced the poor and unjustly punished defeated parties. See *Conte v. Flota Mercante Del Estado*, 277 F.2d 664, 672 (2d Cir. 1960) (citing Goodhart, *supra* note 1, at 872-77). The difficulty in assessing a reasonable fee also has been cited as part of a "solid foundation" for denying recovery of legal costs. *Oelrichs v. Spain*, 82 U.S. (15 Wall.) 211, 231 (1872). In addition, the practice of awarding attorney's fees to victorious litigants has been viewed as "an instrument of revenge." *Farmer v. Arabian Am. Oil Co.*, 324 F.2d 359, 370 (2d Cir. 1963) (en banc) (Clark, J., dissenting), *rev'd*, 379 U.S. 227 (1964).

³ Act of Feb. 26, 1853, ch. 80, 10 Stat. 161 (current version at 28 U.S.C. § 1923(a) (1976)).

⁴ See *The Baltimore*, 75 U.S. (8 Wall.) 377, 392 (1869); *cf.* *Henkel v. Chicago, St. Paul, Minneapolis & Omaha Ry.*, 284 U.S. 444, 446-47 (1932) (costs for expert witnesses not recoverable absent express statutory provision). In *The Baltimore*, the Supreme Court noted that the Federal Judiciary Act of 1789, Act of Sept. 24, 1789, ch. 20, 1 Stat. 73, which provided for awards of costs, implicitly adopted the English rule. 75 U.S. (8 Wall.) at 388. See also *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 164-65 (1939); *In re Paschal*, 77 U.S. (10 Wall.) 483, 493-94 (1870). The Court concluded, however, that the 1853 Act effectively repealed this endorsement by making its own provisions the exclusive means for compensation. 75 U.S. (8 Wall.) at 392.

⁵ See, e.g., *Hall v. Cole*, 412 U.S. 1, 4-5 (1973); *Vaughan v. Atkinson*, 369 U.S. 527, 530 (1962); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 164-65 & n.2 (1939); *Dodge v. Tulleys*, 144 U.S. 451, 457 (1892); *Trustees v. Greenough*, 105 U.S. 527, 535-36 (1882); 1 S. SPEISER, *supra* note 2, § 12:11. The equity jurisdiction of the federal courts originated in the English Court of Chancery, which was empowered to fix costs at intervals in litigation and to allocate "the entire expenses of the litigation of one of the parties as fair justice to the other party will permit." *Sprague v. Ticonic Nat'l Bank*, 307 U.S. at 164-65 & n.1. See generally 1 J. STORY, *COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA* §§ 57-58 (14th ed. 1918).

A. Common Fund Exception to the American Rule

Under the "common fund" exception,⁶ as first conceived, a court could assess attorney's fees against funds that had been created, increased, or protected by successful litigation.⁷ Because this doctrine was based upon the concept of unjust enrichment,⁸ legal fees were awarded only when a representative plaintiff's action produced an identifiable fund which permitted all members of a class to share in the pecuniary benefit of recovery.⁹ Ultimately,

⁶ The common-fund doctrine originated in two Supreme Court decisions. See *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 124-25 (1885); *Trustees v. Greenough*, 105 U.S. 527, 535-36 (1882). In *Greenough*, the plaintiff, representing a class of bondholders, brought suit to prevent a trustee of a fund that had been pledged as security for the bonds from committing waste. 105 U.S. at 528-29. The resulting judgment set aside the fraudulent conveyances and restored the fund. *Id.* at 529. The plaintiff then filed a petition to obtain funds from the trust as reimbursement for litigation expenses. *Id.* In *Central Railroad*, several unsecured creditors successfully brought a creditors' bill to reach the assets of a debtor-railroad. 113 U.S. at 118. Subsequently, the creditors' attorneys attempted to recover for the services they rendered to the noncontracting parties named as class members in the creditor's bill. *Id.* at 120-21. Recognizing that those who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the expense of the successful litigants, the Supreme Court held that both the litigant in *Greenough*, 105 U.S. at 532, and the attorney in *Central Railroad* had independent claims to reasonable attorney's fees from the common fund. 113 U.S. at 127.

The common-fund doctrine is consistent with the American rule since it is not the losing party but the fund itself that is taxed with the victor's fees. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 481 (1980); see *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257-58 (1975); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 167 (1939). Indeed, one commentator has noted that the courts, when invoking the common-fund theory of recovery, actually are imposing extracontractual obligations upon the nonclient, nonparty beneficiaries of the fund. Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?* 126 U. PA. L. REV. 281, 298 (1977). See also Dawson, *Lawyers and Involuntary Clients: Attorney Fees From Funds*, 87 HARV. L. REV. 1597, 1653 (1974).

⁷ See, e.g., *Boeing Co. v. Van Gemert*, 444 U.S. 472, 479-81 (1980); *United States v. Equitable Trust Co.*, 283 U.S. 738, 744 (1931); *Harrison v. Perea*, 168 U.S. 311, 325 (1897); *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 126-27 (1885).

⁸ *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 392 (1970). The common-fund doctrine reflects the notion that persons who are benefited by a suit, without helping to defray its cost, are unjustly enriched at the expense of the prevailing litigant. *Id.*

⁹ E.g., *Hall v. Cole*, 412 U.S. 1, 5 n.7 (1973); *Trustees v. Greenough*, 105 U.S. 527, 536-37 (1882). The classic example of a common fund which confers pecuniary benefit upon those who are charged with attorney's fees is an express trust. See *United States v. Equitable Trust Co.*, 283 U.S. 738, 744-45 (1931); *Trustees v. Greenough*, 105 U.S. at 532. The courts, however, have expanded the scope of the common-fund theory to encompass a wide range of civil litigation. See, e.g., *Boeing Co. v. Van Gemert*, 444 U.S. 472, 479-81 (1980) (money judgments); *Harrison v. Perea*, 168 U.S. 311, 325 (1897) (decendent's estates); *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 126-27 (1885) (creditor suits); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 468-69 (2d Cir. 1974) (settlement funds); 1 S. SPEISER, *supra* note 2, §§ 11:13 to 11:26, at 416-46.

however, the doctrine was construed liberally and evolved into a "common benefit" theory¹⁰ pursuant to which neither an identifiable fund nor pecuniary recovery were necessary preconditions to fees awards.¹¹ Currently, the doctrine encompasses litigation "which corrects or prevents an abuse which would be prejudicial to the rights and interests" of others.¹² Courts making an award under this exception, however, must be able to exact the fees from those who have benefited from the litigation.¹³

B. *Bad Faith Exception to the American Rule*

The second traditional equitable exception to the American rule, the "bad faith" exception,¹⁴ is punitive in nature,¹⁵ and en-

¹⁰ See generally *Hall v. Cole*, 412 U.S. 1, 5-7 & n.7 (1973); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-95 (1970); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 165-66 (1939); *Schechtman v. Wolfson*, 244 F.2d 537, 540 (2d Cir. 1957).

¹¹ See, e.g., *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 392 (1970). In *Mills*, the Supreme Court noted that although the early "common fund" cases involved pecuniary recovery, "nothing in these cases indicate[d] that the suit must actually bring money into the court as a prerequisite to the court's power to order reimbursement of expenses." *Id.* at 392 (footnote omitted).

¹² *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 396 (1970) (quoting *Bosch v. Meeker Coop. Light & Power Ass'n*, 257 Minn. 362, 366-67, 101 N.W.2d 423, 427 (1960)). See generally Note, *Attorneys' Fees: What Constitutes a "Benefit" Sufficient to Award Fees from Third Party Beneficiaries*, 1972 WASH. U.L.Q. 271, 273-81.

¹³ See, e.g., Note, *The Civil Rights Attorney's Fees Awards Act of 1976*, 52 ST. JOHN'S L. REV. 562, 568 (1978).

¹⁴ See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59 (1975); *F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 129 (1974); *Hall v. Cole*, 412 U.S. 1, 5 (1973); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.4 (1968); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967); *Vaughan v. Atkinson*, 369 U.S. 527, 530-31 (1962). See generally Comment, *Attorney's Fees and the Federal Bad Faith Exception*, 29 HASTINGS L.J. 319 (1977); Comment, *Nemeroff v. Abelson, Bad Faith, and Awards of Attorneys' Fees*, 128 U. PA. L. REV. 468 (1979). A fee award pursuant to the bad faith exception is limited in several respects. Fees may be awarded only for those legal services necessitated by the vexatious conduct of the defeated party. *E.g.*, *Richardson v. Communications Workers of Am. Local 7495*, 530 F.2d 126, 133 (8th Cir.), *cert. denied*, 429 U.S. 824 (1976); *Wright v. Jackson*, 522 F.2d 955, 957 (4th Cir. 1975); *Signal Delivery Serv., Inc. v. Highway Truck Drivers & Helpers Local 107*, 68 F.R.D. 318, 322-23 (E.D. Pa. 1975). Additionally, because the bad faith exception is founded upon the inherent equitable powers of the federal courts, see note 5 and accompanying text *supra*, a court properly may refuse to award attorney's fees when the party requesting the award also has been guilty of misconduct. *E.g.*, *In re Kaid*, 347 F. Supp. 540, 543-44 (E.D. Va. 1972); *Lee Nat'l Corp. v. Kansas City S. Indus., Inc.*, 50 F.R.D. 412, 415 (S.D.N.Y. 1970).

¹⁵ *Hall v. Cole*, 412 U.S. 1, 5 (1973). Since the basic purpose of the bad faith exception is punitive, "the essential element in triggering the award of fees is . . . the existence of 'bad faith' on the part of the unsuccessful litigant." *Id.* In *Straub v. Vaisman & Co.*, 540 F.2d 591 (3d Cir. 1976), however, the Third Circuit held that the punitive nature of this exception may preclude its application in actions instituted under section 10(b) of the Securities Ex-

ables a court to assess attorney's fees against a losing party¹⁶ who has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons."¹⁷ A court may premise its use of this exception upon either the acts giving rise to the plaintiff's claim¹⁸ or the conduct of a

change Act of 1934, 15 U.S.C. § 78j(b) (1976) and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (1981). 540 F.2d at 599. Noting that section 28(a) of the '34 Act, 15 U.S.C. § 78bb(a) (1976), prohibits recovery of amounts which exceed the "actual damages on account of the act complained of," and observing that assessments of attorney's fees are equivalent to awards of punitive damages in this context, the court concluded that recovery of fees is not permitted when premised on the facts giving rise to the cause of action itself. 540 F.2d at 599. The court noted, however, that counsel fees can be awarded when "an unfounded action or defense is brought or maintained in bad faith," *id.* at 600 (quoting 6 J. MOORE, FEDERAL PRACTICE ¶ 54.77, at 1709 (2d ed. 1976)), or when the wanton conduct occurred during, or just before, the commencement of the litigation. 540 F.2d at 600; *accord*, Huddleston v. Herman & MacLean, 640 F.2d 534, 559 (5th Cir. 1981). *But see* Wright v. Heizer Corp., 503 F. Supp. 802, 812 (N.D. Ill. 1980) (*Straub* rule too strict); Note, *Recovery of Attorneys' Fees Under Rule 10b-5*, 53 NOTRE DAME LAW. 320, 337 (1977) (bad faith exception should be expanded to permit successful litigants in 10b-5 actions to recover reasonable attorney's fees unless special circumstances render such an award unjust). *See generally* Note, *Securities Regulation—Scope of Due Diligence Defense and Permissibility of an Award of Attorneys' Fees Under the "Bad Faith" Exception to the American Rule in a Private 10b-5 Action—Straub v. Vaisman & Co.*, 540 F.2d 591 (3d Cir. 1976), 50 TEMP. L.Q. 124 (1976).

¹⁶ In *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), the Supreme Court extended the equitable bad faith exception to permit federal courts to assess counsel fees against attorneys who act in bad faith. *Id.* at 766-67. *See generally* Comment, *Awards of Attorneys' Fees Against Attorneys: Roadway Express, Inc. v. Piper*, 60 B.U.L. REV. 950 (1980). After rejecting the defendant's contention that section 1927 of Title 28 authorized a fee award against lawyers who abuse the "court's process," 447 U.S. at 763. *But see* 28 U.S.C.A. § 1927 (West Supp. 1981) (subsequent amendment now permits such awards), the *Roadway Express* Court looked to the federal judiciary's inherent equitable powers. 447 U.S. at 765. In examining the scope of these powers, the Court noted that the authority of federal courts to levy sanctions to deter abusive litigation practices was "well-acknowledged." *Id.* (citing *Link v. Wabash R.R.*, 370 U.S. 626, 632 (1962)). Moreover, the Court reasoned, since the bad faith exception encompasses a party's litigation conduct, 447 U.S. at 766 (quoting *Hall v. Cole*, 412 U.S. 1, 15 (1973)), and a court's power "over members of its bar is at least as great as its authority over litigants," 447 U.S. at 766 (footnote omitted), it may levy counsel fees against attorneys who intentionally abuse the judicial process. *Id.* For an analysis of the appropriate scope of the bad faith exception's application to sanctions levied against attorneys, see Comment, *supra*, at 958-68 (intentional abuse standard is appropriate).

¹⁷ *F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 129 (1974) (citing *Vaughan v. Atkinson*, 369 U.S. 527, 530-31 (1962)); *Hall v. Cole*, 412 U.S. 1, 5 (1973); *cf.* *Universal Oil Prods. Co. v. Root Ref. Co.*, 328 U.S. 575, 580 (1946) (attorney's fees may be awarded when fraud is practiced upon tribunal).

¹⁸ *See, e.g.*, *Richardson v. Communications Workers of Am. Local 7495*, 530 F.2d 126, 132-33 (8th Cir.) (labor union's breach of duty to represent non-member employee leading to wrongful discharge), *cert. denied*, 429 U.S. 824 (1976); *Rolax v. Atlantic Coast Line R.R.*, 186 F.2d 473, 475, 481 (4th Cir. 1951) (dictum) (discriminatory contract between union and employer substantially similar to contract previously declared illegal); *Schlein v. Smith*, 160 F.2d 22, 25 (D.C. Cir. 1947) (defendants engaging in series of usurious transactions with illiterate woman); *Lamb v. Sallee*, 417 F. Supp. 282, 288 (E.D. Ky. 1976) (landlord refusing to rent because of race); *Sperry Rand Corp. v. Electronic Concepts, Inc.*, 325 F. Supp. 1209,

party during the course of the litigation.¹⁹ Ordinarily, the question of whether the circumstances are sufficient to warrant invoking this exception is left to the sound discretion of the court, and a finding of bad faith will be reversed only if it lacks a reasonable

1219 (E.D. Va. 1970) (deliberate misuse of trade secrets and breach of confidential relationships), *vacated on other grounds sub nom.* Sperry Rand Corp. v. A-T-O, Inc., 447 F.2d 1387 (4th Cir.), *cert. denied*, 405 U.S. 1017 (1972). *But see* Makofsky v. Cunningham, 576 F.2d 1223, 1233 (5th Cir. 1978) (no award for failure to perform contract for the sale of real estate); Straub v. Vaisman & Co., 540 F.2d 591, 599 (3d Cir. 1976) (no award where securities statute limits recovery to actual damages); Foley v. Devaney, 528 F.2d 888, 891-92 (3d Cir. 1976) (*per curiam*) (no award against trustee who acted in defense of fund); Local 149, UAW v. American Brake Shoe Co., 298 F.2d 212, 216 (4th Cir.) (doubt concerning interpretation of case justified litigation), *cert. denied*, 369 U.S. 873 (1962).

Although not falling squarely within the scope of the bad faith exception, attorney's fees also have been held to be recoverable as an element of compensatory damages in an admiralty action in which the defendant shipowner refused to satisfy a seaman's meritorious claim for maintenance and cure. *Vaughan v. Atkinson*, 369 U.S. 527, 530-31 (1962). Similarly, awards of attorney's fees have been included in civil contempt penalties, *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 426 (1923); *Feldman v. American Palestine Line, Inc.*, 18 F.2d 749, 750 (2d Cir. 1927), as well as in the damages recovered by plaintiffs injured as a result of wilful disobedience of a writ of mandamus. *Branch v. Davis*, 29 F. 888, 894-95 (C.C.M.D. Ala. 1886).

¹⁹ *See, e.g.*, *Ryan v. Hatfield*, 578 F.2d 275, 277 (10th Cir. 1978) (award of attorney's fees upheld after dismissal for failure to prosecute); *In re Boston & Providence R.R.*, 501 F.2d 545, 549-50 (1st Cir. 1974) (vexatious motion to enjoin trustee's disbursement of funds); *Kinnear-Weed Corp. v. Humble Oil & Ref. Co.*, 441 F.2d 631, 636-37 & n.5 (5th Cir.) (fraudulent allegation that defendant altered evidentiary exhibit), *cert. denied*, 404 U.S. 941 (1971); *Cleveland v. Second Nat'l Bank & Trust Co.*, 149 F.2d 466, 469-70 (6th Cir.) (beneficiary asserted "utterly unfounded" allegations of mismanagement and fraud against the trustee), *cert. denied*, 326 U.S. 775 (1945); *Nemeroff v. Abelson*, 469 F. Supp. 630, 640-41 (S.D.N.Y. 1979) (action instituted maliciously), *modified*, 620 F.2d 339 (2d Cir. 1980); *Stratton Group, Ltd. v. Sprayregen*, 466 F. Supp. 1180, 1186 (S.D.N.Y. 1979) (frivolous lawsuit); *Flora v. Moore*, 461 F. Supp. 1104, 1120-22 (N.D. Miss. 1978) (bad faith pursuit of meritless claim); *EEOC v. Datapoint Corp.*, 457 F. Supp. 62, 67-69 (W.D. Tex. 1978); *Scheriff v. Beck*, 452 F. Supp. 1254, 1257-58 (D. Colo. 1978) (action instituted unreasonably); *Southerland v. County of Oakland*, 77 F.R.D. 727, 734 (E.D. Mich. 1978) (fraud perpetrated upon the court), *aff'd sub nom.* *Southerland v. Irons*, 628 F.2d 978 (6th Cir. 1980); *Lewis v. Texaco, Inc.*, 418 F. Supp. 27, 28 (S.D.N.Y. 1976) (bad faith assertion of defense); *United States v. Reserve Mining Co.*, 412 F. Supp. 705, 712-13 (D. Minn.) (subpoenaed reports concealed solely for purpose of delay), *aff'd*, 543 F.2d 1210 (8th Cir. 1976); *Gazan v. Vadsco Sales Corp.*, 6 F. Supp. 568, 568 (E.D.N.Y. 1934) (baseless action instituted solely for purpose of harassing defendant). *But see, e.g.*, *Union Bank v. Winnebago Indus., Inc.*, 528 F.2d 95, 99-100 (9th Cir. 1975); *Lichtenstein v. Lichtenstein*, 481 F.2d 682, 684-85 (3d Cir. 1973), *cert. denied*, 414 U.S. 1144 (1974); *Diamond Shamrock Corp. v. Lumbermens Mut. Cas. Co.*, 466 F.2d 722, 729-30 (7th Cir. 1972); *Walker v. CBS*, 443 F.2d 33, 37-38 (7th Cir. 1971); *Burndy Corp. v. Kearney-National, Inc.*, 466 F. Supp. 80, 92 (S.D.N.Y.), *aff'd mem.*, 614 F.2d 1286 (2d Cir. 1979), *cert. denied*, 101 S. Ct. 82 (1981); *Catanzaro v. Masco Corp.*, 423 F. Supp. 415, 445 (D. Del. 1976), *aff'd per curiam sub nom.* *Catanzaro v. ITT*, 575 F.2d 1085 (3d Cir.), *cert. denied*, 439 U.S. 989 (1978); *Chicago Title & Trust Co. v. Fox Theatres Corp.*, 178 F. Supp. 899, 905 (S.D.N.Y. 1959), *aff'd per curiam*, 277 F.2d 462 (2d Cir. 1960).

basis.²⁰ It is well settled, however, that the mere resolution of issues against a party will not demonstrate the requisite degree of vexatiousness.²¹ Indeed, fee shifting under the "bad faith" doctrine is justified only in exceptional circumstances.²²

C. Private Attorney General Doctrine

Recognizing the limitations of the common-benefit and bad-faith exceptions to the American rule,²³ the federal courts, in the early 1970's, employed their equitable powers to award fees to litigants who benefited the public by successfully vindicating congressional policies "of the highest order."²⁴ Notwithstanding its adop-

²⁰ See, e.g., *In re Boston & Providence R.R.*, 501 F.2d 545, 549-50 (1st Cir. 1974); *Local No. 4, Int'l Bhd. of Elec. Workers v. Radio Thirteen-Eighty, Inc.*, 469 F.2d 610, 615 (8th Cir. 1972); *National Ass'n for Mental Health, Inc. v. Weinberger*, 68 F.R.D. 387, 392 (D.D.C. 1975).

²¹ *Runyon v. McCrary*, 427 U.S. 160, 183 (1976). The Second Circuit has attempted to guide the district courts by delineating the parameters of the bad faith exception. In *Browning Debenture Holders' Comm. v. DASA Corp.*, 560 F.2d 1078 (2d Cir. 1977), for example, the Second Circuit stated that a finding of pre-litigation bad faith requires clear evidence that a claim is "entirely without color and has been asserted wantonly, for purposes of harassment or delay, or for other improper reasons." *Id.* at 1088. In *Nemeroff v. Abelson*, 620 F.2d 339 (2d Cir. 1980), the court, defining the concept of a colorable claim, observed that:

A claim is colorable, for the purpose of the bad faith exception, when it has some legal and factual support, considered in light of the reasonable beliefs of the individual making the claim. The question is whether a reasonable attorney could have concluded that facts supporting the claim *might be established*, not whether such facts actually *had been established*.

Id. at 348 (emphasis in original) (footnote omitted). The Second Circuit's views have not only been applied by the district courts within the circuit, see, e.g., *The Cambridge Fund, Inc. v. Abella*, 501 F. Supp. 598, 632 (S.D.N.Y. 1980); *Crane Co. v. American Standard, Inc.*, 439 F. Supp. 945, 958 n.5, (S.D.N.Y. 1977), *modified*, 603 F.2d 244 (2d Cir. 1979), but also by the lower courts of other circuits, see, e.g., *Driscoll v. Oppenheimer & Co.*, 500 F. Supp. 174, 175 (N.D. Ill. 1980); *Medtronic, Inc. v. Mine Safety Appliances Co.*, 468 F. Supp. 1132, 1149 (D. Minn. 1979).

²² See, e.g., *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 167 (1939); *National Ass'n of Letter Carriers v. United States Postal Serv.*, 590 F.2d 1171, 1176-78 (D.C. Cir. 1978); *Cordeco Dev. Corp. v. Santiago Vasquez*, 539 F.2d 256, 263 (1st Cir.), *cert. denied*, 429 U.S. 978 (1976); *Richardson v. Communication Workers of Am. Local 7495*, 530 F.2d 126, 132-33 (8th Cir.), *cert. denied*, 429 U.S. 824 (1976); *Rolax v. Atlantic Coast Line R.R.*, 186 F.2d 473, 481 (4th Cir. 1951); *Cleveland v. Second Nat'l Bank & Trust Co.*, 149 F.2d 446, 469 (6th Cir.), *cert. denied*, 326 U.S. 775 (1945); *Chicago Title & Trust Co. v. Fox Theatres Corp.*, 178 F. Supp. 899, 905 (S.D.N.Y. 1959), *aff'd per curiam*, 277 F.2d 462 (2d Cir. 1960).

²³ See, e.g., Note, *supra* note 13, at 568.

²⁴ *Sims v. Amos*, 340 F. Supp. 691, 694 (M.D. Ala.), *aff'd*, 409 U.S. 942 (1972). The genesis of this doctrine apparently occurred in *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400 (1968) (*per curiam*). In *Newman*, the Supreme Court held that a plaintiff who obtains an injunction enforcing compliance with Title II of the Civil Rights Act of 1964, which proscribes racial discrimination in public accommodations, does so "not for himself

tion by seven federal courts of appeals,²⁵ this "private attorney general" doctrine²⁶ ultimately was rejected by the Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society*.²⁷ The *Alyeska* Court held that it was the province of Congress, not the judiciary, to determine which public policies were sufficiently important to merit the application of a fee-shifting remedy.²⁸

Writing for the majority, Justice White observed that the general rule limiting attorney's fee awards to the nominal amounts enumerated in the costs statute had not been altered by the enactment of various federal statutes which expressly authorized fee shifting in certain circumstances.²⁹ Although Congress had chosen to employ the private attorney general rationale in some instances,³⁰ the Court noted that congressional use of the doctrine could not be construed as authorizing the courts to award attor-

alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Id.* at 401-02 (footnote omitted); see notes 215-218 and accompanying text *infra*. *Newman* was interpreted by numerous lower federal courts as enunciating an important new fee-shifting rationale and, therefore, enthusiastically was adopted. Note, *Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest*, 24 HASTINGS L.J. 733, 742-48 (1973) [hereinafter cited as *Green Light*]; see note 25 *infra*.

²⁵ See, e.g., *Souza v. Travisono*, 512 F.2d 1137, 1138-39 (1st Cir. 1975), *vacated*, 423 U.S. 809 (1975); *Taylor v. Perini*, 503 F.2d 899, 905 (6th Cir. 1974), *vacated*, 421 U.S. 982 (1975); *Fowler v. Schwarzwalder*, 498 F.2d 143, 145-46 (8th Cir. 1974); *Wilderness Soc'y v. Morton*, 495 F.2d 1026, 1036 (D.C. Cir. 1974), *rev'd sub nom. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975); *Hoitt v. Vitek*, 495 F.2d 219, 220-21 (1st Cir. 1974); *Cornist v. Richland Parish School Bd.*, 495 F.2d 189, 192 (5th Cir. 1974) (*per curiam*); *Brandenburger v. Thompson*, 494 F.2d 885, 889 (9th Cir. 1974); *Fairley v. Patterson*, 493 F.2d 598, 606 (5th Cir. 1974); *Donahue v. Staunton*, 471 F.2d 475, 483 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973); *Knight v. Auciello*, 453 F.2d 852, 853 (1st Cir. 1972) (*per curiam*); *Lee v. Southern Home Sites Corp.*, 444 F.2d 143, 147-48 (5th Cir. 1971). *But see Bradley v. School Bd.*, 472 F.2d 318, 329-31 (4th Cir. 1972), *vacated on other grounds*, 416 U.S. 696 (1974).

²⁶ See generally *Derfner, One Giant Step: The Civil Rights Attorney's Fees Awards Act of 1976*, 21 St. Louis U.L.J. 441, 441-45 (1977); *Green Light*, *supra* note 24, at 733-34, 742-69; Note, *supra* note 13, at 569-70.

²⁷ 421 U.S. 240 (1975). Prior to *Alyeska*, the Fourth Circuit refused to adopt the private attorney general exception to the American rule. See *Bradley v. School Bd.*, 472 F.2d 318, 329-31 (4th Cir. 1972), *vacated on other grounds*, 416 U.S. 696 (1974). Emphasizing the difficulty in determining which public policies would warrant awards of attorney's fees under the exception, the *Bradley* court concluded that Congress was better qualified to make that determination. 472 F.2d at 329-31.

²⁸ 421 U.S. at 269.

²⁹ *Id.* at 260; see, e.g., notes 34-37 *infra*.

³⁰ 421 U.S. at 263; see, e.g., *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 265-66 (1972) (fee shifting in connection with treble damages awards under the antitrust laws); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968) (*per curiam*) (fee shifting in connection with provision precluding discrimination in places of public accommodation).

ney's fees to a prevailing party whenever they "deem the public policy furthered by a particular statute important enough to warrant the award."³¹ Moreover, the Court stated that awards made under a private attorney general exception inevitably would conflict with a statutory provision barring the assessment of legal fee awards against the federal government.³² The *Alyeska* Court concluded, therefore, that judicial adoption of the private attorney general doctrine "would make major inroads on a policy matter that Congress has reserved for itself."³³

Because the *Alyeska* Court unequivocally rejected the private attorney general rationale, express statutory fee authorization has become the primary vehicle through which attorney's fees may be awarded in the federal court system. This Note will examine the operation and interpretation of such statutes. Since some degree of victory generally is a prerequisite to a fee award, the Note first will address the prevailing party concept. The standards which govern the exercise of judicial discretion in awarding fees also will be examined. Thereafter, the Note will review the elusive "reasonableness" standard used to ascertain the size of a fee award. Finally, the Note will consider the special problem of fee recovery against governmental bodies and officials.

II. PREVAILING PARTIES

Numerous federal statutes authorize awards of attorney's fees

³¹ 421 U.S. at 263.

³² *Id.* at 265-67; see notes 322-325 and accompanying text *infra*. The Court noted that section 2412 of Title 28 permits the taxation of costs "but not including the fees and expenses of attorneys" against the United States in civil actions involving that entity or any agency or official thereof. 421 U.S. at 265-66 (quoting 28 U.S.C. § 2412(a) (1976) as amended by Pub. L. No. 96-481, 94 Stat. 2327 (1980)). The Court observed that if a primary function of a private attorney general was, as the plaintiffs maintained, to hold public officials accountable for their actions, then the logical implication should be that attorney's fees are awardable against the government or its representatives. 421 U.S. at 267. The Court stated, however, that section 2412 constitutes an absolute bar to fee awards against the United States in the absence of an express statutory waiver of sovereign immunity. *Id.* at 267-68.

³³ 421 U.S. at 269. One commentator has noted that *Alyeska* eliminated the private attorney general doctrine only with regard to federal law and that it therefore is a potentially viable concept under state law. Comment, *Theories of Recovering Attorneys' Fees: Exceptions to the American Rule*, 47 U. Mo. K.C. L. REV. 566, 576, 585 (1979). Another commentator has suggested that the doctrine should be recognized in the areas of public interest litigation and suits instituted in behalf of litigants of moderate financial means which involve important congressional policies. Comment, *Attorney Fees: Slipping From The American Rule Strait Jacket*, 40 MONT. L. REV. 308, 313-14 (1979).

to "prevailing parties."³⁴ Perhaps the most significant of these

³⁴ See, e.g., Civil Service Reform Act of 1978, § 205(g)(1), 5 U.S.C. § 7701(g)(1) (Supp. IV 1980); Commodity Futures Trading Commission Act of 1974, § 106(f), (g), 7 U.S.C. § 18(f), (g) (1976); Agricultural Fair Practices Act of 1967, § 6(a), (c), 7 U.S.C. § 2305(a), (c) (1976); Plant Variety Protection Act, § 125, 7 U.S.C. § 2565 (1976); Consumer Product Safety Commission Improvements Act of 1976, § 24, 15 U.S.C. § 2073 (1976); Petroleum Marketing Practices Act, § 105(d)(1)(C), (3), 15 U.S.C. § 2805(d)(1)(C), (3) (Supp. IV 1980); Copyrights Act, § 505, 17 U.S.C. § 505 (1976 & Supp. IV 1980); Emergency School Aid Act, § 718, 20 U.S.C. § 1617 (1976) (current version at 20 U.S.C. § 3205 (Supp. III 1979)); Jury Systems Improvement Act of 1978, § 6(a)(1), 28 U.S.C. § 1875(d)(2) (Supp. III 1979); 28 U.S.C. § 1912 (1976); Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, § 505, 29 U.S.C. § 794a(b) (Supp. II 1978); Patent Infringement Act, § 1, 35 U.S.C. § 285 (1976); Veterans' Benefits Act, § 784(g), 38 U.S.C. § 784(g) (1976); Voting Rights Act Extension of 1975, § 402, 42 U.S.C. § 1973l(e) (1976); Civil Rights Attorney's Fees Awards Act of 1976, § 2, 42 U.S.C. § 1988 (1976), as amended by Pub. L. No. 96-481, 94 Stat. 2330 (1980); Civil Rights Act of 1964, § 204(b), 42 U.S.C. § 2000a-3(b) (1976); Civil Rights Act of 1964, § 706(k), 42 U.S.C. § 2000e-5(k) (1976); Fair Housing Act of 1968, § 812(c), 42 U.S.C. § 3612(c) (1976); Railway Labor Act, 45 U.S.C. § 153(p) (1976); 49 U.S.C. § 11708(c) (Supp. II 1978); cf. FED. R. CIV. P. 54(d) (authorizing award of costs to prevailing party).

The legislative histories of the fee-shifting statutes indicate common congressional goals. One objective of these statutes is to encourage lawsuits by private litigants of modest means so that underlying substantive laws will be enforced effectively. The Senate Report accompanying the Civil Rights Attorney's Fees Awards Act of 1976 is indicative of the rationale behind the enactment of fee-shifting provisions in the civil rights area:

All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.

In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

S. REP. NO. 1011, 94th Cong., 2d Sess. 2, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5908, 5910 [hereinafter cited as S. REP. NO. 1011]. Congress has included fee-shifting provisions similar to the Fees Awards Act in every major piece of civil rights legislation enacted since 1964. *United States v. Board of Educ.*, 605 F.2d 573, 575 (2d Cir. 1979) (citing S. REP. NO. 1011, *supra*); see, e.g., Emergency School Aid Act, § 718, 20 U.S.C. § 1617 (1976) (current version at 20 U.S.C. § 3205 (Supp. II 1978)); Voting Rights Act Extension of 1975, § 402, 42 U.S.C. § 1973l(e) (1976); Civil Rights Attorney's Fees Awards Act of 1976, § 2, 42 U.S.C. § 1988 (1976), as amended by Pub. L. No. 96-481, 94 Stat. 2330 (1980); Civil Rights Act of 1964, § 204(b), 42 U.S.C. § 2000a-3(b) (1976); Civil Rights Act of 1964, § 706(k), 42 U.S.C. § 2000e-5(k) (1976); Fair Housing Act of 1968, § 812(c), 42 U.S.C. § 3612(c) (1976). By including these provisions, Congress clearly intended to facilitate the prosecution of meritorious suits by plaintiffs of limited means. 110 CONG. REC. 12724 (1964) (remarks by Senator Humphrey regarding the fee-shifting provisions contained in the Civil Rights Act of 1964). Because civil rights plaintiffs play such an essential part in the congressional enforcement scheme, the Supreme Court has indicated that they ordinarily should recover their attorney's fees whenever they are successful in the prosecution of their suits. *E.g.*, *Albemarle*

statutes is the Civil Rights Attorney's Fees Awards Act of 1976 (the Fees Awards Act).³⁵ Enacted by Congress in response to the *Alyeska* decision, the Fees Awards Act is applicable to some of the most frequently litigated statutes in the civil rights area, and

Paper Co. v. Moody, 422 U.S. 405, 415 (1975); *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968) (per curiam).

Another legislative purpose behind the fee-shifting statutes is to deter wrongful conduct which, otherwise, would be fostered by the knowledge that excessive litigation expenses often prevent individuals from bringing suit to vindicate their rights. *See, e.g.*, *Grooms v. Snyder*, 474 F. Supp. 380, 383-84 (N.D. Ind. 1979). Since the cost of litigating a Freedom of Information Act (FOIA) case typically exceeds one thousand dollars, the statutory fee-shifting provision was deemed essential if there was to be effective judicial review of arbitrary bureaucratic refusals to comply thoroughly with the disclosure requirements. S. REP. NO. 854, 93d Cong., 2d Sess. 18 (1974). Thus, to some extent, a successful plaintiff benefits the citizenry by securing government compliance with the disclosure policy embodied in the FOIA. *Blue v. Bureau of Prisons*, 570 F.2d 529, 533 (5th Cir. 1978) (citing *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1367 (D.C. Cir. 1977)).

There is also a strong public policy which favors litigation by private citizens of limited means as a method of eliminating discrimination in employment, *e.g.*, *Garner v. Giarrusso*, 571 F.2d 1330, 1337 (5th Cir. 1978); *see Copeland v. Marshall*, 641 F.2d 880, 895 (D.C. Cir. 1980), and encouraging compliance with other civil rights laws, *e.g.*, *Seattle School Dist. No. 1 v. Washington*, 633 F.2d 1338, 1348 (9th Cir. 1980), *appeal pending*, 102 S. Ct. 384 (1981); *Dennis v. Chang*, 611 F.2d 1302, 1306 & n.10 (9th Cir. 1980). The fee-shifting provisions of these laws, therefore, also are designed to deter conduct which is at variance with statutory policies. *Davis v. Bolger*, 512 F. Supp. 61, 63 (D.D.C. 1981) (citing *Copeland v. Marshall*, 641 F.2d 880, 890 (D.C. Cir. 1980)).

³⁵ The Civil Rights Attorney's Fees Awards Act of 1976 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, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988 (1976), *as amended* by Pub. L. No. 96-481, 94 Stat. 2330 (1980). The Revised Statutes include the following frequently litigated civil rights provisions: 42 U.S.C. § 1981 (1976) (equal rights of citizens under the law); 42 U.S.C. § 1982 (1976) (property rights of citizens); and 42 U.S.C. § 1983 (1976) (civil action for deprivation of rights).

Notably, the law review commentary dealing with significant prevailing party issues has been devoted almost exclusively to the civil rights area. *See, e.g.*, Brutocao, *Attorneys Fees: Who Prevails?*, 55 CAL. ST. B.J. 300, 302 (1980); Derfner, *supra* note 26, at 450; Heinsz, *Attorney's Fees for Prevailing Title VII Defendants: Toward a Workable Standard*, 8 U. TOL. L. REV. 259, 259-82 (1977); Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act*, 80 COLUM. L. REV. 346, 353-55 (1980); Note, *Attorney's Fees in Civil Rights Actions Against the Federal Government—NAACP v. Civiletti*, 29 DE PAUL L. REV. 1177, 1177 n.3 (1980); Note, *Administrative Law: Recovery of Attorney's Fees by Prevailing Plaintiffs in Title VII Actions*, 33 OKLA. L. REV. 98, 99-101 (1980); Note, *Attorney's Fees—Recovery By Prevailing Defendants In Title VII Actions*, 13 WAKE FOREST L. REV. 627, 632-39 (1977); Comment, *The Civil Rights Attorney's Fees Awards Act of 1976: A View from the Second Circuit*, 29 BUFFALO L. REV. 559, 564-66 (1980); Comment, 11 RUT.-CAM. L.J. 145, 151-52 (1979); Note, *supra* note 13, at 573-75; Survey, *Flexibility and Fairness—Sixth Circuit Jurisprudence Under the Civil Rights Attorney's Fees Awards Act*, 12 U. TOL. L. REV. 623, 635-54 (1981).

therefore has been the vehicle for a great number of the recent leading attorney's fees decisions. Additionally, fee awards may be made to "substantially prevailing parties" pursuant to such statutes as the Hart-Scott-Rodino Antitrust Improvements Act of 1976³⁶ and the Freedom of Information Act (FOIA).³⁷

A. Attributes of Prevailing Parties

The Senate Report accompanying the Fees Awards Act ex-

³⁶ See 15 U.S.C. § 26 (1976). The Hart-Scott-Rodino Antitrust Improvements Act of 1976 provides in part:

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . . and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

15 U.S.C. § 26 (1976); see *Alphin v. Henson*, 552 F.2d 1033, 1034 (4th Cir.) (per curiam), cert. denied, 434 U.S. 823 (1977). The plaintiffs in *Alphin* were denied an award of fees under section 4 of the Sherman Act because they were unable to prove that they sustained any damages as a consequence of an attempt to monopolize. 552 F.2d at 1034. Since they succeeded in obtaining injunctive relief, however, they were eligible for an award of attorney's fees under the Antitrust Improvements Act. *Id.*; accord, *City of Mishawaka v. American Elec. Power Co.*, 465 F. Supp. 1320, 1345 (N.D. Ind. 1979), modified, 616 F.2d 976 (7th Cir. 1980), cert. denied, 449 U.S. 1096 (1981).

In *F. & M. Schaefer Corp. v. C. Schmidt & Sons, Inc.*, 476 F. Supp. 203, 206 (S.D.N.Y.), aff'd on other grounds, 597 F.2d 814 (2d Cir. 1979), the District Court for the Southern District of New York enunciated the standard to be followed when determining whether a party has prevailed in antitrust litigation. Relying on cases construing the Civil Rights Attorney's Fees Awards Act of 1976 and the FOIA fee-shifting provision, the court held that the critical inquiry must be whether the litigation effected any change in the parties' situation as it existed immediately prior to the institution of the suit. *Id.* at 206 & n.3 (citing *Bonnes v. Long*, 599 F.2d 1316, 1319 (4th Cir. 1979); *Vermont Low Income Advocacy Council, Inc. v. Usery*, 546 F.2d 509, 513 (2d Cir. 1976)). The defendant in *F. & M. Schaefer Corp.* had attempted to enter into a note purchase agreement which would enable it to obtain 30% of its competitor's common stock. 476 F. Supp. at 207. As a result of a preliminary injunction enjoining the execution of the agreement, the defendant assigned its rights under the agreement to an entity not in competition with the plaintiff. *Id.* Consequently, the court found that the plaintiff had substantially prevailed and rendered a fee award. *Id.*

³⁷ See 5 U.S.C. § 552(a)(4)(E) (1976). The FOIA was amended in 1974 to allow courts to "assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." *Id.* For a discussion of the discretionary nature of a fee award under the FOIA, see notes 255-263 *infra*. For a discussion of the availability of attorney's fees to pro se litigants under the FOIA, see Comment, *Pro Se Litigant's Eligibility for Attorney Fees Under FOIA: Crooker v. United States Department of Justice*, 55 ST. JOHN'S L. REV. 520 (1981); notes 175-202 *infra*.

pressly states that "for purposes of the award of counsel fees, parties may be deemed to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief."³⁸ Relying upon this legislative history, the Supreme Court recently held that a litigant may qualify as a prevailing party under the Act by settling his case.³⁹ Consequently, it is clear that a party

³⁸ S. REP. No. 1011, *supra* note 34, at 5. In the Senate Report accompanying the Fees Awards Act, Congress expressly endorsed certain judicial constructions of the "prevailing party" term. *Id.*; see *Kopet v. Esquire Realty Co.*, 523 F.2d 1005, 1008 (2d Cir. 1975); *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421, 429-30 (8th Cir. 1970); *Thomas v. Honeybrook Mines, Inc.*, 428 F.2d 981, 985-86 (3d Cir. 1970), *cert. denied*, 401 U.S. 911 (1971); *Aspira of N.Y., Inc. v. Board of Educ.*, 65 F.R.D. 541, 542-43 (S.D.N.Y. 1975); *Richards v. Griffith Rubber Mills*, 300 F. Supp. 338, 341 (D. Or. 1969). Moreover, Congress intended that the standards which had evolved under other civil rights statutes would also apply under the Fees Awards Act. See S. REP. No. 1011, *supra* note 34, at 3; H.R. REP. No. 1558, 94th Cong., 2d Sess. 6 (1976) [hereinafter cited as H.R. REP. No. 1558]. Notably, in *Hanrahan v. Hampton*, 446 U.S. 754 (1980), the Court indicated that the meaning of the term "prevailing party" is identical under the Voting Rights Act, 42 U.S.C. § 1973l(e) (1976), the Fees Awards Act, 42 U.S.C. § 1988 (1976), as amended by Pub. L. No. 96-481, 94 Stat. 2330, and Title VII, 42 U.S.C. § 2000e-5(k) (1976). 446 U.S. at 759 n.4; *Smith v. University of N.C.*, 632 F.2d 316, 351 (4th Cir. 1980) (citing *Hanrahan v. Hampton*, 446 U.S. 754, 759 n.4 (1980)); see *Bly v. McLeod*, 605 F.2d 134, 138-39 (4th Cir. 1979) (Voting Rights and Fees Awards Acts), *cert. denied*, 445 U.S. 928 (1980); *Nadeau v. Helgemoe*, 581 F.2d 275, 278 n.2 (1st Cir. 1978) (Title VII and Fees Awards Act); cf. *LeGare v. University of Pa. Medical School*, 448 F. Supp. 1250, 1257 (E.D. Pa. 1980) (same standard under Title VII and Fees Awards Act for prevailing defendants). Moreover, it has been held that the Fees Awards Act and the fee-shifting provision in the Emergency School Aid Act, 20 U.S.C. § 3205 (Supp. II 1978), should be interpreted together. *Seattle School Dist. No. 1 v. Washington*, 633 F.2d 1338, 1348 (9th Cir. 1980), appeal pending, 102 S. Ct. 384 (1981) (citing *Northcross v. Memphis Bd. of Educ.*, 412 U.S. 427 (1973) (per curiam)); *Wheeler v. Durham City Bd. of Educ.*, 585 F.2d 618, 621-22 (4th Cir. 1978). Fee-shifting provisions generally are interpreted in a similar fashion because they are phrased in virtually identical language. *Connor v. Winter*, 519 F. Supp. 1337, 1339 (S.D. Miss. 1981) (Voting Rights and Fees Awards Acts) (citing *Riddel v. National Democratic Party*, 624 F.2d 539, 543 (5th Cir. 1980)); *Westfall v. Board of Comm'rs*, 477 F. Supp. 862, 868 (N.D. Ga. 1979) (standards under Title VII and Fees Awards Act generally identical).

³⁹ *Maher v. Gagne*, 448 U.S. 122, 129 (1980). *But cf.* *Pearson v. Western Elec. Co.*, 542 F.2d 1150, 1153 (10th Cir. 1976) (entitlement to fee award dependent upon favorable judicial determination); *Williams v. General Foods Corp.*, 492 F.2d 399, 408 (7th Cir. 1974) (no awards outside courtroom context). The federal courts of appeals have adopted a two-tier inquiry for determining whether a party has prevailed in a case which resulted in settlement. See, e.g., *Harrington v. DeVito*, 656 F.2d 264, 266-68 (7th Cir. 1981); *United Handicapped Fed'n v. Andre*, 622 F.2d 342, 345-48 (8th Cir. 1980); *Nadeau v. Helgemoe*, 581 F.2d 275, 279-81 (1st Cir. 1978). Initially, the plaintiff must establish a causal connection between his lawsuit and the relief which he has obtained. 656 F.2d at 266. After this factual determination is made, it then must be demonstrated that the defendant did not settle the case in a wholly gratuitous manner. *Id.* This part of the test will be deemed satisfied if the claims asserted were not groundless, frivolous, or unreasonable. *Id.* at 266-67. Some of the courts also have looked to whether the plaintiff has prevailed on the central issue of the case, *Bonnes v. Long*, 599 F.2d 1316, 1318-19 (4th Cir. 1979); *Parker v. Matthews*, 411 F. Supp.

no longer must obtain a final judgment to qualify as a prevailing party and, indeed may prevail through a settlement agreement⁴⁰ or a consent decree.⁴¹ Although the question concerning the procedural vehicle through which a party may succeed has been resolved, the degree to which a litigant must be able to claim victory before obtaining prevailing party status is not clearly defined.

1059, 1064 (D.D.C. 1976), *aff'd sub nom.* Parker v. Califano, 561 F.2d 320 (D.C. Cir. 1977); Richardson v. Civil Serv. Comm'n, 420 F. Supp. 64, 67 (S.D.N.Y. 1976); *cf.* Young v. Kenley, 641 F.2d 192, 194-95 (4th Cir. 1981) (achieved some objectives through compromise), *petition for cert. filed*, 50 U.S.L.W. 3084 (U.S. June 19, 1981) (No. 80-2153), and whether the commencement of the action was necessary. Howard v. Phelps, 443 F. Supp. 374, 376 (E.D. La. 1978); 420 F. Supp. at 67. *See also* Delta Air Lines, Inc. v. August, 101 S. Ct. 1146, 1155-57 (1981) (Powell, J., concurring) (offer of judgment under Rule 68 of Federal Rules of Civil Procedure includes an unspecified fee award in Title VII cases).

Successful FOIA plaintiffs also have been awarded attorney's fees after reaching out of court settlements. *See, e.g.,* Consumers Union of United States, Inc. v. Board of Governors, 410 F. Supp. 63, 64 (D.D.C. 1975). In *Consumers Union*, the court found that the plaintiffs had substantially prevailed by entering into a settlement agreement under which the Board of Governors of the Federal Reserve System was required to release interest rate information relating to certain categories of consumer installment loans. *Id.* Since the court believed that the settlement would not have occurred without the lawsuit, the plaintiffs were awarded a reasonable attorney's fee. *Id.*

⁴⁰ *See, e.g.,* Maher v. Gagne, 448 U.S. 122, 129 (1980); Harrington v. DeVito, 656 F.2d 264, 266 (7th Cir. 1981); Williams v. Alioto, 625 F.2d 845, 848 (9th Cir. 1980) (*per curiam*), *cert. denied*, 101 S. Ct. 1723 (1981); Chicano Police Officer's Ass'n v. Stover, 624 F.2d 127, 131 (10th Cir. 1980); United Handicapped Fed'n v. Andre, 622 F.2d 342, 345-47 (8th Cir. 1980); Nadeau v. Helgemoe, 581 F.2d 275, 279 (1st Cir. 1978); Pace v. Califano, 15 Fair Empl. Prac. Cas. (BNA) 704, 705 (D.D.C. 1977) (settlement at administrative level). *But see* Pearson v. Western Elec. Co., 542 F.2d 1150, 1153 (10th Cir. 1976) (success in obtaining favorable settlement through arbitration agreement does not give rise to prevailing party status absent success in court action); Williams v. General Foods Corp., 492 F.2d 399, 408 (7th Cir. 1974) (no awards outside courtroom context); Brown v. Boorstin, 471 F. Supp. 56, 58 (D.D.C. 1978) (plaintiff not prevailing party if court-approved settlement agreement does not reflect or concede discrimination by the defendant).

⁴¹ *See, e.g.,* Bonnes v. Long, 599 F.2d 1316, 1318-19 (4th Cir. 1979) (Fees Awards Act); Brown v. Culpepper, 559 F.2d 274, 277 (5th Cir. 1977) (Fees Awards Act); Parker v. Matthews, 411 F. Supp. 1059, 1063 (D.D.C. 1976), *aff'd sub nom.* Parker v. Califano, 561 F.2d 320 (D.C. Cir. 1977) (Title VII); Aspira of N.Y., Inc. v. Board of Educ., 65 F.R.D. 541, 542-43 (S.D.N.Y. 1975) (Emergency School Aid Act). In a recent case, a court considered the question whether attorney's fees may be awarded to a party who prevails in an arbitration proceeding brought to enforce a consent decree obtained in a Title VII action. *See* Smith v. La Cote Basque, 519 F. Supp. 663, 665 (S.D.N.Y. 1981). Finding no authority directly on point, the court, relying on the traditionally liberal judicial construction accorded to the Title VII fee provision, concluded that a fee award was appropriate in this situation. *Id.* at 666. Moreover, the court noted, a contrary interpretation would frustrate the congressional policy which had "cast the Title VII plaintiff in the role of 'a private attorney general' vindicating a policy 'of the highest priority.'" *Id.* (quoting *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63 (1980)).

1. Formal Success

The federal courts of appeals appear to disagree concerning the standard to be applied under the Fees Awards Act for ascertaining the circumstances in which a party will be deemed to have prevailed. The Third,⁴² Fifth,⁴³ and Ninth⁴⁴ Circuits have espoused a strict standard, requiring that a plaintiff be "successful on the central issue . . . as exhibited by the fact that he has acquired the primary relief sought."⁴⁵ A more liberal standard, adopted by the First⁴⁶ and Seventh Circuits,⁴⁷ requires only that a party "succeed

⁴² See, e.g., *Morrison v. Ayoob*, 627 F.2d 669, 671 (3d Cir. 1980) (per curiam), *cert. denied*, 449 U.S. 1102 (1981); *Swietlowich v. County of Bucks*, 620 F.2d 33, 34 (3d Cir. 1980) (per curiam); *Bagby v. Beal*, 607 F.2d 411, 414-15 (3d Cir. 1979).

⁴³ See, e.g., *Robinson v. Kimbrough*, 652 F.2d 458, 465-67 (5th Cir. 1981); *Coen v. Harrison County School Bd.*, 638 F.2d 24, 26 (5th Cir. 1981) (per curiam), *petition for cert. filed*, 50 U.S.L.W. 3132 (U.S. Aug. 6, 1981) (No. 81-286); *Watkins v. Mobile Hous. Bd.*, 632 F.2d 565, 567 (5th Cir. 1980) (per curiam); *Iranian Students Ass'n v. Edwards*, 604 F.2d 352, 353 (5th Cir. 1979). Because the fee-shifting provisions contained in the Voting Rights Act and the Fees Awards Act are phrased in similar terms, one court has extended the Fifth Circuit's standard to a voting rights case. See *Conner v. Winter*, 519 F. Supp. 1337, 1339-40 (S.D. Miss. 1981).

⁴⁴ *Williams v. Alioto*, 625 F.2d 845, 847 (9th Cir. 1980) (per curiam), *cert. denied*, 101 S. Ct. 1723 (1981); *Sethy v. Alameda County Water Dist.*, 602 F.2d 894, 897-98 (9th Cir. 1979), *cert. denied*, 444 U.S. 1046 (1980) (plaintiffs must succeed on a "significant issue in litigation which achieves . . . the benefit the parties sought in bringing suit").

⁴⁵ *Iranian Students Ass'n v. Edwards*, 604 F.2d 352, 353-54 (5th Cir. 1979) (citations omitted) (student association obtained immunity from state and university prerequisites to demonstration); see, e.g., *Ramos v. Koebig*, 638 F.2d 838, 845 (5th Cir. 1981) (awarded injunction against future elections under unconstitutional reapportionment plan); *Keith v. Volpe*, 501 F. Supp. 403, 407-08 (C.D. Cal. 1980) (substantial civil rights claims, which court did not address, were sufficiently related to successful environmental claims); *Peeler v. Longview Indep. School Dist.*, 485 F. Supp. 117, 121 (E.D. Tex. 1979) (manner and reasons for nonrenewal of employment contract declared unconstitutional).

Under the "central issue" standard, if the plaintiff prevails on the entire case, the resulting fee award will encompass all of the claims involved in the litigation. *Northcross v. Board of Educ.*, 611 F.2d 624, 636 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); *Bell v. Board of Educ.*, 491 F. Supp. 916, 942 & n.25 (N.D. Ohio 1980). A plaintiff who partially recovers on his claim against only some of the originally named parties nevertheless would qualify for fee awards against those defendants. *Coop v. City of South Bend*, 635 F.2d 652, 654 (7th Cir. 1980) (citing *Muscare v. Quinn*, 614 F.2d 577, 580-81 (7th Cir. 1980); *Dawson v. Pastrick*, 600 F.2d 70, 78-79 (7th Cir. 1979)). Of course, the fee award would be limited to the claim or claims upon which the plaintiff had prevailed. *Muscare v. Quinn*, 614 F.2d at 580-81. Similarly, when multiple plaintiffs prevail against fewer than all of the named defendants, an award of attorney's fees cannot be assessed against those defendants whose activities were held to be lawful. *Bell v. Board of Educ.*, 491 F. Supp. at 942 & n.25.

⁴⁶ *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978).

⁴⁷ *Busche v. Burkee*, 649 F.2d 509, 521 (7th Cir. 1981). The Eighth Circuit has adopted the same standard as the First and Seventh Circuits in the context of settlements only. See *United Handicapped Fed'n v. Andre*, 622 F.2d 342, 348 (8th Cir. 1980).

on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit."⁴⁸

2. Causal Relationship

Under either standard, it is apparent that the Fees Awards Act requires a litigant to establish "some sort of clear, *causal relationship* between the litigation brought and the practical outcome realized."⁴⁹ A similar element of causality has been adopted by the courts in construing other fee-shifting statutes. In the context of Title VII of the Civil Rights Act of 1964, for example, one court has stated that "to 'prevail' a party must establish . . . that the litigation activities served to establish the existence of the right or contributed to an enjoyment of the right."⁵⁰ Causality also is an element of a two-tier test which the courts have applied in determining the eligibility of applicants for fee awards under the FOIA. As enunciated by Judge Friendly in *Vermont Low Income Advocacy Council, Inc. v. Usery*,⁵¹ the successful FOIA plaintiff must

⁴⁸ *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978); *see, e.g.*, *Murphy v. Kolovitz*, 635 F.2d 662, 663 (7th Cir. 1981) (unsuccessful on claim of false arrest asserted against police officer, but successful in demonstrating unnecessary physical abuse); *Entertainment Concepts, Inc. v. Maciejewski*, 631 F.2d 497, 505-07 (7th Cir. 1980) (theatre owner succeeded in obtaining permanent injunction against enforcement of village zoning ordinance but failed to obtain damages or declaratory judgment), *cert. denied*, 450 U.S. 919 (1981). *Coyote v. Roberts*, 502 F. Supp. 1342, 1346 (D.R.I. 1980) (overbroad state statute prohibiting extramarital intercourse and "unnatural" methods of copulation was amended after trial but prior to decision); *Jordan v. Wokle*, 464 F. Supp. 173, 174 (E.D. Wis. 1979) (award of injunctive relief on half of claims); *M.C.I. Concord Advisory Bd. v. Hall*, 457 F. Supp. 911, 913-14 (D. Mass. 1978) (injunctive relief awarded with respect to living conditions within some, but not all, areas of prison mentioned in plaintiffs' complaint).

⁴⁹ *American Constitutional Party v. Munro*, 650 F.2d 184, 188 (9th Cir. 1981) (emphasis in original).

⁵⁰ *Smith v. University of N.C.*, 632 F.2d 316, 346 (4th Cir. 1980). The *Smith* court suggested that the minimum criterion for prevailing party status is "the establishment of a right or the proscription of a wrong." *Id.* at 347. Under Title VII, the right established need not relate directly to the primary claim of discrimination in employment. In *Davis v. Bolger*, 512 F. Supp. 61 (D.D.C. 1981), for example, the plaintiff lost on his claim that the Postal Service had denied him a promotion because of his age, race and sex. *Id.* at 62. The plaintiff prevailed, however, on the collateral issue of whether the Postal Service improperly permitted employees testifying on its behalf, but not those testifying against its interests, to claim paid leave. *Id.* at 62-63. Reasoning that a fee award would deter governmental conduct which unlawfully placed aggrieved plaintiffs at a disadvantage in Title VII litigation, the *Davis* court awarded the plaintiff attorney's fees with respect to the issue of witness compensation. *Id.* at 63-64. The court also noted that federal employees were required to rely more heavily on enforcement by "private attorneys general" since they cannot avail themselves of any public enforcement mechanism. *Id.*

⁵¹ 546 F.2d 509 (2d Cir. 1976).

demonstrate, at a minimum, that "the prosecution of the action could reasonably have been regarded as necessary and that the action had substantial causative effect on the delivery of the information."⁵²

3. Catalyst Doctrine

In addition to the basic standard of formal success on a central or significant issue in litigation,⁵³ the federal courts have adopted a "catalyst" test which extends the prevailing party concept beyond the typical courtroom context. Pursuant to such "catalyst" doctrine, a plaintiff, although having failed in the litigation of his claim, may nevertheless be deemed to have prevailed if his lawsuit was a factor in the elimination of a challenged practice or

⁵² *Id.* at 513. After promulgating its standard, the Second Circuit concluded that the *Usery* plaintiff met neither of the requirements. *Id.* Judge Friendly noted that the plaintiff had received a telegram from the defendant requesting a meeting to establish a timetable for compliance with the information request. *Id.* Thus, the court concluded that the litigation was unnecessary. *Id.* Moreover, the court observed that the lawsuit did not have a causal effect upon the delivery of the requested information since the record indicated that the defendant sincerely desired to comply with the FOIA and did so at the earliest opportunity. *Id.* at 514-15. Consequently, the court found that the plaintiff would have received the requested information without resorting to the courts. *Id.*; cf. *Lovell v. Alderete*, 630 F.2d 428, 432 (5th Cir. 1980) (change in government guidelines for disclosure of exempted materials resulted in release of information); *Cox v. United States Dep't of Justice*, 601 F.2d 1, 6 (D.C. Cir. 1979) (release of information following commencement of suit insufficient, by itself, to establish that complainant substantially prevailed). *But see* *Marschner v. Department of State*, 470 F. Supp. 196, 199 (D. Conn. 1979) (defendant failed to rebut inference that suit had substantial causative effect on delivery of information requested); *Goldstein v. Levi*, 415 F. Supp. 303, 305 (D.D.C. 1976) (release of documents shortly after initiation of court proceeding given significance in determining whether complainant substantially prevailed).

Plaintiffs have failed to qualify as prevailing parties under the FOIA when the disclosure compelled was of minimal significance, *see, e.g.*, *Braintree Elec. Light Dep't v. Department of Energy*, 494 F. Supp. 287, 291 (D.D.C. 1980), and when there was an excusable delay in producing the documents requested, *see* *Fund for Constitutional Gov't v. National Archives & Records Serv.*, 485 F. Supp. 1, 15 (D.D.C. 1978). Conversely, the courts have recognized that a party may substantially prevail despite a defendant's voluntary compliance, *e.g.*, *Jones v. United States Secret Serv.*, 81 F.R.D. 700, 701 (D.D.C. 1979); *Burke v. Department of Justice*, 432 F. Supp. 251, 252 (D. Kan. 1976), *aff'd*, 559 F.2d 1182 (10th Cir. 1977), and notwithstanding the government's success in exempting from disclosure some of the information sought, *see* *Katz v. Department of Justice*, 498 F. Supp. 177, 185-86 (S.D.N.Y. 1979). One court has held that a plaintiff may substantially prevail by obtaining, *inter alia*, a priority for her information request. *Exner v. FBI*, 443 F. Supp. 1349, 1353-54 (S.D. Cal. 1978), *aff'd*, 612 F.2d 1202, 1207 (9th Cir. 1980). For a discussion of the *Exner* decision, *see* note 67 *infra*.

⁵³ *See, e.g.*, *Iranian Students Ass'n v. Edwards*, 604 F.2d 352, 353 (5th Cir. 1979); *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978); notes 42-48 *supra*.

procedure.⁵⁴ Conceptually subsumed within this approach is the established rule that a plaintiff may prevail even when his suit had been mooted by a last-minute tender of the requested relief.⁵⁵ A

⁵⁴ See, e.g., *American Constitutional Party v. Munro*, 650 F.2d 184, 187-88 (9th Cir. 1981); *Morrison v. Ayoob*, 627 F.2d 669, 671-72 (3d Cir. 1980), cert. denied, 449 U.S. 1102 (1981); *Oldham v. Ehrlich*, 617 F.2d 163, 168 & n.9 (8th Cir. 1980); *Muscare v. Quinn*, 614 F.2d 577, 580 (7th Cir. 1980); *Dawson v. Pastrick*, 600 F.2d 70, 78-79 (7th Cir. 1979); *Ross v. Horn*, 598 F.2d 1312, 1321-22 (3d Cir. 1979), cert. denied, 448 U.S. 906 (1980); *Fischer v. Adams*, 572 F.2d 406, 410 (1st Cir. 1978); *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421, 429-30 (8th Cir. 1970); *Meriwether v. Sherwood*, 514 F. Supp. 433, 435 (S.D.N.Y. 1981); *Marci v. City of New Haven*, 503 F. Supp. 6, 8 (D. Conn. 1980); *Ackerman v. Board of Educ.*, 387 F. Supp. 76, 82-83 (S.D.N.Y. 1974). The catalyst theory first was enunciated in *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421 (8th Cir. 1970). Parham, a black youth, had sought employment with the defendant company as a stockman. *Id.* at 422. Although no such positions were available at the time, Parham underwent pre-employment testing for a lineman position. *Id.* at 423. An investigation revealed, however, that he had been discharged for cause by two of his previous employers and had graduated in the bottom fifth of his high school class. The defendant thereupon informed Parham that he lacked the necessary qualifications for employment. *Id.* Alleging racial discrimination, Parham instituted proceedings before the Equal Employment Opportunity Commission (EEOC). *Id.* After the EEOC acted favorably on his complaint, the defendant company offered the plaintiff a position as a lineman. *Id.* Since Parham was in college at the time, he declined the offer, choosing instead to commence a Title VII action in federal district court. *Id.* In his class action, Parham, as the representative plaintiff, introduced employment statistics to support his allegation of racial discrimination. *Id.* at 424. The company defended by offering evidence of its recently adopted affirmative action program. *Id.*

On appeal, the Eighth Circuit held that the employment statistics revealed a violation of Title VII as a matter of law. *Id.* at 426. Parham's individual claim for back pay was rejected, however, upon the ground that the company had refused to hire him because of the poor recommendations it received from previous employers. *Id.* at 428. Notwithstanding his failure to prove the individual claim, the court awarded Parham attorney's fees as a prevailing plaintiff, reasoning that his class action suit had triggered the company's implementation of nondiscriminatory employment policies. *Id.* at 429-30. Notably, the *Parham* case was cited with approval in the Senate Report accompanying the Fees Awards Act. S. REP. NO. 1011, *supra* note 34, at 5. Thus, it appears that the legislature has at least implicitly sanctioned the judiciary's employment of the catalyst doctrine.

⁵⁵ E.g., *Foster v. Boorstin*, 561 F.2d 340, 342-43 (D.C. Cir. 1977); *Nationwide Bldg. Maintenance, Inc. v. Sampson*, 559 F.2d 704, 709-10 (D.C. Cir. 1977); see *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1364 (D.C. Cir. 1977) (FOIA case); *Parker v. Matthews*, 411 F. Supp. 1059, 1063 (D.D.C. 1976), *aff'd on other grounds sub nom. Parker v. Califano*, 561 F.2d 320 (D.C. Cir. 1977); Note, *Recovery of Attorneys' Fees on Mooted Claims*, 63 CORNELL L. REV. 880, 905-11 (1978). In *Foster*, the leading case on the issue of mooted claims within the context of civil rights litigation, a black bindery foreman employed by the Library of Congress alleged discrimination by two of his white supervisors who had bypassed him in promoting a less qualified applicant. 561 F.2d at 341. After the Equal Opportunity Office (EOO) dismissed the complaint because of a failure to prosecute, the plaintiff unsuccessfully appealed to the deputy librarian. *Id.* Shortly thereafter, the plaintiff commenced a Title VII action in federal district court. *Id.* As a result of this action, the deputy librarian rescinded the decision of the EOO. *Id.* During a stay of the judicial proceedings, the EOO conducted a further investigation into the employment discrimination claim. *Id.* The plaintiff finally received his promotion after the EOO had conducted a 4-day hearing on the matter. *Id.* Ob-

difficult case arises, however, when the defendant claims to have "adopted" a new practice after the commencement of the plaintiff's action and denies that the suit played any part in the decision to provide such relief. In such cases, the courts have inquired into the nature and extent of the causative role performed by the plaintiff's suit.⁵⁶

A Fees Awards Act case decided by the Third Circuit is illustrative of the catalyst concept. In *Ross v. Horn*,⁵⁷ the plaintiffs instituted a class action challenging, *inter alia*, the constitutionality of procedures used by the New Jersey Department of Labor and Industry to combat fraudulent claims for unemployment benefits.⁵⁸ Shortly thereafter, the department adopted new practices which provided claimants suspected of fraud with the opportunity to be heard before their benefits were terminated.⁵⁹ After concluding

serving that it had merely "received [the] plaintiff's discrimination complaint and stayed its hand by consent of the parties," the district court held that the plaintiff was not a prevailing party within the meaning of the statute and denied the motion for attorney's fees. *Id.* at 342.

The Court of Appeals for the District of Columbia reversed, holding that a plaintiff cannot be denied a fee award when the defendant moots the suit by voluntarily conferring the requested relief after an action is commenced but prior to the entry of an order or judgment. *Id.* Emphasizing that the congressional objective underlying the Title VII fee-shifting provision was to facilitate suits by plaintiffs of limited means, the *Foster* court concluded that its holding was necessary to achieve that goal. *Id.* Additionally, the *Foster* court noted that it had previously affirmed an award of attorney's fees in *Parker v. Matthews*, a case involving virtually identical facts. *Id.* at 343 (citing *Parker v. Matthews*, 411 F. Supp. 1059 (D.D.C. 1976), *aff'd sub nom.* *Parker v. Califano*, 561 F.2d 320 (D.C. Cir. 1977)). Indeed, the court observed that the only factual distinction between the *Foster* and *Parker* cases was that, in *Parker*, the plaintiff had prevailed through a formal settlement. 561 F.2d at 343; *see Parker v. Matthews*, 411 F. Supp. at 1061; Note, *supra*, at 908. Finally, the majority in *Foster* relied upon the reasoning employed in two previous decisions which had construed the fee-shifting provision contained in the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (1976). 561 F.2d at 342 (citing *Nationwide Bldg. Maintenance, Inc. v. Sampson*, 559 F.2d 704 (D.C. Cir. 1977); *Cuneo v. Rumsfeld*, 553 F.2d 1360 (D.C. Cir. 1977)).

⁵⁶ One court has stated that the inquiry in catalyst cases should be "whether as a quite practical matter the outcome, in whatever form it is realized, is one to which the plaintiff[']s . . . efforts contributed in a significant way, and which does involve an actual conferral of benefit or relief from burden when measured against the benchmark condition." *Bonnes v. Long*, 599 F.2d 1316, 1319 (4th Cir. 1979). There must be a "clear, causal relationship" between the lawsuit and the practical outcome. *American Constitutional Party v. Munro*, 650 F.2d 184, 188 (9th Cir. 1981); *see Entertainment Concepts, Inc. v. Maciejewski*, 631 F.2d 497, 507 (7th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981). Thus, at a minimum, the lawsuit must be a material factor which results in the defendant's decision to eliminate the challenged practice or procedure. *Morrison v. Ayoob*, 627 F.2d 669, 671 (3d Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981).

⁵⁷ 598 F.2d 1312 (3d Cir. 1979), *cert. denied*, 448 U.S. 906 (1980).

⁵⁸ *Id.* at 1314-15.

⁵⁹ *Id.* at 1316.

that the newly implemented procedures were constitutional, the district court entered judgment for the defendants and denied attorney's fees to the plaintiffs.⁶⁰

On appeal, a unanimous Third Circuit panel affirmed the judgment against the plaintiffs.⁶¹ The plaintiffs maintained, however, that they were the prevailing parties because the new procedures were implemented as a direct result of their lawsuit.⁶² Judge Higginbotham, writing for the court, agreed that the form of the judgment should not be dispositive of the prevailing party issue.⁶³ Rather, the *Ross* court held that plaintiffs may be deemed to have prevailed should their suit result in the adoption of new practices.⁶⁴ Observing that the chronology of events in the instant case strongly suggested a causal relationship between the suit and the implementation of the new procedures, Judge Higginbotham ordered the district court to determine whether the suit had acted as the catalyst which led to the reforms.⁶⁵

Various limitations have been placed upon the use of a catalyst analysis. Although the sequence of events is critical in any such inquiry, the courts have warned against engaging in *post hoc ergo propter hoc* reasoning.⁶⁶ A "mere chronology of events," for example, will not suffice to confer prevailing party status when a factor other than the lawsuit was the primary catalyst.⁶⁷ Thus, fees

⁶⁰ *Id.* at 1314-15.

⁶¹ *Id.* at 1315, 1322.

⁶² *Id.* at 1321-22.

⁶³ *Id.* at 1322.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See, e.g., *Vermont Low Income Advocacy Council, Inc. v. Usery*, 546 F.2d 509, 514 (2d Cir. 1976); notes 49-52 and accompanying text *supra*; cf. *Nadeau v. Helgemore*, 581 F.2d 275, 281 (1st Cir. 1978) (chronological sequence of events important though not dispositive).

⁶⁷ *Ackerman v. Board of Educ.*, 387 F. Supp. 76, 82 (S.D.N.Y. 1974); see *Nadeau v. Helgemore*, 581 F.2d 275, 281 (1st Cir. 1978). In *Ackerman*, a male school teacher was denied child-care leave pursuant to a New York City Board of Education bylaw which was used routinely to grant leave to female teachers. *Id.* at 77. Shortly after the plaintiff instituted his Title VII action, the Board of Education amended the bylaw to eliminate the allegedly discriminatory sexual distinction, thereby mooting the demand for declaratory relief. *Id.* Additionally, the plaintiff's teaching license was terminated for reasons unrelated to the suit, thus precluding an award of injunctive relief. *Id.* Moreover, because the plaintiff failed to establish that he had suffered economic loss, the court found that he was not entitled to an award of back pay. *Id.* at 79.

In support of his claim for attorney's fees, the plaintiff argued that the amendment to the bylaws was triggered either by the EEOC's determination that discrimination may have occurred or by his lawsuit. *Id.* at 81-82. The court disagreed, reasoning that the most probable catalyst was a 1972 amendment to Title VII which brought the defendant within its

have not been awarded when the desired result was achieved primarily as a result of circumstances extraneous to the suit.⁶⁸ An ad-

purview. *Id.* at 82-83. Distinguishing the Eighth Circuit's decision in *Parham*, see note 54 *supra*, the court held that the "mere chronology of events" in this case was not sufficient to establish that the plaintiff had prevailed. 387 F. Supp. at 83.

Although not falling squarely within the catalyst concept, *Exner v. FBI*, 443 F. Supp. 1349 (S.D. Cal. 1978), *aff'd*, 621 F.2d 1202 (9th Cir. 1980) is illustrative of a similar method of analysis. While testifying before a senate committee on intelligence activities, Judith Exner discovered that the FBI had been investigating her at various times during the previous 15 years. 443 F. Supp. at 1353. Throughout that period of time, the FBI compiled partially inaccurate information concerning Exner's alleged relationships with several members of organized crime. *Id.* After this information was revealed to the media by the staff of the Senate committee, Exner requested access to all of the relevant information which the FBI had accumulated. *Id.* at 1350. She was informed, however, that there would be a delay in processing her FOIA request because of a backlog of information requests. *Id.* Unable to obtain preferential treatment for her request and believing that the inaccurate nature of the information exposed her to personal danger, Exner commenced an action to obtain the immediate release of the requested information. *Id.* at 1350, 1353.

The district court denied a motion by the defendant to stay the proceedings until it could review the requested documents. *Id.* at 1351. Shortly thereafter, the Ninth Circuit refused to issue a stay of the district court's orders pending appeal, forcing the government to produce the undisputed documents. *Id.* Although the government was granted summary judgment with respect to portions of the document request, *id.*, the district court granted the plaintiff's motion for attorney's fees. *Id.* at 1353-54. The court found that the plaintiff had commenced the action in order to obtain the preferential treatment which her request required. *Id.* at 1353. Finding that the lawsuit had a substantial causative effect upon the production of documents, the court observed that "[w]hen the information is delivered may be as important as *what* information is delivered." *Id.* Since the plaintiff succeeded in obtaining the vast majority of the requested material, and was able to ensure that her request was accorded preferential treatment, the court found that she had substantially prevailed in the litigation. *Id.* at 1353-54. Moreover, the court observed that the complainant's lawsuit had vindicated an important public policy by establishing the principle that the government must accord priority to FOIA requests in exceptional cases. *Id.* (citing S. REP. NO. 854, 93d Cong., 2d Sess. 19 (1974)).

⁶⁸ *E.g.*, *Marci v. City of New Haven*, 503 F. Supp. 6, 8-9 (D. Conn. 1980); see *American Constitutional Party v. Munro*, 650 F.2d 184, 188 (9th Cir. 1981). In order to prevail under the Fees Awards Act there must be a causal relationship between the institution of the action and the relief ultimately received. *Morrison v. Ayob*, 627 F.2d 669, 671 (3d Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981). To prevent a defendant from taking refuge behind a fictitious motivation when multiple causes are involved, the plaintiff's suit must be a "material factor" in bringing about the desired result. *Id.* In *American Constitutional Party v. Munro*, 650 F.2d 184 (9th Cir. 1981), for example, the Ninth Circuit noted that the litigation must "sufficiently" influence the defendant's act. *Id.* at 188. In *Munro*, the plaintiff's action was mooted when a challenged statute was amended to repeal the objectionable provision. *Id.* at 185-86. One year after the amendment, a legislator stated in an affidavit that the plaintiff's suit had been "an important factor" leading to the repeal of the provision. *Id.* at 186. The court denied an award of attorney's fees, holding that the plaintiffs had failed to show that their role in the legislative process had been "sufficiently influential." *Id.* at 188. In support of its holding, the court noted that although the affidavit stated that the suit had been discussed by the legislators, there was no indication that it had been the causative agent leading to the enactment of the amendment. *Id.*

ditional limitation, in the class action context, prohibits the use of the catalyst doctrine when the representative plaintiff has failed on all of his class claims.⁶⁹ The doctrine may be invoked, however, when the representative plaintiff loses on his individual cause of action but succeeds on the class claim.⁷⁰

The catalyst test ensures that a defendant may not avoid liability for attorney's fees by concealing his true motivation behind a facially plausible alternative justification.⁷¹ Cases involving moot issues vividly demonstrate the importance of this function.⁷² Indeed, absent the catalyst doctrine, fees would be unavailable to a plaintiff whose meritorious claim prompted his adversary to abandon a challenged practice prior to trial. To require a formal adjudication or a settlement agreement in such a situation would be to exalt form over substance. The attraction of the catalyst approach is its insistent refusal to do so.

4. Entitlement to Relief

In addition to the elements of causation embodied in the "central or significant issue" standards and in the catalyst approach,

Similarly, in *Marci v. City of New Haven*, 503 F. Supp. 6 (D. Conn. 1980), a plaintiff's request for fees was denied in part because causation was not sufficiently demonstrated. The plaintiff in *Marci* sought, *inter alia*, to continue working for a local Employment and Training Administration (ETA). *Id.* at 7. A stipulated agreement between the parties enabled the plaintiff to retain his position while he pursued administrative remedies. *Id.* While the plaintiff was seeking such relief, a new mayor was elected for the City of New Haven. *Id.* The mayor appointed the plaintiff to the position of ETA Administrator, mooting the case. *Id.* The *Marci* court denied the plaintiff's fee request with respect to this portion of his claim, concluding that the desired result was obtained not because of the catalytic effect of the plaintiff's suit but by virtue of his relationship with the mayor. *Id.* at 8-9.

⁶⁹ *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263, 273 (10th Cir. 1975). The *Taylor* court distinguished *Parham* because it involved a plaintiff who had prevailed on his class action claim. *Id.*; see note 54 *supra*. Because *Taylor* involved a nonprevailing class representative, the court noted that the plaintiff could not recover attorney's fees in his representative capacity even if he could demonstrate that the lawsuit was the catalyst for a change in the challenged employment practices. 524 F.2d at 273. Notably, however, the plaintiff was awarded attorney's fees for his successfully litigated individual claims. *Id.* at 268.

⁷⁰ *Watkins v. Scott Paper Co.*, 530 F.2d 1159, 1198 n.53 (5th Cir.), *cert. denied*, 429 U.S. 861 (1976); *Barnett v. W. T. Grant Co.*, 518 F.2d 543, 548 n.5 (4th Cir. 1975); *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421, 428 (8th Cir. 1970); see *Reed v. Arlington Hotel Co.*, 476 F.2d 721, 722, 725-26 (8th Cir.), *cert. denied*, 414 U.S. 854 (1973); *Saracini v. Missouri Pac. R.R.*, 431 F. Supp. 389, 398 (E.D. Ark. 1977); *Clark v. American Marine Corp.*, 320 F. Supp. 709, 710 (E.D. La. 1970), *aff'd*, 437 F.2d 959, 960 (5th Cir. 1971). See generally *Nadeau v. Helgemoe*, 581 F.2d 881, 884 & n.2 (5th Cir. 1977).

⁷¹ *Morrison v. Ayoob*, 627 F.2d 669, 671 (3d Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981).

⁷² See note 55 *supra*.

the Sixth Circuit has held that the plaintiff must have been entitled to some form of relief at the time he commenced the suit in order to be deemed a prevailing party. In *Harrington v. Vandalia-Butler Board of Education*,⁷³ the plaintiff, a physical education teacher, commenced an action alleging sexual discrimination by her employer.⁷⁴ Prior to filing suit, Mrs. Harrington voluntarily retired on disability and never attempted to re-enter the Vandalia-Butler school system.⁷⁵ The district court found that the facilities made available to her were inferior to those provided for male physical education teachers and, accordingly, awarded her compensatory damages and attorney's fees.⁷⁶

On appeal, a unanimous Sixth Circuit panel reversed the district court's award in both respects, adopting the view espoused by a clear majority of the federal courts that compensatory damages are not recoverable under Title VII.⁷⁷ Although it conceded that the plaintiff had obtained a judicial determination that her employer maintained discriminatory working conditions,⁷⁸ the court concluded that such a "determination, standing alone, does not suffice" to establish the plaintiff's status as a "prevailing party."⁷⁹ Upon further observing that Title VII's statutory scheme does not provide for compensatory relief, the Sixth Circuit held that a fee award in the present case would be unwarranted.⁸⁰

Although the standard enunciated in *Harrington* may have validity when a plaintiff formally succeeds in obtaining only a favorable determination that a wrong has occurred, it is suggested

⁷³ 585 F.2d 192 (6th Cir. 1978), cert. denied, 441 U.S. 932 (1979).

⁷⁴ 585 F.2d at 193.

⁷⁵ *Id.* at 194.

⁷⁶ *Id.* at 193-94, 197.

⁷⁷ *Id.* at 197; see, e.g., *Pearson v. Western Elec. Co.*, 542 F.2d 1150, 1151 (10th Cir. 1976); *Presseisen v. Swarthmore College*, 71 F.R.D. 34, 45 n.12 (E.D. Pa. 1976); *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363, 1369-71 (S.D.N.Y. 1975).

⁷⁸ 585 F.2d at 197-98.

⁷⁹ *Id.* at 197. But see *Jones v. Glitsch, Inc.*, 489 F. Supp. 990, 996 n.3 (N.D. Tex. 1980). Noting that the plaintiff in *Harrington* had not prevailed on her discriminatory discharge claim, the *Jones* court reasoned that the case was distinguishable. *Id.*

⁸⁰ 585 F.2d at 197-98. For an analysis of the issues presented in *Harrington*, see 28 EMORY L.J. 859 (1979). The *Harrington* court distinguished *Marr v. Rife*, 545 F.2d 554 (6th Cir. 1976), in which the plaintiffs were awarded fees after obtaining one dollar in nominal damages, *id.* at 555. 585 F.2d at 198. *Marr* was distinguished upon the ground that it had been brought under the Fair Housing Act, 42 U.S.C. § 3612(c) (1976), which expressly authorizes compensatory damages. 585 F.2d at 198. Moreover, the *Harrington* court noted that the plaintiffs in *Marr* had received the nominal amount because they had been unable to establish the actual value of their damages. *Id.*

that the entitlement requirement should not be extended to cases involving the catalyst approach. In catalyst cases, a favorable determination does not "stand alone" since fee awards are made only to those plaintiffs whose suits successfully eliminated, not merely exposed, the defendant's illegal activities.⁸¹ Moreover, it is submitted that a refusal to award fees in these circumstances unnecessarily would undermine the congressional intention to encourage suits by private attorneys general. In order to effectuate this underlying legislative goal, therefore, it seems that the *Harrington* rule should not be applied in the catalyst context.

5. Prevailing Defendant

The final question to be addressed in the context of prevailing parties involves the degree to which the courts may stray from the legislative intention of facilitating the activities of private attorneys general. Although this congressional purpose has led to the belief that a civil rights plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust,"⁸² it has been unclear whether different criteria should govern fee awards to a prevailing defendant.⁸³ Whatever

⁸¹ See notes 54-72 and accompanying text *supra*. One commentator has suggested that the plaintiff in *Harrington* could have been awarded attorney's fees had her suit been "the catalyst which spurred the defendant to end its discriminatory practices." 28 EMORY L.J. 859, 892 & n.219 (1979). Unlike the plaintiff in *Parham*, see note 54 *supra*, the *Harrington* plaintiff succeeded in establishing unlawful employment discrimination. 28 EMORY L.J. 859, 892 n.219 (1979). Nevertheless, her action was arguably "fruitless" because it merely exposed a set of discriminatory practices. See 585 F.2d at 198. If the plaintiff had been able to demonstrate that her lawsuit caused the defendant to eliminate the challenged practices, however, it seems that the court would have been unable to characterize her suit as "fruitless." Cf. EEOC v. Murphy Motor Freight Lines, Inc., 488 F. Supp. 381, 389 n.2 (D. Minn. 1980) (*Harrington* distinguishable when plaintiff's suit achieves benefits for others who are similarly situated).

⁸² *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968) (per curiam); accord, *Albamarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975); *Northcross v. Board of Educ.*, 412 U.S. 427, 427-28 (1973) (per curiam).

⁸³ Compare *Bolton v. Murray Envelope Corp.*, 553 F.2d 881, 884 n.2 (5th Cir. 1977); *EEOC v. Christiansburg Garment Co.*, 550 F.2d 949, 951-52 (4th Cir. 1977), *aff'd*, 434 U.S. 412 (1978); *Grubbs v. Butz*, 548 F.2d 973, 975-76 (D.C. Cir. 1976); *Carrion v. Yeshiva Univ.*, 535 F.2d 722, 727 (2d Cir. 1976); *Wright v. Stone Container Corp.*, 524 F.2d 1058, 1063-64 (8th Cir. 1975) and *United States Steel Corp. v. United States*, 519 F.2d 359, 363 (3d Cir. 1975) (action must be unfounded, meritless, frivolous or vexatious) with *EEOC v. Bailey Co.*, 563 F.2d 439, 456 (6th Cir. 1977) (bad faith need not be shown to award attorneys' fees), *cert. denied*, 435 U.S. 915 (1978). See generally Heinsz, *supra* note 35, at 275-83; Comment, *Title VII, Civil Rights Act of 1964: Standards for Award of Attorney's Fees to Prevailing Defendants*, 1976 Wis. L. Rev. 207, 209-18.

doubt may have existed was removed, however, by the decision in *Christiansburg Garment Co. v. EEOC*,⁸⁴ in which the Supreme Court held that a separate standard must govern the decision to award fees to a prevailing defendant.

Justice Stewart, writing for a unanimous Court, noted that the policy considerations underlying fee awards to prevailing plaintiffs are inapplicable when the prevailing party is a defendant.⁸⁵ Justice Stewart observed that, unlike a victorious plaintiff, a prevailing defendant has not cast himself in the role of a private attorney general and is not awarded his fees against a party who has transgressed federal law.⁸⁶ The Court therefore refused to hold that prevailing defendants should recover their fees absent special circumstances.⁸⁷ Nevertheless, the Court also declined to adopt a standard of subjective bad faith, reasoning that statutory implementation of such a standard would have been unnecessary in view of the antecedent bad faith exception to the common-law American rule against fee shifting.⁸⁸ Accordingly, Justice Stewart concluded that the plaintiff's lawsuit must be "frivolous, unreasonable or without foundation, even though not brought in subjective bad faith" in order for a prevailing defendant to recover his attorney's fees.⁸⁹ Although *Christiansburg* was decided under Title VII,⁹⁰ its

⁸⁴ 434 U.S. 412 (1978). In *Christiansburg*, the EEOC brought suit against the defendant after Title VII was amended to permit the Commission to bring actions to prosecute charges pending before it. *Id.* at 414. Because the charge at issue was not pending before the EEOC on the effective date of the amendments, the district court entered summary judgment for the defendant. *Id.* Nevertheless, because the EEOC had not acted unreasonably in bringing the action, the district court denied the defendant's request for attorney's fees. *Id.* at 415.

⁸⁵ *Id.* at 418.

⁸⁶ *Id.* at 418-19.

⁸⁷ *Id.* at 421-22.

⁸⁸ *Id.* at 419. The *Christiansburg* Court qualifiedly approved of the bad faith standard employed by the Second Circuit in *Carrion v. Yeshiva Univ.*, 553 F.2d 722, 727-28 (2d Cir. 1976), and the Third Circuit in *United States Steel Corp. v. United States*, 519 F.2d 359, 364 (3d Cir. 1975). 434 U.S. at 421. The Court made clear, however, that such approach "in no way implies that the plaintiff's subjective bad faith is a necessary prerequisite to a fee award against him." *Id.* Indeed, Justice Stewart warned the district courts to avoid "the understandable temptation" to conclude that plaintiffs who do not prevail have acted frivolously in bringing suit. *Id.* at 421-22.

Both the *Carrion* and *United States Steel* cases were cited with approval in the House and Senate Reports accompanying the Fees Awards Act. H.R. REP. No. 1558, *supra* note 38, at 7; S. REP. No. 1011, *supra* note 34, at 5. One commentator has suggested that these citations in the legislative reports clearly indicate a congressional intention to codify and apply the traditional standard of subjective bad faith under the Fees Awards Act. Note, *supra* note 13, at 586-87 & nn.139-42.

⁸⁹ 434 U.S. at 421. When an action previously had been dismissed as frivolous under the

standard has been applied under both the Fees Awards Act⁹¹ and the Securities Exchange Act of 1934.⁹²

B. Interim Awards

1. Partial Success on the Merits

The propriety of a fee award *pendente lite*, that is, an award made during the pendency of litigation, has been considered almost exclusively in the field of civil rights, primarily in the context

Christiansburg Garment standard, a subsequent reversal of the dismissal by a federal court of appeals apparently also would require reversal of the attorney's fee award. *Dike v. School Bd.*, 650 F.2d 783, 787-88 (5th Cir. 1981) (Fees Awards Act); *EEOC v. First Nat'l Bank*, 614 F.2d 1004, 1008 (5th Cir. 1980) (Title VII), *cert. denied*, 101 S. Ct. 1361 (1981).

⁹⁰ 434 U.S. at 417-18; *see, e.g.*, *Nulf v. International Paper Co.*, 656 F.2d 553, 564 (10th Cir. 1981) (no fee award when factual issues were presented which only could be resolved through a trial); *Shah v. Mount Zion Hosp. & Medical Center*, 642 F.2d 268, 270 n.2 (9th Cir. 1981) (no fee award even though appeal bordered on the frivolous); *Nilsen v. City of Moss Point*, 621 F.2d 117, 120, 122 (5th Cir. 1980) (no fee award when plaintiff merely failed to satisfy Title VII's jurisdictional time limits); *Durant v. Owens-Illinois Glass Co.*, 517 F. Supp. 710, 726 (E.D. La. 1980) (no fee award when most claims were reasonable and plaintiff attempted to withdraw one claim after it had become unreasonable), *aff'd*, 656 F.2d 89 (5th Cir. 1981); *EEOC v. Chandelle Club*, 506 F. Supp. 75, 77 (W.D. Okla. 1980) (no fee award when plaintiff was unaware that defendant merely had purchased building in which employer club operated and did not operate club himself); *Davis v. Braniff Airways, Inc.*, 468 F. Supp. 10, 14-15 (N.D. Tex. 1979) (fee awarded when plaintiff continued to litigate after receiving an indication that he had released defendant from liability).

⁹¹ *See, e.g.*, *Anthony v. Marion County Gen. Hosp.*, 617 F.2d 1164, 1170 & n.10 (5th Cir. 1980) (no fee award when plaintiff guilty of failure to prosecute); *Lopez v. Arkansas County Indep. School Dist.*, 570 F.2d 541, 545 (5th Cir. 1978); *Nash v. Reedel*, 86 F.R.D. 16, 18 (E.D. Pa. 1980) (fees awarded when section 1983 suit lacked a factual basis and defendant clearly had not been acting under color of state law); *LeGare v. University of Pa. Medical School*, 488 F. Supp. 1250, 1257 (E.D. Pa. 1980) (no award despite fact that complaint was "riddled with elementary legal errors"); *Ohland v. City of Montpelier*, 467 F. Supp. 324, 350 (D. Vt. 1979); *Keown v. Storti*, 456 F. Supp. 232, 244 (E.D. Pa. 1978), *aff'd mem.*, 601 F.2d 575 (3d Cir. 1979) (no fee award when evidence enabled jury to decide the claim either way); *Bryant v. United States*, 456 F. Supp. 174, 176 (E.D. Pa. 1978) (prevailing taxpayers may be awarded fees when government's suit is "frivolous, vexatious, unfounded, harassing or instituted in bad faith"); *Milburn v. Girard*, 455 F. Supp. 283, 285-86 (E.D. Pa. 1978) (no fee award even though jury took less than a half hour to return a verdict against plaintiff); *Scheriff v. Beck*, 452 F. Supp. 1254, 1257-58 (D. Colo. 1978) (fees awarded when plaintiff intentionally inflicted emotional distress upon defendant); *Vogel v. Torrance Bd. of Educ.*, 447 F. Supp. 258, 266 (C.D. Cal. 1978) (no fee award even though action was barred on numerous grounds).

⁹² *See Nemeroff v. Abelson*, 620 F.2d 339, 349-50 (2d Cir. 1980) (per curiam). In *Nemeroff*, the Second Circuit held that the *Christiansburg* standard represents the minimum standard for an award of fees against a plaintiff under section 9(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78i(e) (1976). 620 F.2d at 350. Since the court concluded that the action has at least some foundation, it had no occasion to consider whether bad faith also would be necessary to sustain a fee award under section 9(e). *Id.*

of the Fees Awards Act and Title VII.⁹³ In *Hanrahan v. Hampton*,⁹⁴ the Supreme Court enunciated the appropriate standard for granting interim awards of attorney's fees under the Fees Awards Act.

In *Hanrahan*, the plaintiffs brought an action under various civil rights statutes, alleging that their constitutional rights had been violated by federal and state law enforcement officials.⁹⁵ The district court rendered a directed verdict for the defendants and the plaintiffs appealed.⁹⁶ Upon reversing the district court's decision, the Seventh Circuit held that the plaintiffs had prevailed for purposes of the Fees Awards Act to the extent of counsel fees incurred on appeal.⁹⁷ Noting that if the plaintiffs ultimately prevailed, attorney's fees incurred at the trial level also would be recoverable, the court requested an affidavit supporting the claim for appellate costs so that an award could be made.⁹⁸

A divided Supreme Court reversed the award of attorney's fees, holding that Congress intended to permit interim fee awards "only when a party has prevailed on the merits of at least some of his claims."⁹⁹ In arriving at this conclusion, the Court analyzed the legislative history of the Fees Awards Act, placing great weight upon the citation therein of two Supreme Court cases.¹⁰⁰ The Court observed that although final judgments had not been en-

⁹³ The availability of interim fee awards also has been discussed in the context of section 718 of the Emergency School Aid Act (ESAA), 20 U.S.C. § 1617 (1976), section 7(b) of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 626(b) (1976) and section 14(e) of the Voting Rights Act of 1965, 42 U.S.C. § 1973l(e) (1976). See, e.g., *Hickey v. Arkla Indus., Inc.*, 624 F.2d 35, 36 (5th Cir. 1980) (per curiam) (ADEA); *Bly v. McLeod*, 605 F.2d 134, 137 (4th Cir. 1979) (Voting Rights Act), cert. denied, 445 U.S. 928 (1980); *Chinese for Affirmative Action v. Leguennec*, 580 F.2d 1006, 1009 (9th Cir. 1978) (Voting Rights Act), cert. denied, 439 U.S. 1129 (1979); *Arthur v. Nyquist*, 426 F. Supp. 194, 197 (W.D.N.Y. 1977) (ESAA); *Armstrong v. O'Connell*, 416 F. Supp. 1325, 1335 (E.D. Wis. 1976) (ESAA).

⁹⁴ 446 U.S. 754 (1980) (per curiam).

⁹⁵ *Id.* at 755. The plaintiffs had brought suit under 42 U.S.C. §§ 1983, 1985(3), 1986, and under various constitutional provisions. 446 U.S. at 755 n.1. Alleging that their constitutional rights had been violated, the plaintiffs sought to recover money damages. *Id.* at 755.

⁹⁶ 446 U.S. at 755.

⁹⁷ *Id.* at 755 & n.3. Because the plaintiffs had not yet "prevailed" at trial, the Seventh Circuit limited the award of counsel fees to those incurred in the course of the appeal. *Id.*

⁹⁸ *Hanrahan v. Hampton*, 600 F.2d 600, 643 (7th Cir. 1979), *rev'd*, 446 U.S. 754 (1980) (per curiam).

⁹⁹ 446 U.S. at 758.

¹⁰⁰ *Id.* at 757; see *Bradley v. Richmond School Bd.*, 416 U.S. 696 (1974); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); S. REP. NO. 1011, *supra* note 34, at 5; H.R. REP. NO. 1558, *supra* note 38, at 7-8.

tered in either of these cases, the liability of the opposing party had been established by the party to whom fees were awarded.¹⁰¹ Moreover, the Court noted, the House Committee Report expressly approved the view enunciated in one of these cases that "the entry of any order that determines substantial rights of the parties may be an appropriate occasion [to consider the propriety of a fee award]."¹⁰² The Court emphasized, however, that the plaintiffs had not prevailed on the merits of any of their claims.¹⁰³ Indeed, the Court observed that the plaintiffs' success on appeal was no more a substantive victory than a denial of the defendants' motion for a directed verdict would have been, since the jury remained free to rule against them on the merits of their claims.¹⁰⁴ Finally, the Court concluded that other interlocutory dispositions in the case "which affected only the extent of discovery" were not matters which would give rise to prevailing party status within the meaning of the Act even though they could affect the ultimate determination on the merits.¹⁰⁵

Perhaps the most interesting of the post-*Hanrahan* adjudications concerning the propriety of interim fee awards¹⁰⁶ is *Smith v.*

¹⁰¹ 446 U.S. at 757.

¹⁰² *Id.* (citing H.R. REP. No. 1558, *supra* note 38, at 8). The Senate Report explained that a fee award *pendente lite* would be "especially appropriate where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail in *all* issues." 446 U.S. at 757 (quoting S. REP. No. 1011, *supra* note 34, at 5 (emphasis added)). Noting that the Fees Awards Act was patterned upon the fee-shifting provisions contained in earlier civil rights statutes, the *Hanrahan* Court found further support, in the cases construing those provisions, for its holding that only parties who have prevailed on the merits of their claims may obtain fee awards. 446 U.S. at 758 n.4 (citing *Bly v. McLeod*, 605 F.2d 134, 137 (4th Cir. 1979) (Voting Rights Act), *cert. denied*, 445 U.S. 928 (1980); *Chinese for Affirmative Action v. Leguennec*, 580 F.2d 1006, 1009 (9th Cir. 1978) (Voting Rights Act), *cert. denied*, 439 U.S. 1129 (1979); *Gribbs v. Butz*, 548 F.2d 973, 975-76 (D.C. Cir. 1976) (Title VII); *Sperling v. United States*, 515 F.2d 465, 485 (3d Cir. 1975) (Title VII), *cert. denied*, 426 U.S. 919 (1976).

¹⁰³ 446 U.S. at 758.

¹⁰⁴ *Id.* at 758-59.

¹⁰⁵ *Id.* at 759.

¹⁰⁶ Cases interpreting *Hanrahan* have arisen under a number of different statutes. *See, e.g., Williams v. Alioto*, 625 F.2d 845, 847 (9th Cir. 1980) (per curiam) (Fees Awards Act), *cert. denied*, 101 S. Ct. 1723 (1981); *Hickey v. Arkla Indus., Inc.*, 624 F.2d 35, 36 (5th Cir. 1980) (per curiam) (ADEA); *Othen v. Ann Arbor School Bd.*, 507 F. Supp. 1376, 1379 n.4 (E.D. Mich. 1981); *Oshiver v. Philadelphia Court of Common Pleas Court Adm.*, 497 F. Supp. 416, 418 (E.D. Pa. 1980). In *Williams v. Alioto*, 625 F.2d 845 (9th Cir. 1980) (per curiam), *cert. denied*, 101 S. Ct. 1723 (1981), for example, the Ninth Circuit held that the plaintiffs, having obtained a preliminary injunction against certain police investigative procedures, were prevailing parties under the Fees Awards Act. *Id.* at 847. The court reasoned that by obtaining the preliminary injunction, the plaintiffs had succeeded on a significant

University of North Carolina,¹⁰⁷ decided in the context of Title VII.¹⁰⁸ In *Smith*, the defendant university declined to promote or reappoint the plaintiff, a female assistant professor.¹⁰⁹ She filed suit against the university and individual faculty members, alleging discrimination on the basis of age and sex.¹¹⁰ During the trial, and pending a decision on the merits, the Fourth Circuit granted a temporary restraining order and a preliminary injunction requiring the university to, *inter alia*, continue the plaintiff's employment.¹¹¹ Although the plaintiff ultimately lost on the merits, the district court award permitted her to recoup the attorney's fees which she had incurred in obtaining the preliminary injunction.¹¹² The university appealed, asserting that the plaintiff was not a prevailing party within the meaning of Title VII and therefore was ineligible for a fee award.¹¹³

The Court of Appeals for the Fourth Circuit reversed, holding that in Title VII cases an interim fee award is available only when "a party . . . prevail[s] on the merits of at least some of his claims."¹¹⁴ The court rejected the plaintiff's reliance upon a line of cases favoring fee awards for interlocutory motions or appeals which are "sufficiently significant and discrete to be treated as a

issue in the litigation and had achieved the benefit they sought. *Id.* at 847-48.

In *Hickey v. Arkla Indus., Inc.*, 624 F.2d 35 (5th Cir. 1980) (per curiam), the Fifth Circuit extended the *Hanrahan* standard to the ADEA. *Id.* at 36. The *Hickey* court held that the fee-shifting provision of this statute does not permit an interim fee award to a party who prevails on appeal only to the extent of obtaining reinstatement of his improperly dismissed discrimination suit. *Id.* In so holding, the Fifth Circuit discerned no congressional purpose germane to the interpretation of the ADEA which would mandate a different result from that reached pursuant to the *Hanrahan* Court's construction of the Fees Awards Act. *Id.*

¹⁰⁷ 632 F.2d 316 (4th Cir. 1980).

¹⁰⁸ *Id.* at 350-51.

¹⁰⁹ *Id.* at 324-25.

¹¹⁰ *Smith* alleged violations of various federal and state constitutional and statutory rights. *Id.* at 321. The issues on appeal concerned age discrimination in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1976), and sex discrimination in violation of Title VII.

¹¹¹ 632 F.2d at 321-22. In addition to being ordered to maintain the plaintiff on its payroll, the university was required to refrain from hiring a replacement, to maintain the plaintiff's teaching position, to pay the plaintiff as before, and to refrain from spreading information harmful to the plaintiff's business or personal reputation. *Id.* at 322.

¹¹² *Id.* at 322. The trial court awarded *Smith* \$8,300 in attorney's fees under Title VII and \$302.06 in related litigation expenses, incurred in securing the injunctive relief. *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 352-53.

separate unit."¹¹⁵ Although conceding that other forums had permitted fee awards upon the issuance of a preliminary injunction under this standard, the Fourth Circuit emphasized that in each of these cases there also had been a ruling on the merits of at least one of the claims involved.¹¹⁶ Accordingly, the *Smith* court stated that it would be erroneous to assume that counsel fees are recoverable whenever "the label 'preliminary injunction' attache[s]."¹¹⁷

Attempting to arrive at an appropriate standard for an interim fee award under Title VII, the *Smith* court noted that the general criteria for the recovery of counsel fees under this statute are identical to those developed under the Fees Awards Act.¹¹⁸ The *Smith* court therefore derived additional support from *Hanrahan* and other Fees Awards Acts cases involving interim awards. The court observed that the *Hanrahan* opinion cited with approval *Bly v. McLeod*,¹¹⁹ a Fourth Circuit case holding that an interim award is appropriate only upon a showing that a party has prevailed on the

¹¹⁵ *Id.* at 348 (quoting *Smith v. University of N.C.*, 23 Fair Empl. Prac. Cas. (BNA) 1735, 1736 (M.D.N.C. 1979) which quoted *Van Hoomissen v. Xerox Corp.*, 503 F.2d 1131, 1133 (9th Cir. 1974)). In *Van Hoomissen*, a Title VII case, the plaintiff contended that he was discharged from his employment because of his efforts to recruit minority workers. 503 F.2d at 1132. The EEOC sought to intervene on the plaintiff's behalf to challenge both the dismissal and the hiring practices of the employer. The district court permitted intervention, but only as to the issue of retaliation. *Id.* An interlocutory appeal of the partial denial of intervention was dismissed by the Ninth Circuit and the employer, asserting that this rendered it a prevailing party, petitioned the court for an award of attorney's fees. *Id.* at 1132. While acknowledging that litigation should not be "dissected" to permit recovery of attorney's fees by the losing party in connection with every procedural motion on which it succeeded, the court held that this appeal was "sufficiently significant and discrete to be treated as a separate unit." *Id.* at 1133. Accordingly, the court concluded that the employer qualified as a prevailing party and could be awarded an interim fee award. *Id.*

¹¹⁶ 632 F.2d at 348-50 (citing *Smallwood v. National Can Co.*, 583 F.2d 419 (9th Cir. 1978) (finding of unlawful retaliation and grant of injunction against union effectively terminated action); *Kimbrough v. Arkansas Activities Assoc.*, 574 F.2d 423, 426 (8th Cir. 1978) (injunction was "part of a final, appealable order which terminated the controversy"); *Lea v. Cone Mills Corp.*, 438 F.2d 86, 88 (4th Cir. 1971) (injunction was issued after finding of discrimination)).

¹¹⁷ 632 F.2d at 349. The district court, attempting to apply the *Van Hoomissen* rule, see note 115 and accompanying text *supra*, had held that "a preliminary injunction is a sufficiently significant and discrete proceeding that a party who prevails on the motion can be considered a 'prevailing party' eligible for attorney's fees under [Title VII]." 632 F.2d at 348. The Fourth Circuit, however, noted that *Van Hoomissen* should be given a more narrow interpretation so that fees are awarded only when an interlocutory proceeding "results in a final resolution of a separable dispute." *Id.* at 349 (quoting *Grubbs v. Butz*, 548 F.2d 973, 974-75 n.5 (D.C. Cir. 1976)).

¹¹⁸ 632 F.2d at 350; see notes 100-102 and accompanying text *supra*.

¹¹⁹ 605 F.2d 134 (4th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980).

merits of a claim.¹²⁰ Indeed, the *Smith* court found that "all the cases" decided in this context demonstrate the necessity of victory on the merits of at least one claim before an interim award can be made.¹²¹ Noting that *Smith* clearly had failed to prevail on any claim, the court reversed the lower court's fee award.¹²²

The *Smith* case seems to indicate that the impact of *Hanrahan* will be felt far beyond the confines of the Fees Awards Act. Notably, the *Hanrahan* and *Smith* courts observed that the Act was patterned upon the fee provisions of other antidiscrimination and voting rights enforcement statutes.¹²³ Moreover, the *Hanrahan* court cited with approval a number of cases decided under these statutes which had held that interim fee awards can only be made to parties who prevail on the merits of their claims.¹²⁴ It is suggested that the message behind the Supreme Court's endorsement of this standard in such a variety of contexts will not be lost upon the federal courts of appeals. Consequently, absent some policy considerations unique to a particular statute which militate against the application of such a standard, the federal courts most probably will adopt the *Hanrahan* test as the minimum criterion for fee awards *pendente lite*.

C. Administrative Proceedings

1. Federal and State Proceedings

It is well-settled that attorney's fees may be awarded for legal services rendered in connection with federal administrative proceedings¹²⁵ which are instituted as a prerequisite to the filing of a suit alleging a violation of Title VII.¹²⁶ The question of the availa-

¹²⁰ 446 U.S. at 758 n.4; see 605 F.2d at 137. The *Bly* court held that although the plaintiffs had obtained a temporary injunction, a clarification of the record, and the empaneling of a three judge district court, they were not prevailing parties eligible for an interim fee award. The court reasoned that such victories were procedural in nature and that the plaintiffs had failed to demonstrate any success on the merits. 605 F.2d at 137.

¹²¹ 632 F.2d at 352.

¹²² *Id.* at 352-53.

¹²³ See 446 U.S. at 758 n.4; 632 F.2d at 350; note 102 *supra*.

¹²⁴ 446 U.S. at 758 n.4.

¹²⁵ See, e.g., *Brown v. Bathke*, 588 F.2d 634, 638 (8th Cir. 1978); *Fischer v. Adams*, 572 F.2d 406, 409 (1st Cir. 1978); *Foster v. Boorstin*, 561 F.2d 340, 342-44 (D.C. Cir. 1977); *Parker v. Califano*, 561 F.2d 320, 327 (D.C. Cir. 1977); *Johnson v. United States*, 554 F.2d 632, 633 (4th Cir. 1977). See generally Note, *Administrative Law: Recovery of Attorney's Fees by Prevailing Plaintiffs in Title VII Actions*, 33 OKLA. L. REV. 98, 102-05 (1980).

¹²⁶ 42 U.S.C. § 2000e-5(c)-(d) (1976). Title VII requires that, prior to filing a civil action in federal court, an employee first must exhaust his available administrative remedies. Civil

bility of fee awards in state administrative proceedings, however, only recently has been addressed by the federal judiciary.¹²⁷ A comparison of two recent cases decided under Title VII and the Age Discrimination in Employment Act of 1967 (ADEA)¹²⁸ indicates that the availability of an award depends upon the context in which the state proceeding arose.

2. Title VII Action

In *New York Gaslight Club, Inc. v. Carey*,¹²⁹ the Supreme Court held that attorney's fees may be awarded in a federal court action for legal services performed for a prevailing complainant in state administrative proceedings mandated by Title VII.¹³⁰ The plaintiff in *Gaslight Club* filed a complaint alleging that she had been denied a position as a cocktail waitress on account of her race.¹³¹ A New York state administrative agency determined that

Rights Act of 1964, §§ 706(f), 717(c), 42 U.S.C. §§ 2000e-5(f), 2000e-16(c) (1976). Congress envisioned that Title VII's procedures and remedies would mesh coherently with state and city legislation. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63-64 (1980). Accordingly, the statute requires that an individual alleging a Title VII violation first must commence proceedings with the state or local equal opportunity agency empowered to grant or seek relief from employment practices prohibited by law. 42 U.S.C. § 2000e-5(c)-(d) (1976). The statute further prescribes a 60-day deferral period, during which the EEOC will refrain from exercising jurisdiction over an allegation of discrimination in deference to the available state administrative proceedings. *Id.* Upon termination of the state proceedings or after the 60-day deferral period expires, whichever occurs first, the EEOC will assume jurisdiction and determine whether there is probable cause to believe that the complainant's charge is true. 42 U.S.C. § 2000e-5(b)-(c) (1976). At any time during the following 30 days, the EEOC may bring a civil action in which the complainant has a right to intervene. 42 U.S.C. § 2000e-5(f)(1) (1976). If the EEOC neither commences its own action nor enters into a conciliation agreement within this 30-day period, it must issue a "right to sue" letter to the complainant. *Id.* Thereafter, the complainant has 90 days within which to commence a Title VII action in federal district court. *Id.*

¹²⁷ See, e.g., *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 61-66 (1980); cf. *Porter v. District of Columbia*, 502 F. Supp. 271, 273-75 (D.D.C. 1980) (District of Columbia administrative proceedings). The *Porter* court held that fees incurred in Title VII administrative proceedings, instituted to resolve a claim of discrimination by the government of the District of Columbia, were recoverable. *Id.* at 275. In addition to the rationale relied upon by the *Gaslight Club* Court regarding state proceedings, see notes 137-141 and accompanying text *infra*, the *Porter* court reasoned that a contrary conclusion would substantially diminish any incentive to pursue an administrative disposition of the claim. 502 F. Supp. at 274. Moreover, the court observed that officials responsible for the administrative resolution of such claims probably are more familiar with the surrounding factual context than are federal judges. *Id.*

¹²⁸ 29 U.S.C. §§ 621-634 (1976 & Supp. III 1979).

¹²⁹ 447 U.S. 54 (1980).

¹³⁰ *Id.* at 71.

¹³¹ *Id.* at 56. The EEOC referred the plaintiff's complaint to the New York State Divi-

the plaintiff had indeed been the victim of racial discrimination.¹³² Following the issuance of a "right to sue" letter by the EEOC,¹³³ the plaintiff filed suit in federal district court in order to preserve her Title VII remedies.¹³⁴ The Court of Appeals for the Second Circuit reversed the district court's denial of attorney's fees,¹³⁵ and the Supreme Court, on a writ of certiorari, affirmed the holding of the Second Circuit.¹³⁶

Justice Blackmun, writing for the majority, initially noted that the disjunctive nature of the statutory language conferring jurisdiction to award attorney's fees "[i]n any action or proceeding" signified a congressional intent to permit fee awards for expenses incurred in administrative proceedings.¹³⁷ In addition, the Court

sion of Human Rights (Division). *Id.* at 57. The Division determined that there was probable cause to believe that the defendants were guilty of an illegal discriminatory practice. *Id.* When efforts at conciliation proved fruitless, a state administrative hearing was conducted. *Id.*

¹³² *Id.* The hearing examiner ordered the defendants to offer the plaintiff the position that she had sought and to pay her back wages. *Id.* The Division's order subsequently was affirmed by the New York State Human Rights Appeal Board and by the Appellate Division, First Department, of the New York State Supreme Court. *Id.* at 58.

¹³³ *Id.* After having reassumed jurisdiction over the discrimination charge at the request of the complainant, the EEOC determined that there was reasonable cause to believe that the defendants had violated Title VII. *Id.*

¹³⁴ See note 126 *supra*.

¹³⁵ 447 U.S. 54, 60 (1980).

¹³⁶ *Id.* at 71.

¹³⁷ *Id.* at 61 (emphasis added). The Court emphasized the importance of the language of Title VII by contrasting it with that of Title II of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a to 2000a-6. *Id.* Section 204(b) of Title II, 42 U.S.C. § 2000a-3(b), does not contain the language "or proceeding." 447 U.S. at 61. The Court found this omission understandable since the enforcement of Title II depends solely upon court actions. *Id.* Furthermore, the Court noted that an interpretation of the word "proceeding" could not rationally be confined to the context of federal agencies since the term is used to refer to "all of the different types of proceedings in which the statute is enforced, state and federal, administrative and judicial." *Id.* at 61-62 & n.3; see, e.g., Civil Rights Act of 1964, § 706(f)(1), (i), 42 U.S.C. § 2000e-5(f)(1), (i).

Several other courts have interpreted the phrase "action or proceeding" in the Fees Awards Act for the purpose of determining the availability of attorney's fees for work performed in connection with taxpayer's suits against the government. *Toner v. Commissioner*, 629 F.2d 899, 900-02 (3d Cir. 1980), *cert. denied*, 101 S. Ct. 1358 (1981); *Kipperman v. Commissioner*, 622 F.2d 431, 432-33 (9th Cir. 1980); *Key Buick Co. v. Commissioner*, 613 F.2d 1306, 1307-09 (5th Cir. 1980). The *Toner* case involved a suit brought by a taxpayer contesting tax deficiencies. 629 F.2d at 900. After the taxpayer prevailed, she filed a motion for attorney's fees pursuant to the Fees Awards Act, which authorizes such an award "in any action or proceedings, [sic] by or on behalf of the United States . . . to enforce, or charging a violation of a provision of the United States Internal Revenue Code." *Id.* (quoting 42 U.S.C. § 1988 (1976)). The plaintiff taxpayer asserted that the government initiated a civil "proceeding" within the meaning of the Fees Awards Act when it sent her a deficiency

emphasized that the clear congressional policy behind Title VII was to facilitate the prosecution of discrimination complaints.¹³⁸ A denial of attorney's fees to one in the plaintiff's position, the Court observed, would force the complainant to bear the costs of mandatory state proceedings, thus deterring the enforcement of meritorious complaints.¹³⁹ Moreover, it was clear to the Court that Congress intended the EEOC and federal proceedings merely to constitute supplementary relief when the mandatory state and local remedies were inadequate.¹⁴⁰ The Court concluded, therefore, that authorization of fee awards in state administrative proceedings was an essential step to ensure the meaningful integration of state procedures with the Title VII enforcement scheme.¹⁴¹

3. ADEA Action

In contrast, the district court for the District of Columbia held, in *Kennedy v. Whitehurst*,¹⁴² that the ADEA did not authorize the court to award attorney's fees for services performed at the administrative level.¹⁴³ The plaintiff in *Kennedy* filed a complaint of age discrimination alleging a denial of employment opportunities.¹⁴⁴ As a result of this complaint, the EEOC negotiated a settlement agreement with the defendant which provided for a retroactive promotion and an award of back pay to the plaintiff.¹⁴⁵ The

letter. 629 F.2d at 901. The court denied the motion, quoting passages from the legislative history which indicated that Congress intended fee awards to be available in this context only when suit is brought by the United States. *Id.*; see, e.g., 122 CONG. REC. 33,311 (1976) (remarks of Sen. Allen); *id.* at 33,312-13 (remarks of Sen. Kennedy); *id.* at 35,122 (remarks of Rep. Drinan). Moreover, the court emphasized that acceptance of the plaintiff's argument would mean that every time the government took administrative action it would be subject to potential liability for the plaintiff's attorney's fees. 629 F.2d at 902. If Congress had intended to create such a broad waiver of the government's traditional sovereign immunity from fee awards, the court concluded, it surely would have done so expressly. *Id.*

¹³⁸ 447 U.S. at 63.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 65; cf. *Chrapliwy v. Uniroyal, Inc.*, 509 F. Supp. 442, 452 (N.D. Ind. 1981) (attorney's fees are not recoverable for proceedings which are collateral to and not mandated by pursuit of a Title VII cause of action even when they have the same goal and are the proximate cause of the plaintiff's success).

¹⁴¹ 447 U.S. at 65. The Court emphasized the fact that it would be "anomalous to award fees to the complainant who is unsuccessful . . . in obtaining state or local remedies, but to deny an award to the complainant who is successful in fulfilling Congress' plan that federal policies be vindicated at the state or local level." *Id.* at 66.

¹⁴² 509 F. Supp. 226 (D.D.C. 1981).

¹⁴³ *Id.* at 231.

¹⁴⁴ *Id.* at 227.

¹⁴⁵ *Id.*

settlement, however, did not include an award of attorney's fees and the plaintiff brought suit in federal district court to recover costs incurred at the administrative level.¹⁴⁶

In rejecting the plaintiff's claim, District Judge Gasch noted that in contrast to the language of the Title VII fee provision,¹⁴⁷ the ADEA refers only to an "action."¹⁴⁸ Moreover, the court found that a comparison of the remedial schemes contemplated by the two statutes buttressed its conclusion.¹⁴⁹ The court observed that Title VII required the plaintiff in *Gaslight Club* to resort to state administrative proceedings before filing suit in federal court.¹⁵⁰ Additionally, the court observed that the adversarial nature of these proceedings necessitated representation by competent counsel in order to preserve the complainant's rights.¹⁵¹ The court emphasized, however, that the ADEA does not implicate the same concerns since the statute contains no parallel requirement that administrative remedies be exhausted.¹⁵² Finally, the court concluded that it is the responsibility of Congress, not the judiciary, to act upon the concern that the unavailability of attorney's fees in ADEA cases would deter claimants from pursuing administrative

¹⁴⁶ *Id.* at 226.

¹⁴⁷ See note 137 *supra*.

¹⁴⁸ 509 F. Supp. at 230. The section governing fee awards under the ADEA, which section 7(b) of the statute, 29 U.S.C. § 626(b) (1976), incorporates by reference, is section 16 of the Fair Labor Standards Act, 29 U.S.C. § 216 (1976), which provides in part:

[An] [a]ction . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction The court in such *action* shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

Id. § 216(b).

The *Kennedy* court suggested that the words "judgment" and "plaintiff" clearly envisage a court action, not an administrative proceeding. 509 F. Supp. at 230. The court made one final linguistic point, indicating that the language of the ADEA fee provision was semantically closer to that of Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b), than to that of Title VII. 509 F. Supp. at 230. This was significant, the court noted, because the Supreme Court in *Gaslight Club* had expressly distinguished the Title II language. *Id.*; see note 137 *supra*.

¹⁴⁹ 509 F. Supp. at 230.

¹⁵⁰ *Id.* at 231; see note 126 *supra*.

¹⁵¹ 509 F. Supp. at 231. The court observed that, unlike Title VII cases, the first adversarial step demanded in an ADEA case is the filing of a complaint in the district court. *Id.*

¹⁵² *Id.* at 230. The only administrative prerequisite to the filing of an ADEA action is that the putative plaintiff must furnish notice of his intention to sue to the appropriate federal official. *Id.* The court felt that such a requirement could be satisfied by a layman or inexpensively performed by counsel. *Id.* at 231.

resolution of their claims.¹⁵³

D. *Intervenors*

The nature of the role played by the intervenor in litigation is often difficult to assess. He may appear as a party¹⁵⁴ or may be denied intervention altogether,¹⁵⁵ and, like a prompter, make his contribution from the wings. His role may be pivotal¹⁵⁶ or negligible¹⁵⁷ to the result. Consequently, there are no definitive rules dictating when intervenors properly may be awarded fees. Rather, the criteria governing fee awards vary with the circumstances of each case. Nevertheless, since intervenors frequently do appear, it is necessary to seek guidance from the sparse case law that has addressed this subject.

Perhaps the most interesting of the recent cases involving intervenors is *Baker v. City of Detroit*,¹⁵⁸ a Fees Awards Act case involving a challenge to the affirmative action program of the Detroit Police Department.¹⁵⁹ After granting a motion for interven-

¹⁵³ *See id.*

¹⁵⁴ *E.g.*, *Lipscomb v. Wise*, 643 F.2d 319, 320 (5th Cir. 1981); *Seattle School Dist. No. 1 v. Washington*, 633 F.2d 1338, 1342 (9th Cir. 1980); *EEOC v. Murphy Motor Freight Lines, Inc.*, 488 F. Supp. 381, 383 (D. Minn. 1980). Although the issue clearly does not arise in the context of the prevailing intervenor, there have been cases in which the party seeking intervention must pay attorney's fees to his adversary. *See, e.g.*, *Barrett v. Thomas*, 649 F.2d 1193, 1202 (5th Cir. 1981) (attorney's fees assessed under Fees Awards Act against nonparty county treasurer for section 1983 violations despite denial of opportunity to intervene); *Haycraft v. Hollenbach*, 606 F.2d 128, 131-33 (6th Cir. 1979) (per curiam) (because defendant intervenor's proposed alternative school desegregation plan imposed substantial barrier to full realization of constitutional rights of prevailing parties, award of attorney's fees under ESAA was not abuse of discretion); *Moten v. Bricklayers, Mason & Plasterers Int'l Union*, 543 F.2d 224, 239-40 (D.C. Cir. 1976) (per curiam) (Title VII fee award appropriate against nonparty defendant whose appeal forced plaintiffs to incur additional attorney's fees to defend settlement agreement); *Greater St. Louis Health Sys. Agency v. Teasdale*, 506 F. Supp. 23, 42 (E.D. Mo. 1980) (fee award not appropriate under Fees Awards Act against defendant intervenors who were required by state law to engage in conduct challenged in civil rights suits); *Chance v. Board of Examiners*, 70 F.R.D. 334, 340 (S.D.N.Y. 1976) (intervenor acting as amicus curiae in ESAA suit not subject to liability for fee award).

¹⁵⁵ *E.g.*, *United States v. Ford*, 650 F.2d 1141, 1142 (9th Cir. 1981); *Barrett v. Thomas*, 649 F.2d 1193, 1202 (5th Cir. 1981); *Stenson v. Blum*, 512 F. Supp. 680, 683-84 (S.D.N.Y. 1981); *Chance v. Board of Examiners*, 70 F.R.D. 334, 340 (S.D.N.Y. 1976); *Alaniz v. California Processors, Inc.*, 13 FAIR EMPL. PRAC. CAS. (BNA) 738, 741-42 (N.D. Cal. 1976).

¹⁵⁶ *E.g.*, *Alaniz v. California Processors, Inc.*, 13 FAIR EMPL. PRAC. CAS. (BNA) 738, 742 (N.D. Cal. 1976).

¹⁵⁷ *E.g.*, *Lipscomb v. Wise*, 643 F.2d 319, 322 (5th Cir. 1981).

¹⁵⁸ 504 F. Supp. 841 (E.D. Mich. 1980).

¹⁵⁹ *Id.* at 843. The affirmative action program related to promotions from sergeant to lieutenant. *Id.* at 843 & n.1.

tion by a group of black police officers who had benefited or would benefit from the program,¹⁶⁰ the district court issued an extensive opinion upholding the department's plan for affirmative action.¹⁶¹ In response to the intervenors' claim for attorney's fees, the plaintiffs¹⁶² asserted that, under the *Christiansburg* standard,¹⁶³ an award could be made to defendants only if the suit was "frivolous, unreasonable, or without foundation."¹⁶⁴ Notwithstanding the intervenors' technical status as defendants, however, the court declined to apply the *Christiansburg* standard and awarded them

¹⁶⁰ *Id.* at 848. The intervenors consisted of the Guardians of Michigan, a voluntary association of black police officers, and seven named individuals, who moved to intervene as defendants on May 18, 1978. *Baker v. City of Detroit*, 483 F. Supp. 930, 938 (E.D. Mich. 1979). In an order dated July 6, 1978, the court permitted them to proceed as defendants. *Id.*

¹⁶¹ 483 F. Supp. at 1000-03.

¹⁶² The plaintiffs consisted of several named individuals and the Detroit Police Lieutenant's and Sergeant's Associations (LSA). *See* 504 F. Supp. at 849. The LSA funded the litigation through an assessment imposed upon its membership. *Id.* Counsel for the intervenors made it clear that the request for attorney's fees was directed only against the union, not the individually named plaintiffs. *Id.* at 849 n.8.

¹⁶³ *See* notes 84-92 and accompanying text *supra*.

¹⁶⁴ 504 F. Supp. at 850; *see* *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). The applicability of the *Christiansburg* standard, in the context of fee awards to intervenors, also has been discussed with regard to the "taxpayer suit" provision of the Fees Awards Act. *See* *United States v. Ford*, 650 F.2d 1141, 1143-44 (9th Cir. 1981). The Ninth Circuit in *Ford* upheld the district court's denial of a fee award to a taxpayer whose motion to intervene in a third-party Internal Revenue Service summons enforcement proceeding was refused. *Id.* at 1144. Concluding that the Fees Awards Act was not meant to "reimburse volunteers for expenses incurred in aiding named parties or . . . in their [own] attempts to become parties," the court reasoned that the statute required a taxpayer to be "cast in the role of a defendant" in order to recover attorney's fees. *Id.* In reaching its conclusion, however, the court declined to determine whether the district court erred in denying leave to intervene. *Id.* at 1143. It is suggested that there are a number of troublesome aspects to the *Ford* decision. It seems that by declining to address the district court's denial of intervention, the Ninth Circuit automatically relegated the intervenors to a nonparty status. Additionally, if the Ninth Circuit had reviewed the district court's denial of intervention, held it to be error and accordingly treated the putative intervenors as parties for purposes of a fee award, their roles in the litigation would have been that of defendants. *See id.* at 1142. Thus, the intervenors arguably would have been able to satisfy the Ninth Circuit prerequisite for eligibility for attorney's fees under the Fees Awards Act. Indeed, there was evidence that if they had satisfied the requirement of being "cast in the role" of defendants, they might have been able to satisfy the *Christiansburg* criterion of bad faith. *Id.* Finally, it is submitted that the *Ford* court's expansive dictum that the Fees Awards Act "is not meant to reimburse volunteers," *id.* at 1144, suggests a general distaste for allowing intervention in any Fees Awards Act taxpayer suit, without regard to whether the intervenor may be attempting to vindicate his rights. Indeed, the *Ford* opinion did not address this issue, nor did it address the nature and extent of the intervenor's stake in the litigation. If a court were not to consider these issues and were to apply the *Ford* standard, it is difficult to see how an intervenor in such a suit ever could be a prevailing party.

reasonable attorney's fees.¹⁶⁵

The court initially noted that at the time the motion was granted, intervention appeared to be an essential step from the perspective of the court¹⁶⁶ and of the intervenors.¹⁶⁷ Moreover, the court observed that the presence of counsel for the intervenors had proven to be useful and necessary at the trial itself.¹⁶⁸ Finally, the *Christiansburg* standard was found to be inapplicable because "the procedural posture of the case should not be dispositive."¹⁶⁹ The court supported this proposition by observing that the legislative history of the Fees Awards Act emphasized not the procedure posture of a party as a criterion for prevailing party status, but rather, the importance of facilitating civil rights litigation.¹⁷⁰ The court concluded that since the intervenors had vindicated their civil rights in the case at bar, application of the restrictive *Christiansburg* rule would contravene congressional intent.¹⁷¹

There appear to be at least two points of analytical interest in the *Baker* decision which may have broad application in intervention cases. One point of interest is, of course, the court's holding that regardless of his technical role in litigation, an intervenor who is engaged in the vindication of his civil rights may be awarded

¹⁶⁵ 504 F. Supp. at 851. The court urged counsel for the plaintiffs and counsel for the intervenors to agree upon a reasonable fee award. *Id.*

¹⁶⁶ *Id.* at 849. The court noted that, in a reverse discrimination suit, intervention by parties who have an incentive to introduce evidence of past discrimination often resolves the dilemma of an employer having to demonstrate its own past discrimination in order to justify its affirmative action program. *Id.*

¹⁶⁷ *Id.* at 848. The intervenors in *Baker* explained that they felt an acute need to protect their own interests because a judge sitting in the Eastern District of Michigan had determined that an affirmative action program involving the promotion of blacks from patrolmen to sergeants was unconstitutional. *Id.*

¹⁶⁸ *Id.* at 851. The court noted that the intervenors' counsel had aided his clients in vindicating their rights, *id.*, and had presented useful evidence which tended to demonstrate that the affirmative action program was a necessary response to past discrimination, *id.* at 849.

¹⁶⁹ *Id.* at 850.

¹⁷⁰ *Id.* The Senate Report relating to the Fees Awards Act provides in part:

In the large majority of cases the party or parties seeking to enforce such [civil] rights will be the plaintiffs and/or plaintiff-intervenors. However, in the procedural posture of some cases, the parties seeking to enforce such rights may be the defendants and/or defendant-intervenors.

S. REP. NO. 1011, *supra* note 34, at 4 n.4 (citing *Shelley v. Kraemer*, 334 U.S. 1 (1948)). See also *Prate v. Freedman*, 583 F.2d 42, 46 n.2 (2d Cir. 1978) (dictum) ("[i]t may well be that defendants may on occasion be characterized as 'private attorneys general' who are entitled to the more favorable Supreme Court standard").

¹⁷¹ 504 F. Supp. at 850-51.

attorney's fees.¹⁷² Also important is the court's indication that the eligibility of intervenors for attorney's fees is dependent upon whether, at the time of the intervention motion, intervention appeared to be a necessary step.¹⁷³ Notably, at least one court has suggested that to retroactively deny attorney's fees when an intervenor's presence is found to have been unnecessary "would have the effect of discouraging the intervention of what in future cases may be essential parties."¹⁷⁴

¹⁷² See, e.g., *Baker v. City of Detroit*, 504 F. Supp. 841, 850-51 (E.D. Mich. 1980) (Fees Awards Act); *EEOC v. Murphy Motor Freight Lines, Inc.*, 488 F. Supp. 381, 389 (D. Minn. 1980) (Title VII). It appears that an intervenor's procedural posture is not a dispositive factor in assessing whether he is eligible for a fee award. *Baker v. City of Detroit*, 504 F. Supp. 841, 850 (E.D. Mich. 1980); accord, *Stenson v. Blum*, 512 F. Supp. 680, 683 (S.D.N.Y. 1981); *Alaniz v. California Processors, Inc.*, 13 FAIR EMPL. PRAC. CAS. (BNA) 738, 742 (N.D. Cal. 1976). But see *United States v. Ford*, 650 F.2d 1141, 1144 (9th Cir. 1981). In *Stenson*, the court held that attorney's fees are available for denials of intervenor motions when a plaintiff's success in obtaining class action certification has made intervention unnecessary because the proposed intervenor is included in the class. 512 F. Supp. at 683. The court reasoned that although the intervention movant had not prevailed in a technical sense, a fee award was appropriate because the desired result had been achieved. *Id.* at 683-84.

The district court in *Alaniz* held in a Title VII suit that putative intervenors were "parties" within the meaning of the statute, notwithstanding that official intervenor status was denied. 13 FAIR EMPL. PRAC. CAS. (BNA) at 742. The court noted that in this factual situation, the "intervenors" were given discovery rights, presented evidence at the hearings, conducted cross-examination and, in practical terms, participated in the proceedings to the same extent as an "official" party. *Id.*; accord, *Ex parte Cutting*, 94 U.S. 14, 20-21 (1877) (persons who have been denied formal leave to intervene, but who have acted or been treated as parties in the proceedings, may acquire status of parties to a suit). The *Alaniz* court also observed that since the objections of the intervenors to a proposed settlement significantly improved the eventual settlement for class members, thus securing substantial benefits for the class, they were prevailing parties. 13 FAIR EMPL. PRAC. CAS. (BNA) at 742.

¹⁷³ See notes 166-167 and accompanying text *supra*.

¹⁷⁴ *Seattle School Dist. No. 1 v. Washington*, 633 F.2d 1338, 1349 (9th Cir. 1980), appeal pending, 102 S. Ct. 384 (1981). But see *Lipscomb v. Wise*, 643 F.2d 319, 323 (5th Cir. 1981) (per curiam). In *Seattle School District*, three school districts operating a series of voluntary and mandatory desegregation programs challenged a state anti-busing statute. 633 F.2d at 1341. Various civic and civil rights groups intervened, claiming that even if the statute survived challenge, the districts operated unconstitutional systems. *Id.* Because it invalidated the statutory provision, the district court found it unnecessary to reach the intervenors' claims, and accordingly denied their motion for fees. *Id.* at 1342. The Ninth Circuit reversed the denial of fees, noting that if the challenged statute had been upheld, which seemed likely when the suit was commenced, the "considerable burden" of litigating the question whether the school districts were illegally segregated would have been left to the intervenors. *Id.* at 1350. Notwithstanding that the intervenors played a de minimis role in the litigation, the Ninth Circuit reasoned that a fee award was essential "to effectuate the congressional purpose of encouraging future constitutional litigation in similar circumstances." *Id.*

E. *Pro Se Litigants*

1. Unsettled Eligibility under the FOIA

A question that has arisen with increasing frequency in recent years is the recoverability of attorney's fees by litigants appearing pro se. This issue has been addressed by the courts in the context of several federal statutes, most notably in suits brought under the FOIA, the Fees Awards Act, and the Truth in Lending Act of 1968.¹⁷⁵ The FOIA has generated the greatest controversy in this area. Indeed, although the First¹⁷⁶ and the Tenth¹⁷⁷ Circuits have held that pro se litigants are ineligible for fee awards under the FOIA, the Court of Appeals for the District of Columbia has held that such litigants are eligible for fee awards.¹⁷⁸ The Second Circuit, moreover, has adopted a flexible middle-ground approach.¹⁷⁹

In *Crooker v. United States Department of Justice*,¹⁸⁰ the First Circuit noted that the purpose of the FOIA attorney's fees provision was to abolish administrative resistance to disclosure requests when such recalcitrance was premised upon the knowledge that a plaintiff lacked the financial resources or economic incentives to vindicate his statutory rights.¹⁸¹ Such a purpose, the court

¹⁷⁵ 15 U.S.C. §§ 1601-1665 (1976), as amended by Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, 94 Stat. 168-185.

¹⁷⁶ *Crooker v. Department of Justice*, 632 F.2d 916, 922 (1st Cir. 1980); see notes 180-184 and accompanying text *infra*. For a comprehensive discussion of *Crooker* and the considerations militating in favor of and against recovery of attorney's fees by pro se litigants in the context of the FOIA, see Comment, *supra* note 37.

¹⁷⁷ *Burke v. Department of Justice*, 559 F.2d 1182, 1182 (10th Cir. 1977), *aff'g mem.* 432 F. Supp. 251 (D. Kan. 1976). One district court in the Fifth Circuit, in dictum, also has suggested that pro se litigants are ineligible for an award of attorney's fees under the FOIA. *Maxwell Broadcasting Corp. v. FBI*, 490 F. Supp. 254, 256 (N.D. Tex. 1980). The *Maxwell* court reasoned that the legislative history of the FOIA reflected a desire to reimburse plaintiffs only for expenses actually incurred. *Id.* at 256 & n.2. Moreover, the court was influenced by the statute's failure expressly to provide for fee awards to pro se plaintiffs, particularly in light of the doctrine of restrictive construction of waivers of sovereign immunity. *Id.*

¹⁷⁸ *Crooker v. Department of the Treasury*, No. 80-1412 (D.C. Cir. Oct. 23, 1980) (per curiam); *Cox v. Department of Justice*, 601 F.2d 1, 5-6 (D.C. Cir. 1979); *Jones v. United States Secret Serv.*, 81 F.R.D. 700, 701-02 (D.D.C. 1979); *Holly v. Acree*, 72 F.R.D. 115, 115-16 (D.D.C. 1976), *aff'd mem. sub nom.* *Holly v. Chasen*, 569 F.2d 160 (D.C. Cir. 1977). See also *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1367-68 (D.C. Cir. 1977) (attorney appearing *in propria persona* may recover attorney's fees).

¹⁷⁹ See *Crooker v. Department of the Treasury*, 634 F.2d 48, 49 (2d Cir. 1980); notes 185-188 and accompanying text *infra*; cf. *Marschner v. Department of State*, 470 F. Supp. 196, 201 (D. Conn. 1979) (awarding attorney's fees to pro se litigant without establishing limiting criteria).

¹⁸⁰ 632 F.2d 916 (1st Cir. 1980).

¹⁸¹ *Id.* at 920 (citing *Nationwide Bldg. Maintenance, Inc. v. Sampson*, 559 F.2d 704, 711

reasoned, was not furthered by granting attorney's fees when none were incurred, and such a recovery would constitute an undesirable windfall to the pro se plaintiff.¹⁸² Thus, the court concluded that the economic barriers facing the pro se plaintiff were adequately overcome by awarding litigation costs actually incurred.¹⁸³ In contrast, the District of Columbia Circuit has reasoned that since a pro se plaintiff functions as an attorney, he should not be deemed ineligible for a fee award merely because he did not incur the expense of hiring counsel.¹⁸⁴

2. Middle-Ground Standard for Eligibility Under the FOIA

The Second Circuit, in *Crooker v. United States Department of the Treasury*,¹⁸⁵ adopted a middle-ground approach, permitting pro se litigants to recover attorney's fees upon demonstrating that the prosecution of their lawsuits created a reduction in income.¹⁸⁶ The *Crooker* court derived this eligibility criterion from the legislative history of the FOIA, which refers to the attorney's fee provision as removing "barriers" to suits by the average citizen.¹⁸⁷ The court noted that such a barrier would not be presented should the litigant neither pay an attorney nor forego regular income in order to prepare and pursue a pro se suit.¹⁸⁸

(D.C. Cir. 1977)).

¹⁸² 632 F.2d at 920-21.

¹⁸³ *Id.* at 921.

¹⁸⁴ *Crooker v. Department of the Treasury*, No. 80-1412 (D.C. Cir. Oct. 23, 1980) (per curiam).

¹⁸⁵ 634 F.2d 48 (2d Cir. 1980).

¹⁸⁶ *Id.* at 49.

¹⁸⁷ *Id.*; see S. REP. No. 854, 93d Cong., 2d Sess. 17 (1974).

¹⁸⁸ See 634 F.2d at 49. The *Crooker* rationale clearly comports with the congressional goal of facilitating access to the courts by litigants seeking to vindicate their statutory rights. See *Blue v. Bureau of Prisons*, 570 F.2d 529, 532-34 (5th Cir. 1978); *Nationwide Bldg. Maintenance, Inc. v. Sampson*, 559 F.2d 704, 715 (D.C. Cir. 1977); *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1365 (D.C. Cir. 1977). Of course, the FOIA also was intended to deter arbitrary administrative resistance to disclosure requests. See *Lovell v. Alderete*, 630 F.2d 428, 437 (5th Cir. 1980) (Clark, J., dissenting); *Nationwide Bldg. Maintenance, Inc. v. Sampson*, 559 F.2d 704, 711 (D.C. Cir. 1977). In *Lovell*, Judge Clarke, after highlighting the importance of attorney's fee awards as a useful means to deter unfounded resistance to disclosure requests by pro se plaintiffs, advanced three other arguments favoring recovery. First, he noted that since the pro se complainant's time is valuable, he should be compensated accordingly. 630 F.2d at 437 (Clark, J., dissenting). Second, he observed that such a litigant should be encouraged to enforce his statutory rights. *Id.* (Clark, J., dissenting). Finally, Judge Clark could perceive no valid reason for permitting recovery to the attorney who represents himself, see *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1368 (D.C. Cir. 1977), while denying recovery to the lay person who proceeds pro se. 630 F.2d at 438 (Clark, J., dissenting). *But cf.* *White v.*

3. Ineligibility Under the Fees Awards Act

Although the circuits are divided over the availability of attorney's fees to pro se litigants under the FOIA, those courts that have addressed this issue in the context of the Fees Awards Act are in accord. The First,¹⁸⁹ Fifth,¹⁹⁰ and Eighth¹⁹¹ Circuits, and one district court in the Third Circuit,¹⁹² all have held that pro se litigants are ineligible for an award of attorney's fees under the Fees Awards Act. The reasoning of the Fifth Circuit in *Cofield v. City of Atlanta*¹⁹³ is typical of these decisions. Recognizing that the central purpose of the Act was to "enable and encourage a wronged person to retain a lawyer,"¹⁹⁴ the *Cofield* court distinguished those cases which had granted attorney's fees to pro se complainants under the FOIA,¹⁹⁵ noting that "[t]he history, language, and purpose of the [FOIA] differ significantly from those of the civil rights statutes."¹⁹⁶

4. Ineligibility Under the Truth In Lending Act

The issue of eligibility of pro se litigants for fee awards also has been addressed in the context of the Truth In Lending Act of 1968 (the TILA).¹⁹⁷ The Fourth Circuit, confronted with this issue

Arlen Realty & Dev. Corp., 614 F.2d 387, 389 (4th Cir.) (per curiam), cert. denied, 447 U.S. 923 (1980) (under Truth In Lending Act, attorneys who represent themselves may not recover fees); notes 198-202 and accompanying text *infra*.

¹⁸⁹ Lovell v. Snow, 637 F.2d 170, 171 (1st Cir. 1981).

¹⁹⁰ *Cofield v. City of Atlanta*, 648 F.2d 986, 988 (5th Cir. 1981); *Rheurk v. Shaw*, 628 F.2d 297, 300 n.1 (5th Cir. 1980), *aff'g in part* 477 F. Supp. 897, 928-29 (N.D. Tex. 1979), cert. denied, 101 S. Ct. 1392 (1981) (award of pro se attorney's fees would be startling new remedy not contemplated by Congress in enacting the Fees Awards Act). See also *Gore v. Turner*, 563 F.2d 159, 164 (5th Cir. 1977) (existence of attorney-client relationship is required to recover under the Fees Awards Act).

¹⁹¹ *Davis v. Paratt*, 608 F.2d 717, 718 (8th Cir. 1979) (per curiam).

¹⁹² *Owens-El v. Robinson*, 498 F. Supp. 877, 880 (W.D. Pa. 1980).

¹⁹³ 648 F.2d 986 (5th Cir. 1981).

¹⁹⁴ *Id.* at 988.

¹⁹⁵ *Id.*; see note 178 *supra*.

¹⁹⁶ 648 F.2d at 988. The *Cofield* court noted that actions brought under the FOIA are likely to be brought by pro se complainants. *Id.* at 988 n.4. Since the relief sought generally is the mere release of information, damages generally are not in issue. *Id.* Moreover, the court observed that section 552(a)(4)(F) of the FOIA may indicate a punitive purpose which has no counterpart in the Fees Awards Act or in its legislative history. *Id.*; see note 188 and accompanying text *supra*.

¹⁹⁷ 15 U.S.C. §§ 1601-1665 (1976 & Supp. IV 1980); see *White v. Arlen Realty & Dev. Corp.*, 614 F.2d 387 (4th Cir. 1980) (per curiam), cert. denied, 447 U.S. 923 (1981); *Hannon v. Security Nat'l Bank*, 537 F.2d 327 (9th Cir. 1976). In *Hannon*, the Ninth Circuit denied recovery to a recent law school graduate, not yet admitted to the bar and appearing pro se,

in *White v. Arlen Realty & Development Corp.*,¹⁹⁸ denied recovery of attorney's fees to a plaintiff-attorney appearing *in propria persona*.¹⁹⁹ Reversing the district court's fee award, the *White* court noted that the legislative history of the statute's attorney's fee provision clearly indicated that it was intended to create an incentive for lawyers to handle TILA cases.²⁰⁰ The court reasoned, however, that extension of this rationale to cases wherein attorneys had represented themselves as plaintiffs would "raise the specter of fee generation."²⁰¹ Moreover, noting that self-representation does not serve the goals of the TILA, the court concluded that Congress did not intend that defendant creditors would be forced "to subsidize the personal crusades of consumers who are attorneys."²⁰²

III. STATUTORY FEE AWARDS: AN EXERCISE OF DISCRETION

A party who has prevailed,²⁰³ substantially prevailed,²⁰⁴ or otherwise satisfied the threshold requirements of a statutory fee provision²⁰⁵ is not necessarily entitled to a fee award. Although some

reasoning that "[h]ad Congress wished to compensate non-attorneys for 'services' rendered on their own behalf in pressing their individual claims, it certainly could have done so." 537 F.2d at 329. The *Hannon* court's reasoning subsequently was applied by the district court in *Barrett v. United States Customs Serv.*, 482 F. Supp. 779, 780 (E.D. La. 1980). The district judge in *Barrett*, however, was construing the attorney's fee provision of the Privacy Act of 1974, 5 U.S.C. § 552a(g)(3)(B) (1976), which contains language identical to the analogous provision of the FOIA, 5 U.S.C. § 552(a)(4)(E) (1976). 482 F. Supp. at 779.

¹⁹⁸ 614 F.2d 387 (4th Cir.) (per curiam), *cert. denied*, 447 U.S. 923 (1980).

¹⁹⁹ 614 F.2d at 389.

²⁰⁰ *Id.* at 388.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ See notes 34-35 and accompanying text *supra*.

²⁰⁴ See notes 36-37 and accompanying text *supra*.

²⁰⁵ Under some fee-shifting statutes, a party is not required to succeed on the merits of a claim to be entitled to attorney's fees. See, e.g., Endangered Species Act of 1973, § 11(g)(4), 16 U.S.C. § 1540(g)(4) (1976) (ESA); Employee Retirement Income Security Act of 1974, § 203(a)(2)(A), 29 U.S.C. § 1132(g) (1976) (ERISA); Federal Water Pollution Control Act Amendments of 1972, § 505(d), 33 U.S.C. § 1365(d) (1976) (FWPCA); Clean Air Act, 42 U.S.C. § 7607(f) (Supp. III 1979); Outer Continental Shelf Lands Act, § 23(a)(5), 43 U.S.C. § 1349(a)(5) (Supp. III 1979) (OSLCA). The "citizen-suit" provision of the Clean Air Act, for example, provides that "[i]n any judicial proceeding under this Section, the court may award costs of litigation (including reasonable attorney . . . fees) whenever the court determines that such award is appropriate." 42 U.S.C. § 7607(f) (Supp. III 1979). See generally Comment, Citizens Association of Georgetown v. Washington: Awarding Attorneys' Fees in Citizens Suits to Enforce the Clean Air Act, 125 U. Pa. L. Rev. 1402 (1977). This broad discretionary provision has been interpreted broadly by the District of Columbia Circuit. See Metropolitan Wash. Coalition for Clean Air v. District of Columbia, 639 F.2d 802 (D.C. Cir. 1981) (per curiam). In *Washington Coalition*, the court stated that the central

statutes expressly mandate that awards be made to prevailing parties, leaving federal judges no discretion to deny such relief,²⁰⁶

inquiry in Clean Air Act cases is "whether the suit was of the type that Congress intended to encourage when it enacted the citizen-suit provision." *Id.* at 804. Since the purpose of the legislation was to aid enforcement of the Act, the court noted that the judiciary is empowered to grant attorney's fees "without regard to the outcome of the litigation," *id.* (quoting S. REP. NO. 1196, 91st Cong., 2d Sess. 65 (1970), "whenever such an award is deemed to be in the public interest." 639 F.2d at 804 (quoting S. REP. NO. 1196, *supra*, at 65). The public interest will be furthered by an award, the court suggested, when the suit can be characterized as a "prudent and desirable effort to achieve an unfulfilled objective of the Act." 639 F.2d at 804. Thus, the court concluded, it would be inappropriate to allow fee awards to turn upon the outcome of litigation in this context. *Id.*

The *Washington Coalition* standard has been applied to the citizen-suit provisions of the ESA and OCSLA, which are identical to those of the Clean Air Act. *See* *North Slope Borough v. Andrus*, 507 F. Supp. 106, 107 (D.D.C. 1981). In construing these provisions, the *North Slope* court held that suits implicating environmental concerns pivotal to the legislative purposes of the two Acts would be appropriate for fee awards. *Id.* at 108; *cf.* *Carpenter v. Andrus*, 499 F. Supp. 976, 979-80 (D. Del. 1980) (notwithstanding victory on merits, plaintiff held not entitled to fee award because suit did not contribute to congressional goal of conservation). *But cf.* *Montgomery Env'tl Coalition v. Costle*, 646 F.2d 595, 596-97 (D.C. Cir. 1981) (under FWPCAA, awards are not authorized for litigants seeking judicial review even if the "same litigation could arguably have been framed as a citizen suit").

²⁰⁶ *See, e.g.*, Commodity Futures Trading Commission Act of 1974, § 106, 7 U.S.C. § 18(f), (g) (1976); Packers and Stockyards Act of 1921, § 309, 7 U.S.C. § 210(f) (1976); Clayton Act, § 164, 15 U.S.C. § 1526c (1976), *as amended by* Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 302(3), 90 Stat. 1396; Consumer Leasing Act of 1976, § 183, 15 U.S.C. § 1667b(a) (1976); Motor Vehicle Information and Cost Savings Act, §§ 108, 409, 15 U.S.C. §§ 1918, 1989(a)(2) (1976); Public Utility Regulatory Policies Act of 1978, § 122, 16 U.S.C. § 2632(a)(I) (Supp. III 1979); Fair Labor Standards Act Amendments of 1977, § 10, 29 U.S.C. § 216(b) (Supp. III 1979); Age Discrimination in Employment Act of 1967, § 7, 29 U.S.C. § 626(b) (1976); Federal Mine Safety and Health Act, § 105, 30 U.S.C. § 815(c)(3) (Supp. III 1979); Federal Coal Mine Health and Safety Act of 1969, § 428, 30 U.S.C. § 938(c) (1976); Veterans' Benefits Act, § 784(g), 38 U.S.C. § 784(g) (1976); Safe Drinking Water Act, § 1450, 42 U.S.C. § 300j-9(i)(2)(B)(ii) (1976); Alaska Native Claims Settlement Act of 1976, § 20, 43 U.S.C. § 1619 (1976); Railroad Revitalization and Regulatory Reform Act of 1976, § 217(c), 45 U.S.C. § 854(g) (1976); Railway Labor Act, 45 U.S.C. § 153(p) (1976), *as amended by* Railway Labor Act Amendments of 1934, ch. 691, § 3(p), 48 Stat. 1192; Communications Act of 1934, §§ 206, 407, 47 U.S.C. §§ 206, 407 (1976); Revised Interstate Commerce Act, §§ 11705(d)(3), 11710(a)(3)(b), 49 U.S.C. §§ 17705(d)(3), 11710(a)(3)(b) (Supp. III 1979).

The compulsory character of mandatory fee awards is not a frequently litigated issue. Recently, however, in *Illinois v. Sangamo Constr. Co.*, 657 F.2d 855, 860 (7th Cir. 1981), the defendants in an antitrust action argued that section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), did not mandate a fee award when the prevailing party was a state represented by its attorney general. 657 F.2d at 858. This section states that "[a]ny person who shall be injured . . . shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee." 15 U.S.C. § 15 (1976). The *Sangamo* court conceded that the courts uniformly have construed this language to mandate the award of attorney's fees and costs to successful plaintiffs. 657 F.2d at 858 (citing *Baughman v. Cooper-Jarrett, Inc.*, 530 F.2d 529, 531 n.2 (3d Cir.), *cert. denied*, 429 U.S. 825 (1976); *Knutson v. Daily Review, Inc.*, 479 F. Supp. 1263, 1267 (N.D. Cal. 1979)). Nevertheless, the court was unper-

most fee-shifting provisions employ permissive terms.²⁰⁷ By enacting these discretionary statutes, therefore, Congress not only has determined which of a broad spectrum of public policies merit imposition of the fee-shifting remedy, but also has delegated to the federal courts the power to decide whether a particular set of circumstances warrants an award of attorney's fees. Moreover, after concluding that fee shifting is appropriate in a given case,²⁰⁸ a

sued by the contention that awarding attorney's fees to a state represented by its attorney general would be inconsistent with the purposes and policy behind a section 4 fee award. The court highlighted the main purposes of such a fee award as:

- 1) to encourage private enforcement of the antitrust laws; 2) to insure that the cost of doing so does not diminish the treble damages award, and 3) to deter violations of the antitrust laws by requiring the 'payment of that fee by a losing defendant as part of his penalty for having violated the antitrust laws.'

657 F.2d at 859-60 (quoting *Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 421 F.2d 61, 90 (1st Cir. 1969)). The *Sangamo* court also rejected the argument that the attorney general's statutory obligation to prosecute all actions in favor of Illinois was a sufficient incentive to induce him to bring antitrust actions on behalf of the state. 657 F.2d at 860. Rather, the court observed that political, legal or fiscal considerations might lead to a decision not to prosecute a viable antitrust action. *Id.* The court also noted that the burden of other legal responsibilities "may all but preclude an aggressive antitrust enforcement program." *Id.* The fact that a fee award would pass not to the attorney general's office, but rather, to the Illinois general fund, did not convince the court that a fee award would fail to provide an incentive for the enforcement of the antitrust laws. *Id.* The *Sangamo* court apparently was persuaded by the *amici curiae* brief filed on behalf of 43 states, which extolled the effectiveness of past state antitrust enforcement efforts, as measured in large part by pecuniary recoveries, including attorney's fees, and which asserted that these prior successes would play a significant role in the decision as to appropriations for future antitrust enforcement efforts. *Id.*

²⁰⁷ See, e.g., Freedom of Information Act, § 1, 5 U.S.C. § 552(a)(4)(E) (1976); Civil Service Reform Act of 1978, §§ 230(b)(1)(A)(ii), 205(g)(1), 5 U.S.C. §§ 5596(b)(1)(a)(ii), 7701(g)(1) (Supp. IV 1980); Agricultural Fair Practices Act of 1967, § 6(a), (c), 7 U.S.C. § 2305(a), (c) (1976); Plant Variety Protection Act, § 125, 7 U.S.C. § 2565 (1976); Real Estate Settlement Procedures Act of 1974, § 8(d)(2), 12 U.S.C. § 2607(d)(2) (1976); Right to Financial Privacy Act of 1978, §§ 1117(a)(4), 1118, 12 U.S.C. §§ 3417(a)(4), 3418 (Supp. III 1979); Securities Act of 1933, § 206(e), 15 U.S.C. § 77k(e) (1976); Securities Exchange Act of 1934, §§ 9(e), 18(a), 15 U.S.C. §§ 78i(e), 78r(a) (1976); Toxic Substances Control Act, §§ 6(c)(4)(A), 19(d), 20(c)(2), 21(b)(4)(C), 15 U.S.C. §§ 2605(c)(4)(A), 2618(d), 2619(c)(2), 2620(b)(4)(C) (1976); Endangered Species Act of 1973, § 11(g)(4), 16 U.S.C. § 1540(g)(4) (1976); Employee Retirement Income Security Act of 1974, § 502(g), 29 U.S.C. § 1132(g) (1976), as amended by Act of Sept. 26, 1980, Pub. L. No. 96-364, 94 Stat. 1295; Surface Mining Control and Reclamation Act of 1977, §§ 520(d), 525(e), 30 U.S.C. §§ 1270(d), (f), 1275(e) (Supp. III 1979); Atomic Energy Act of 1954, § 154, 42 U.S.C. § 2184 (1976); Fair Housing Act of 1968, § 812(c), 42 U.S.C. § 3612(c) (1976); Energy Policy and Conservation Act, § 335(d), 42 U.S.C. § 6305(d) (1976); Solid Waste Disposal Act, § 7002(e), 42 U.S.C. § 6972(e) (Supp. II 1978).

²⁰⁸ Before a court can conclude that fee shifting is appropriate, an application for a fee award must be made. There is a conflict among the federal circuit courts of appeals as to whether, should the issue of entitlement to attorney's fees not be raised by a prevailing party prior to judgment on the merits, the application must be made within the 10-day

court again must exercise its discretion in performing the subjective task of determining what constitutes a "reasonable" award of legal costs.²⁰⁹

Increased reliance upon fee-shifting statutes as a means of financing successful efforts to vindicate civil, commercial, environmental, and other rights of "the highest priority"²¹⁰ has demonstrated the need to define the nature of judicial discretion exercised in fee awards litigation. This section of the Note will examine and compare the various statutes authorizing discretionary awards of attorney's fees. It will be suggested that the judiciary's discretionary power must be tempered by the underlying purposes of the fee-shifting statute involved in a given case, even if such power has not expressly been circumscribed by the statutory language or legislative history of the relevant fee-shifting provision. Thereafter, the Note will outline the factors governing the judiciary's exercise of discretion in determining the size of a reasonable fee award.

A. *Discretion: A Question of Degree*

A prevailing party will find that his prospects for recovering attorney's fees under a discretionary fee-shifting provision are tied

period required by rule 59(e) of the Federal Rules of Civil Procedure. See FED. R. CIV. P. 59(e). Some courts have held that, to be timely, such a motion must be made within that 10-day period, which governs motions to alter or amend a judgment. See, e.g., *Glass v. Pfeffer*, 657 F.2d 252, 255 (10th Cir. 1981); *White v. New Hampshire Dep't of Employment Sec.*, 629 F.2d 697, 699 (1st Cir. 1980), cert. denied, 101 S. Ct. 2313 (1981); *Hirschkop v. Snead*, 475 F. Supp. 59, 62 (E.D. Va. 1979), aff'd, 646 F.2d 149 (4th Cir. 1981). The prevalent view, however, appears to be that the rule 59(e) 10-day period does not apply to a postjudgment motion for an award of attorney's fees. See *Obin v. Machinists & Aerospace Dist. No. 9*, 651 F.2d 574, 584 (8th Cir. 1981); *Johnson v. Snyder*, 639 F.2d 316, 317 (6th Cir. 1981); *Bond v. Stanton*, 630 F.2d 1231, 1234 (7th Cir. 1980); *Van Ooteghem v. Gray*, 628 F.2d 488, 497 (5th Cir. 1980), cert. dismissed, 451 U.S. 935 (1981); *Knighton v. Watkins*, 616 F.2d 795, 797-98 (5th Cir. 1980); *Whiten v. Ryder Truck Lines, Inc.*, 520 F. Supp. 1174, 1176 (M.D. La. 1981).

The circuits appear to have adopted a uniform approach to the analogous question whether a district court's adjudication of liability, without addressing the issue of attorney's fees, constitutes a final appealable judgment. Courts have refused to deem such an order a final judgment, reasoning that an order is final only if it addresses all claims for relief. *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 743 (1976); *Anderson v. Morris*, 658 F.2d 246, 248 (4th Cir. 1981); *Gurule v. Wilson*, 635 F.2d 782, 786-87 (10th Cir. 1980); *Johnson v. University of Bridgeport*, 629 F.2d 828, 830 (2d Cir. 1980) (per curiam); *Richerson v. Jones*, 551 F.2d 918, 922 (3d Cir. 1977). In the context of both Title VII and the Fees Awards Act, attorney's fees have been deemed to be an integral part of the remedies necessary to secure compliance with the civil rights laws. See, e.g., *Anderson v. Morris*, 658 F.2d at 248 (Fees Awards Act); *Johnson v. University of Bridgeport*, 629 F.2d at 830 (Title VII).

²⁰⁹ See notes 267-319 and accompanying text *infra*.

²¹⁰ *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968) (per curiam).

to the type of statute forming the basis of his claim. Discretionary statutes fall into three basic categories. The most liberal, from the prevailing party's perspective, favors fee awards absent "special circumstances" and constitutes the touchstone for recovery in the civil rights sphere.²¹¹ The most stringent standard, which pervades the patent, trademark, and securities fields, permits fee awards only upon a finding by the court that the losing party's position was meritless.²¹² In the middle of this spectrum fall those statutes which contain no standard favoring or militating against fee recoveries.²¹³

1. Liberal Civil Rights Standard

The liberal civil rights standard for discretionary fee awards, favoring recovery in all but special circumstances, first arose in the context of injunctive actions brought to secure compliance with Title II of the Civil Rights Act of 1964.²¹⁴ In *Newman v. Piggie Park Enterprises, Inc.*,²¹⁵ the Supreme Court noted that since Title II plaintiffs can only obtain injunctive relief, they act not for their own gain, but rather, to promote the public interest as private attorneys general.²¹⁶ The Court reasoned that the legislative policy of encouraging Title II suits would be frustrated should such plaintiffs be "routinely forced to bear their own attorneys' fees."²¹⁷ Thus, fee awards were held to be appropriate in such cases absent special circumstances.²¹⁸ The Court later applied the same standard to the counsel fee provisions of the Emergency School Aid

²¹¹ See notes 214-245 and accompanying text *infra*.

²¹² See notes 246-249 and accompanying text *infra*.

²¹³ See notes 251-266 and accompanying text *infra*.

²¹⁴ 42 U.S.C. §§ 2000a to 2000a-3 (1976). The counsel fee provision of Title II provides that in an action seeking to enforce that title's proscription of discrimination in the provision of public accommodations, "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 . . ." *Id.* § 2000a-3(b) (1976).

²¹⁵ 390 U.S. 400 (1968) (per curiam).

²¹⁶ *Id.* at 401-02.

²¹⁷ *Id.* at 402.

²¹⁸ *Id.* The *Newman* Court was persuaded by the fact that absent fee shifting few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal court. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title VII. *Id.* (footnote omitted).

Act (ESAA)²¹⁹ in *Northcross v. Board of Education*.²²⁰ The similarity of language and common purposes of Title II and the ESAA were cited in support of the Court's extension of *Newman*.²²¹ The "Newman-Northcross Rule"²²² has been adopted in litigation brought pursuant to Title VII²²³ and other statutes.²²⁴ Moreover, this standard gained the endorsement of Congress in the context of the Fees Awards Act, and thus has been held applicable to cases involving that statute.²²⁵

²¹⁹ 20 U.S.C. § 1617 (1976) (repealed 1979).

²²⁰ 412 U.S. 427 (1973) (per curiam).

²²¹ *Id.* at 428.

²²² The principle that successful civil rights plaintiffs "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust," 390 U.S. at 402, often has been called the "Newman-Northcross Rule." See, e.g., *Zarcone v. Perry*, 581 F.2d 1039, 1042 (2d Cir. 1978), *cert denied*, 439 U.S. 1072 (1979); *Carrion v. Yeshiva Univ.*, 535 F.2d 722, 727 n.7 (2d Cir. 1976).

²²³ See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975). See generally 42 U.S.C. § 2000e-5(k) (1976). In *Albemarle*, the Supreme Court addressed the question of what standard must be used by the federal courts in determining whether to award back pay to a prevailing plaintiff in a Title VII action. The Fourth Circuit had cited *Newman* for the proposition that back pay should be awarded "unless special circumstances would render such an award unjust." *Moody v. Albemarle Paper Co.*, 474 F.2d 134, 142 (4th Cir. 1973), *vacated and remanded*, 422 U.S. 405 (1975) (footnote omitted) (citing *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968)). The Supreme Court noted that *Newman* was not "in point" and that a standard for back pay awards would have to be formed elsewhere. The Court stated, however, that "[t]here is, of course, an equally strong public interest in having injunctive actions brought under Title VII, to eradicate existing discriminatory employment practices. But this interest can be vindicated by applying the [*Newman*] standard to the attorneys' fees provision of Title VII . . ." 422 U.S. at 415 (emphasis in original).

²²⁴ See, e.g., *United Handicapped Fed'n v. Andre*, 622 F.2d 342, 347-48 (8th Cir. 1980) (construing Rehabilitation Act of 1973, § 505(b), 29 U.S.C. § 794(b) (Supp. III 1979)); cf. *Campbell v. Talladega County Bd. of Educ.*, 518 F. Supp. 47, 57 (N.D. Ala. 1981) (awarding fees under Rehabilitation Act without discussing appropriate standard); *Tatro v. Texas*, 516 F. Supp. 968, 985 (N.D. Tex. 1981) (fee awarded under Rehabilitation Act without addressing standard for discretion).

²²⁵ See, e.g., *Teitelbaum v. Sorenson*, 648 F.2d 1248, 1249 (9th Cir. 1981) (per curiam); *Chicano Police Officer's Ass'n v. Stover*, 624 F.2d 127, 130 (10th Cir. 1980); *Skehan v. Board of Trustees*, 590 F.2d 470, 496 (3d Cir. 1978), *cert. denied*, 444 U.S. 832 (1979); *Sargeant v. Sharp*, 579 F.2d 645, 647 (1st Cir. 1978). The legislative history accompanying the Fees Awards Act indicates that Congress intended that the *Newman-Northcross* rule would apply to fee awards under the Act. The House Report, for example, states:

A key feature of the bill is its mandate that fees are only to be allowed in the discretion of the court. Congress has passed many statutes requiring that fees be awarded to a prevailing party. Again the Committee adopted a more moderate approach here by leaving the matter to the discretion of the judge, guided of course by the case law interpreting similar attorney's fee provisions. . . . The Committee intends that, at a minimum, existing judicial standards, to which ample reference is made in this report, should guide the courts in construing [the

The *Newman-Northcross* rule has generated considerable litigation concerning the factual situations which will give rise to a finding of special circumstances sufficient to justify the denial of a fee award.²²⁶ It is well-settled that a prevailing plaintiff's ability to pay his own legal costs is not a sufficiently special circumstance to deny recovery.²²⁷ Conversely, a defendant cannot escape fee shifting by claiming a lack of resources.²²⁸ Moreover, the fact that a prevailing plaintiff has been represented by a publicly funded or-

Act].

H.R. REP. NO. 1558, *supra* note 38, at 8 (footnote omitted) (emphasis omitted). The *Newman-Northcross* rule represented the prevalent "existing judicial standard" in the civil rights context at that time. See *Zarcone v. Perry*, 581 F.2d 1039, 1042-44 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979). Moreover, the Senate Report explicitly endorsed the *Newman* standard:

It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by the statutes covered by S. 2278, if successful, "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." [*Newman*, 390 U.S. at 402].

S. REP. NO. 1011, *supra* note 34, at 4 (footnote omitted).

²²⁶ See notes 227-232 and accompanying text *infra*.

²²⁷ *International Soc'y for Krishna Consciousness, Inc. v. Collins*, 609 F.2d 151, 151 (5th Cir. 1980) (per curiam); *Bunn v. Central Realty*, 592 F.2d 891, 892 (5th Cir. 1979) (per curiam); *Hughes v. Repko*, 578 F.2d 483, 488 (3d Cir. 1978); *Gore v. Turner*, 563 F.2d 159, 163-64 (5th Cir. 1977); *Witherspoon v. Sielaff*, 507 F. Supp. 667, 670 (N.D. Ill. 1981). In *Gore*, the Fifth Circuit observed that "[t]he existence of an attorney-client relationship, a status that exists wholly independently of compensation, is all that is required [for fee shifting]." 563 F.2d at 164. Notably, the Fair Housing Act contains an express exception to the general rule that the ability to pay will not be considered in determining whether a fee award should be granted. Fair Housing Act of 1968, § 812(c), 42 U.S.C. § 3612(c) (1976). This provision allows fee recovery only to prevailing parties who are unable to pay their own counsel. *Id.* This section's importance diminished after the enactment of the Fees Awards Act, however, because plaintiffs alleging violations of the Fair Housing Act frequently can sue under the broad antidiscrimination provision of the Civil Rights Act of 1866. See 42 U.S.C. § 1982 (1976). Section 1982 expressly prohibits discrimination in the context of real property conveyances and has been construed broadly to proscribe all racial discrimination whether public or private, in the sale or rental of real estate. *E.g.*, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968). It has been held, therefore, that plaintiffs who prevail under both the Housing Act and section 1982 are entitled to recover fees under the liberal standard of the Fees Awards Act. *Dillon v. AFBIC Dev. Corp.*, 597 F.2d 556, 563 (5th Cir. 1979); *Bunn v. Central Realty*, 592 F.2d 891, 892 (5th Cir. 1979) (per curiam).

²²⁸ See, *e.g.*, *Entertainment Concepts, Inc. v. Maciejewski*, 631 F.2d 497, 507 (7th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981). The courts uniformly have refused to deny a fee award on the ground that, when the money is paid from a public treasury, the financial impact will fall upon innocent taxpayers. *Aware Woman Clinic, Inc. v. City of Cocoa Beach*, 629 F.2d 1146, 1150 (5th Cir. 1980) (per curiam); *Witherspoon v. Sielaff*, 507 F. Supp. 667, 670 (N.D. Ill. 1981); see *Entertainment Concepts, Inc. v. Maciejewski*, 631 F.2d at 507; *Torres v. Sachs*, 538 F.2d 10, 12-13 (2d Cir. 1976); *Stenson v. Blum*, 512 F. Supp. 680, 684 (S.D.N.Y. 1981). See generally S. REP. NO. 1011, *supra* note 34, at 5.

ganization or an attorney working on a pro bono basis will not preclude an award.²²⁹ In addition, a defendant's good faith, standing alone, will not constitute a special circumstance under the *Newman-Northcross* doctrine.²³⁰ In contradistinction, the cases in which fees have been denied because of special circumstances primarily have involved a prevailing plaintiff's reprehensible conduct in instituting or conducting the lawsuit.²³¹ Indeed, it has been noted that, because fee awards are denied so infrequently, fee shifting occurs almost as a matter of course under the *Newman-Northcross* rule.²³²

It appears, therefore, that although the *Newman-Northcross* standard is viewed as a liberal one from the prevailing civil rights plaintiff's perspective, it can be characterized as a very conservative approach to the exercise of discretion involved under fee-shifting provisions. This is not to say, however, that discretion is no longer an important element governing fee awards in civil rights

²²⁹ See *Oldham v. Ehrlich*, 617 F.2d 163, 168-69 (8th Cir. 1980); *Palmigiano v. Garrahy*, 616 F.2d 598, 600-03 (1st Cir. 1980), *cert. denied*, 449 U.S. 839 (1980); *Dennis v. Chang*, 611 F.2d 1302, 1304-07 (9th Cir. 1980); *Weisenberger v. Huecker*, 593 F.2d 49, 54 (6th Cir.), *cert. denied*, 444 U.S. 880 (1979); *Lund v. Affleck*, 587 F.2d 75, 76 (1st Cir. 1978); *cf. Collins v. Chandler Unified School Dist.*, 644 F.2d 759, 764 (9th Cir.), *cert. denied*, 102 S. Ct. 322 (1981) (status as parent-litigant, bringing a 1983 suit on behalf of student offspring, not special circumstance); *Hernus v. City of Hickory Hills*, 517 F. Supp. 592, 593 n.1 (N.D. Ill. 1981) (fact that defendant in civil rights action was defended by insurance company not special circumstance); *Schwabenbauer v. Board of Educ.*, 515 F. Supp. 33, 35 (W.D.N.Y. 1981) (union whose salaried staff attorney represented female teacher in successful Title VII action entitled to fee award).

²³⁰ *Teitelbaum v. Sorenson*, 648 F.2d 1248, 1250 (9th Cir. 1981) (*per curiam*); *Bond v. Stanton*, 630 F.2d 1231, 1234 (7th Cir. 1980); *Bills v. Hodges*, 628 F.2d 844, 847 (4th Cir. 1980); *Love v. Mayor of Cheyenne*, 620 F.2d 235, 236 (10th Cir. 1980); *Holley v. Lavine*, 605 F.2d 638, 646 (2d Cir. 1979), *cert. denied*, 446 U.S. 913 (1980); *Nadeau v. Helgemoe*, 581 F.2d 275, 280 (1st Cir. 1978); *Brown v. Culpepper*, 559 F.2d 274, 278 (5th Cir. 1977). *But see Chastang v. Flynn & Emrich Co.*, 541 F.2d 1040, 1045 (4th Cir. 1976) (fact that defendants' actions were required of them by their constituting authority and that they acted in good faith is relevant to determination that it would be unjust to hold them liable for plaintiffs' attorney's fees).

²³¹ See *Brown v. Stackler*, 612 F.2d 1057, 1059 (7th Cir. 1980) (outrageously excessive claim for billable hours denied in order to encourage prompt maintenance of adequate billing records and submission of reasonable, carefully calculated counsel fees); *Sprogis v. United Air Lines, Inc.*, 517 F.2d 387, 391 (7th Cir. 1975) (fee award denied because, *inter alia*, identity of real property in interest was concealed, thereby engendering potentially significant impact upon defendant's litigation strategy); *Scheriff v. Beck*, 452 F. Supp. 1254, 1260 (D. Colo. 1978) (fee award denied where, *inter alia*, civil rights violation was precipitated by deliberate scheme to involve defendant in some type of litigation); *Castleberry v. Langford*, 428 F. Supp. 676, 685 (N.D. Tex. 1977) (fee award denied because of plaintiff's conduct).

²³² See, e.g., E. LARSON, *FEDERAL COURT AWARDS OF ATTORNEY'S FEES* 51 (1981).

cases. Indeed, the Second and Ninth Circuits have restricted the scope of the *Newman-Northcross* rule in Fees Awards Act cases which do not involve demands for injunctive relief.²³³ In *Zarcone v. Perry*,²³⁴ the Second Circuit held that in actions for damages, if the prospects for recovery are such that a competent attorney is willing to represent the plaintiff on a contingent fee basis, the *Newman-Northcross* rule is inapplicable since no financial disincentive exists which would affect the enforcement of civil rights.²³⁵ In such cases, the court stated, a trial judge must weigh various factors concerning "the nature and extent of the rights and interests at stake" in deciding whether a fee award is appropriate.²³⁶ The court noted that if the plaintiff can be characterized as a private attor-

²³³ *Buxton v. Patel*, 595 F.2d 1182, 1184-85 (9th Cir. 1979); *Zarcone v. Perry*, 581 F.2d 1039, 1043-44 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); *Calkins v. Blum*, 511 F. Supp. 1073, 1102-03 (N.D.N.Y. 1981); *Kirkland v. Buffalo Bd. of Educ.*, 487 F. Supp. 760, 774 (W.D.N.Y. 1979), *aff'd*, 622 F.2d 1066 (2d Cir. 1980); *Holley v. Lavine*, 464 F. Supp. 718, 725 (W.D.N.Y. 1979), *aff'd*, 605 F.2d 638 (2d Cir. 1979), *cert. denied*, 446 U.S. 913 (1980).

²³⁴ 581 F.2d 1039 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979). In *Zarcone*, a judge expressed his dissatisfaction with the coffee sold by the plaintiff coffee vendor by having him handcuffed and led through a crowded courthouse to the judge's chambers. 581 F.2d at 1040. The plaintiff was then reprimanded and threatened with legal action. *Id.* As a result, the plaintiff allegedly "suffered from anxiety, persistent headaches and stuttering, required treatment in a hospital, experienced marital difficulties, and was unable to work." *Id.* Retaining counsel under a contingent fee agreement, the plaintiff brought a section 1983 action against the judge, and was awarded compensatory and punitive damages in excess of \$140,000. *Id.* The plaintiff's request for a fee award was denied, *id.*, however, and the Second Circuit affirmed, *id.* at 1045.

²³⁵ 581 F.2d at 1044. The Second Circuit, in *Zarcone*, derived its interpretation of the *Newman-Northcross* rule from the Supreme Court's holding in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). In that case, the *Zarcone* court noted that the Supreme Court viewed the *Newman-Northcross* rule as a "reflection of an attempt to reduce the financial barriers to suits by private attorneys general." *Id.* at 1044 (citing *Christiansburg Garment Co. v. EEOC*, 434 U.S. at 415-24).

²³⁶ 581 F.2d at 1044. The factors mentioned by the *Zarcone* court have been restated as follows:

[1] whether a person in the plaintiff's position would have been deterred or inhibited from seeking to enforce civil rights without an assurance that his attorneys' fees would be paid if he were successful . . .

[2] the nature and extent of the right and interests at stake . . .

[3] the size of the benefits conferred by the suit on the public or on others;

[4] the amount of any fund created by the litigation (and its adequacy to cover the plaintiffs' costs and compensate him for actual damages);

[5] the presence or absence of any bad faith or obdurate conduct on the part of either party; and

[6] any unjust hardship that a grant or denial of fee-shifting might impose.

Calkins v. Blum, 511 F. Supp. 1073, 1102 (N.D.N.Y. 1981) (citing *Zarcone v. Perry*, 581 F.2d at 1044).

ney general, he will recover fees.²³⁷ Otherwise, concluded the *Zarcone* court, if the plaintiff has redressed only a private injury, and if his suit does not implicate issues or concerns "imbued with the public interest," fees will be denied.²³⁸

It appears that under the Second Circuit's approach in *Zarcone*, judges are accorded more discretion to deny fee awards when injunctive relief is not requested.²³⁹ It is suggested, however, that nothing in the legislative history of the Fees Awards Act suggests that Congress intended actions for injunctive relief to have such talismanic significance.²⁴⁰ Indeed, it appears that Congress was concerned not only with enforcement of the civil rights of the general public through equitable relief, but also with the vindication of individual plaintiffs' rights through actions for damages.²⁴¹ Additionally, the legislative history of the Act indicates no congressional intention to treat a plaintiff's "bright prospects" for damage recovery as a means to deny fee awards.²⁴² Moreover, since the courts uniformly have held that a party's ability to pay his counsel is irrelevant to fee shifting,²⁴³ it seems anomalous to consider the likelihood that such resources will become available through a

²³⁷ 581 F.2d at 1043-44.

²³⁸ *Id.* at 1044 & n.6.

²³⁹ See notes 235-38 and accompanying text *supra*. The *Zarcone* court indicated that when the concerns underlying the *Newman-Northcross* rule are inapplicable, see note 235 and accompanying text *supra*, it may be appropriate, in a suit for damages, for a district court judge to engage in a discretionary balancing inquiry focusing upon the nature and extent of the benefit conferred upon the public. 581 F.2d at 1044; see note 236 and accompanying text *supra*. It is arguable that the court subsequently contradicted itself by suggesting that "where an individual suit for damages can be characterized as a test case, involves legal issues of recurrent public importance, or is otherwise imbued with the public interest, the concerns underlying the *Newman-Northcross* rule appear applicable." 581 F.2d at 1044 n.6.

²⁴⁰ See, e.g., *Valcourt v. Hyland*, 503 F. Supp. 630, 640-41 (D. Mass. 1980). The Senate Report accompanying the Fees Awards Act recognized that *Newman* arose in the context of injunctions sought under Title II. See S. REP. No. 1011, *supra* note 34, at 3. Nevertheless, the Report expressly adopted the *Newman* standard without making a distinction between actions for damages and those for equitable relief. *Id.* at 4.

²⁴¹ Even the *Zarcone* court expressly acknowledged that "[t]he Act's legislative history is clear that in authorizing awards of attorneys' fees to plaintiffs in civil rights actions Congress was concerned with enforcement not only of the civil rights of the public at large and of identifiable groups but also with the rights of individual plaintiffs." 581 F.2d at 1042.

²⁴² See *Valcourt v. Hyland*, 503 F. Supp. 630, 640-41 (D. Mass. 1980). The *Valcourt* court indicated that any distinction which purports to establish different standards for injunctive and for damages actions and which allegedly is premised upon the *Newman-Northcross* rule "is at odds with the spirit if not the precise holdings of decisions by the Courts of Appeals for the First Circuit." *Id.* at 641; see, e.g., *Perez v. University of P.R.*, 600 F.2d 1, 2 (1st Cir. 1979) (attorney's fee may be awarded in context of award of nominal damages).

²⁴³ See note 210 and accompanying text *supra*.

money judgment as a factor in denying an award. Finally, it is suggested that the *Zarcone* analysis placed insufficient emphasis upon the fact that damage actions designed "to redress an essentially private injury"²⁴⁴ may have a significant deterrent effect upon the behavior of a class of defendants.²⁴⁵ Indeed, because such deterrence is of benefit to the public, it seems fitting to characterize the plaintiff in a damages action as a "private attorney general" and to award him attorney's fees.

2. Strict Standard in Context of Patents, Trademarks, and Securities

The statutes governing fee awards in patent, trademark, and securities cases, like the *Newman-Northcross* rule, permit only a minimal exercise of judicial discretion. Unlike the *Newman-Northcross* standard, however, fee-shifting provisions in these fields severely limit the circumstances in which an award can be made. Indeed, these statutes typically authorize fee shifting only in "exceptional cases"²⁴⁶ or when "the court believes the suit or the defense to have been without merit."²⁴⁷ Under the trademark and patent provisions, a prevailing party seeking a fee award must demonstrate that exceptional circumstances, such as fraud, malice, bad faith, or vexatiousness, make it inequitable for him to bear the

²⁴⁴ *Zarcone v. Perry*, 581 F.2d at 1044.

²⁴⁵ See, e.g., *Carey v. Piphus*, 435 U.S. 247, 257 n.11 (1978); *Witherspoon v. Sielaff*, 507 F. Supp. 667, 669 (N.D. Ill. 1981). There appears to be an undesirable element of subjectivity in characterizing an action as either "essentially private" or as one likely to benefit the public because of its deterrent effect upon potential wrongdoers. In *Zarcone*, for example, the court noted that although "the defendant's conduct was intolerable from the standpoint of the public interest, it is unlikely to recur . . ." 581 F.2d at 1044. In *Milwe v. Cavuoto*, 653 F.2d 80 (2d Cir. 1981), however, the Second Circuit observed that a private action for damages "is often the only tool reasonably available to vindicate society's interest in ensuring that those who enforce the law also abide by it." *Id.* at 84. Finding that the *Milwe* plaintiff's action against police officers, predicated upon their misconduct, conferred an "overall benefit to society," the court held that a fee award was appropriate. *Id.* Significantly, neither the *Zarcone* nor *Milwe* opinions explained why one suit furthered the public interest while the other did not.

²⁴⁶ See, e.g., Plant Variety Protection Act, § 145, 7 U.S.C. § 2565 (1976); Trademark Act, § 323, 15 U.S.C. § 1117 (1976); Patent Infringement Act, § 1, 35 U.S.C. § 285 (1976).

²⁴⁷ See Securities Act of 1933, § 11(e), 15 U.S.C. § 77K(e) (1976). Notably, the Trust Indenture Act, § 315(e), 15 U.S.C. § 7700o(e) (1976), authorizes an award of fees against any party litigant "having due regard to the merits and good faith of the claims or defenses made by such party litigant." See *Browning Debenture Holders' Comm. v. DASA Corp.*, 560 F.2d 1078, 1088 (2d Cir. 1977).

burden of paying his own counsel fees.²⁴⁸ Under the securities laws, a claim or defense will be found to "lack merit" when it borders upon frivolity or is interposed in bad faith.²⁴⁹

3. Other Contexts

Both the *Newman-Northcross* rule and the standards for fee shifting embodied in the patent, trademark, and securities laws circumscribe the judiciary's discretionary power. In addition, the legislative history and statutory language in these contexts have guided the courts in the exercise of their limited discretion by indicating the importance that Congress attached to private enforcement in particular spheres.²⁵⁰ Surprisingly little legislative gui-

²⁴⁸ See *Arbrook, Inc. v. American Hosp. Supply Corp.*, 645 F.2d 273, 279 (5th Cir. 1981); *Campbell v. Spectrum Automation Co.*, 601 F.2d 246, 251-53 (6th Cir. 1979); *Maurice A. Garbell, Inc. v. Boeing Co.*, 546 F.2d 297, 300 (9th Cir. 1976), *cert. denied*, 431 U.S. 955 (1977); *Stillman v. Edmund Scientific Co.*, 522 F.2d 798, 800-01 (4th Cir. 1975); *Deyerle v. Wright Mfg. Co.*, 496 F.2d 45, 54-55 (6th Cir. 1974); *Ashcroft v. Paper Mate Mfg. Co.*, 434 F.2d 910, 914-15 (9th Cir. 1970); *Bowmar Instrument Corp. v. Continental Micro, Inc.*, 497 F. Supp. 947, 961 (S.D.N.Y. 1980); *Sims v. Mack Trucks, Inc.*, 459 F. Supp. 1198, 1220-21 (E.D. Pa. 1978), *rev'd*, 608 F.2d 87 (3d Cir. 1979); *Amana Soc'y v. Gemeinde Brau, Inc.*, 417 F. Supp. 310, 311-12 (N.D. Iowa 1976), *aff'd per curiam*, 557 F.2d 638 (8th Cir.), *cert. denied*, 434 U.S. 967 (1977); *Steak & Brew, Inc. v. Beef & Brew Rest., Inc.*, 370 F. Supp. 1030, 1038 (S.D. Ill. 1974).

²⁴⁹ See *Aid Auto Stores, Inc. v. Cannon*, 525 F.2d 468, 471 (2d Cir. 1975); *Klein v. Shields & Co.*, 470 F.2d 1344, 1347 (2d Cir. 1972); *Can-Am Petroleum Co. v. Beck*, 331 F.2d 371, 374 (10th Cir. 1964); *Stadia Oil & Uranium Co. v. Wheelis*, 251 F.2d 269, 277 (10th Cir. 1957); *Driscoll v. Oppenheimer & Co.*, 500 F. Supp. 174, 175 (N.D. Ill. 1980); *Miller v. Schweickart*, 413 F. Supp. 1059, 1061-62 (S.D.N.Y. 1976). Section 9(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78i(e)(I) (1976), authorizes discretionary fee awards for violations of the Act's proscriptions against the manipulation of a security's price. *Nemeroff v. Abelson*, 620 F.2d 339, 349 (2d Cir. 1980). In *Nemeroff*, the court held that the minimum standard for a fee award to prevailing defendants under the statute requires a showing that the plaintiff's action was "frivolous, unreasonable or without foundation, even though not brought in subjective bad faith." *Id.* at 349 (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978)). In arriving at its conclusion, the *Nemeroff* court found persuasive the *Christiansburg* Court's rationale that "to require less would defeat Congressional efforts to promote vigorous enforcement of the statute, but to require more would be unnecessary, in view of the long-standing equitable power to award fees upon a finding of bad faith." *Id.* at 349-50 (quoting 434 U.S. at 419-22).

²⁵⁰ It is suggested that Congress, in the legislative history of the Fees Awards Act, embraced the *Newman-Northcross* standard largely in recognition of the success of equally liberal fee-shifting provisions "in enabling vigorous enforcement of modern civil rights legislation, while at the same time limiting the growth of the enforcement bureaucracy." S. REP. NO. 1011, *supra* note 35, at 14. In contrast, the stringent standards that prevail in the patent, trademark, and securities fields seem to signify a reluctance on the part of Congress to encourage private enforcement. Such reticence may well stem from a congressional perception that the appropriate role of private enforcement in the patent, trademark, and securities fields is to supplement the extensive and vigorous governmental enforcement effort con-

dance is available, however, to assist the courts in interpreting a third category of statutory fee provisions, namely those which grant the judiciary almost unfettered discretionary power.²⁵¹ Although most of these statutes state merely that a court "may" award a fee in its discretion,²⁵² others require that fee requests be evaluated in terms of their appropriateness,²⁵³ while still others mandate an assessment of whether an award is warranted in the interests of justice.²⁵⁴

One of these statutes, section 552(a)(4)(E) of the FOIA,²⁵⁵ is known for its "unusually complete" legislative history.²⁵⁶ The section provides that a court "may assess against the United States reasonable attorney fees . . . in any case . . . in which the complainant has substantially prevailed."²⁵⁷ The legislative history accompanying this statute contemplates a reasoned exercise of the court's discretion in accordance with four factors: (1) "the benefit to the public, if any, deriving from the case";²⁵⁸ (2) "the commer-

ducted in these fields by such traditionally active public watchdogs as the SEC.

²⁵¹ A plausible explanation for Congress' failure to provide express guidance concerning judicial discretion is that most of the discretionary fee-shifting provisions were enacted prior to *Alyeska*, when the lower courts awarded fees under the private attorney general rationale. See notes 23-32 and accompanying text *supra*. It appears that if Congress had been aware of the impact of *Alyeska*, it might have provided the courts with more guidance concerning the exercise of discretion under these statutes.

²⁵² See note 207 and accompanying text *supra*.

²⁵³ See Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270(d) (Supp. I 1977); Solid Waste Disposal Act, 42 U.S.C. § 6972(e) (1976); Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(a)(5) (Supp. III 1979).

²⁵⁴ See Consumer Product Safety Act §§ 23, 24, 15 U.S.C. §§ 2072, 2073 (1976).

²⁵⁵ 5 U.S.C. § 552(a)(4)(E) (1976).

²⁵⁶ Vermont Low Income Advocacy Council, Inc. v. Utery, 546 F.2d 509, 512 (2d Cir. 1976).

²⁵⁷ 5 U.S.C. § 552(a)(4)(E) (1976).

²⁵⁸ See S. REP. NO. 854, 93d Cong., 2d Sess. 19 (1974) [hereinafter cited as S. REP. NO. 854]. The Senate Report accompanying the Act illustrated the public benefit criterion by noting that a fee award ordinarily would be appropriate when a newsman sought information for use in a publication or when a public interest group sought information in furtherance of a project designed to benefit the public. *Id.* The Report stated, however, that an award ordinarily would be inappropriate when a business entity sought to use the FOIA as a means to obtain information about a competitor. *Id.*

When the public benefit is merely of secondary concern, satisfaction of this criterion will not suffice to trigger an award of fees. *Blue v. Bureau of Prisons*, 570 F.2d 529, 533-34 (5th Cir. 1978); *Sabalos v. Regan*, 520 F. Supp. 1069, 1072 (E.D. Va. 1981). In *Blue*, for example, the court observed that:

[I]t is doubtless true . . . that the successful FOIA plaintiff always acts in some degree for the benefit of the public Yet the Senate Report's discussion of this criterion referred repeatedly to disclosure to the press and to public interest organizations, thus strongly suggesting that in weighing this factor a court should

cial benefit to the complainant";²⁵⁹ (3) "the nature of" the complainant's "interest in the records sought";²⁶⁰ and (4) "whether the government's withholding of the records sought had a reasonable basis in law."²⁶¹ Although these four criteria appeared in the original Senate bill, they subsequently were eliminated because decisional law indicated that courts already had been considering such factors.²⁶² It is suggested, however, that if Congress had been forewarned of the Supreme Court's decision in *Alyeska*, wherein the Court mandated specific statutory authorization for fee awards, a

take into account the degree of dissemination and likely public impact that might be expected from a particular disclosure. . . . Thus the factor of 'public benefit' does not particularly favor attorneys' fees where the award would merely subsidize a matter of private concern

570 F.2d at 533-34. The *Blue* court emphasized that the public interest criterion should be reserved for those situations in which the complainant's victory is likely to "add to the fund of information that citizens may use in making vital political choices." *Id.* at 534. Moreover, in cases in which the purpose of the FOIA litigation was to augment civil discovery, the courts have echoed the views expressed in the Senate Report and have rejected claims for attorney's fees. *Nix v. United States*, 572 F.2d 998, 1007 (4th Cir. 1978); *Westinghouse Elec. Corp. v. NLRB*, 497 F. Supp. 82, 85 (W.D. Pa. 1980).

²⁵⁹ See S. REP. No. 854, *supra* note 258, at 19. The Senate Judiciary Committee noted that a court should favor fee awards to indigents or nonprofit interests rather than to large corporate enterprises. *Id.* The Committee elaborated upon the rationale behind this principle, observing that

there will seldom be an award of attorney's fees when the suit is to advance the private commercial interests of the complainant. In these cases there is usually no need to award attorney's fees to insure that the action will be brought. The private self-interest motive of, and often pecuniary benefit to, the complainant will be sufficient to insure the vindication of the rights given in the FOIA.

Id.; accord, *Fenster v. Brown*, 617 F.2d 740, 743-44 (D.C. Cir. 1979); *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1367-68 (D.C. Cir. 1977).

²⁶⁰ See S. REP. No. 854, *supra* note 258, at 19. The Senate Report suggested that a court ordinarily should award fees when the complainant's interest in the records was "scholarly or journalistic or public interest oriented but would not do so if his interest was of a frivolous or purely commercial nature." *Id.*

²⁶¹ *Vermont Low Income Advocacy Council, Inc. v. Usery*, 546 F.2d 509, 512 (2d Cir. 1976) (quoting S. REP. No. 854, *supra* note 258, at 19). Under the final criterion, the Senate Report stated that a court should award fees when the government's inaction was designed merely "to avoid embarrassment or to frustrate the requester," not when it had a "colorable basis in law." S. REP. No. 854, *supra* note 258, at 19. The Report also stated that a court may consider whether the case involved a second attempt by the same plaintiff to obtain judicial production of the same or similar documents. *Id.* Notably, the courts have adhered to the language of the Senate Report in their interpretation of what constitutes a reasonable basis in law. See, e.g., *Education/Instruction, Inc. v. United States Dep't of Hous. and Urban Dev.*, 649 F.2d 4, 8 (1st Cir. 1981); *Lasalle Extension Univ. v. FTC*, 627 F.2d 481, 486 (D.C. Cir. 1980) (per curiam); *Fenster v. Brown*, 617 F.2d 740, 744 (D.C. Cir. 1979); *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1365-66 (D.C. Cir. 1977).

²⁶² H.R. REP. No. 876, 93d Cong., 2d Sess. 3, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6267, 6288.

bill might have been approved incorporating these criteria. In any event, the judiciary consistently has applied these factors in determining whether fee awards should be made pursuant to the FOIA.²⁶³

Since the legislative history of the FOIA stands alone as a guide to the exercise of discretion, it seems that the task of the lower courts in determining whether to award fees under other discretionary statutes is exceedingly difficult. To alleviate this burden, it appears that the federal courts of appeals will be required to formulate criteria governing the interpretation of each discretionary statute.²⁶⁴ It is suggested, therefore, that after examining

²⁶³ See, e.g., *Crooker v. United States Dep't of Justice*, 632 F.2d 916, 922 (1st Cir. 1980); *Fenster v. Brown*, 617 F.2d 740, 742 (D.C. Cir. 1979); *Polynesian Cultural Center, Inc. v. NLRB*, 600 F.2d 1327, 1330 (9th Cir. 1979); *Chamberlain v. Kurtz*, 589 F.2d 827, 842 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979); *Blue v. Bureau of Prisons*, 570 F.2d 529, 533 (5th Cir. 1978); *Vermont Low Income Advocacy Council, Inc. v. Usery*, 546 F.2d 509, 512 (2d Cir. 1976). One court has suggested that the four criteria outlined in the Senate Report can be condensed into alternative conditions for granting fee awards:

The first condition is that the plaintiff had an insufficient private or pecuniary interest to justify bringing the suit without an award of fees. This requirement encompasses the first three criteria traditionally used by the courts. The second condition is that the government has no reasonable legal basis for withholding the requested information. If an FOIA suit meets either of these two conditions, the court should award attorney's fees to the plaintiff.

Sabalos v. Regan, 520 F. Supp. 1069, 1072 (E.D. Va. 1981).

²⁶⁴ The Tenth Circuit has furnished detailed criteria for the construction of the fee-shifting provision of the Employee Retirement Income Security Act of 1974 (ERISA), § 502(g), 29 U.S.C. § 1132(g) (1976). See *Eaves v. Penn*, 587 F.2d 453, 465 (10th Cir. 1978). Section 502(g) of ERISA provides that "[i]n any action under this subchapter by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee . . . to either party." 29 U.S.C. § 1132(g) (1976). The Tenth Circuit deemed the following factors relevant to a determination of whether to award fees:

- (1) The degree of the offending parties' culpability or bad faith;
- (2) the degree of the ability of the offending parties to personally satisfy an award of attorneys fees;
- (3) whether or not an award of attorneys fees against the offending parties would deter other persons acting under similar circumstances;
- (4) the amount of benefit conferred on members of the pension plan as a whole; and
- (5) the relative merits of the parties' position.

Eaves v. Penn, 587 F.2d 453, 465 (10th Cir. 1978). This standard has been adopted by many federal courts construing the ERISA fee provision. *Marquardt v. North American Car Corp.*, 50 U.S.L.W. 2036 (7th Cir. July 21, 1981); *Hummel v. S.E. Rykoff & Co.*, 634 F.2d 446, 453 (9th Cir. 1980); *Iron Workers Local No. 272 v. Bowen*, 624 F.2d 1255, 1266 (5th Cir. 1980); *Frary v. Shorr Paper Prods., Inc.*, 494 F. Supp. 565, 570 (N.D. Ill. 1980); *Baeten v. Van Ess*, 474 F. Supp. 1324, 1332 (E.D. Wis. 1979). Notably, the Fifth Circuit has emphasized that although these factors are "the nuclei of concerns" that a court should address, no one of them is necessarily decisive. *Iron Workers Local No. 272 v. Bowen*, 624 F.2d 1255, 1266 (5th Cir. 1980). Indeed, the *Iron Workers* court identified an additional factor, namely, "whether those parties [plaintiff-fiduciaries] would have violated their fiduciary duties by not bringing

the language and legislative history of a statute to ascertain the degree of discretion conferred on the judiciary, the courts should inquire into the objectives and policies Congress sought to further by enacting a particular fee-shifting provision. Indeed, this appears to be the method used by the Supreme Court in arriving at the *Newman-Northcross* rule in the context of Title II.²⁶⁵ If this approach cannot produce a standard susceptible of uniform and objective application, it is submitted that the courts should examine other statutes having common legislative goals and should determine whether the criteria governing the exercise of discretion under such other statutes can be applied to the fee-shifting provision at issue. A similar approach has been used by the judiciary in arriving at a definition of the prevailing party concept under various statutes.²⁶⁶

B. *The Reasonable Attorney's Fee*

Although the statutes authorizing fee awards often differ with respect to the standards governing prevailing party concepts and the discretion possessed by the courts to determine whether fee shifting is appropriate,²⁶⁷ they contain identical language describing the amount of the award. Indeed, virtually all of the federal fee-shifting statutes provide for a reasonable attorney's fee.²⁶⁸ Few

suit." *Id.* But see *Mullins v. Kaiser Steel Corp.*, 642 F.2d 1302, 1335 (D.C. Cir. 1980) (being required by ERISA to bring an action is not synonymous with enforcing the statute and therefore does not militate in favor of fee award). Although the factors relevant to the decision concerning whether to make a fee award are fairly clear and uniformly applied, courts have differed with respect to the degree to which fee awards are favored by the statute. *Cf. Iron Workers Local No. 272 v. Bowen*, 624 F.2d 1255, 1265-66 & n.24 (5th Cir. 1980) (*Newman-Northcross* rule inappropriate because ERISA policies less imperative than those underlying civil rights and statutory language significantly different); *Central States Southeast v. Hitchings Trucking, Inc.*, 492 F. Supp. 906, 909-10 (E.D. Mich. 1980) (*Newman-Northcross* rule may be applied in ERISA action); *Bonar v. Barnett Bank*, 488 F. Supp. 365, 370 (M.D. Fla. 1980) (fee award inappropriate because resolution of case turned upon question of law upon which reasonable minds could differ and because of traditional policy against awarding attorney's fees except in limited circumstances).

²⁶⁵ See notes 216-218 and accompanying text *supra*.

²⁶⁶ See note 43 *supra*.

²⁶⁷ See notes 214-266 and accompanying text *supra*.

²⁶⁸ There is some disagreement over whether a reasonable attorney's fee under the Fees Awards Act may include compensation not only for an attorney's time but for associated costs. The legislative history of the Fees Awards Act contains a statement by a member of the Committee on the Judiciary that "the phrase 'attorney's fee' would include the value of the legal services provided by counsel, including all necessary expenses incurred in furnishing effective and competent representation." 122 CONG. REC. H12, 160 (daily ed. Oct. 1, 1976). Accordingly, some courts have held that a reasonable fee award includes such costs

of these provisions, however, purport to define what is meant by the term "reasonable."²⁶⁹ Since trial judges are best equipped to weigh the numerous factors that bear upon the calculation of a reasonable fee award, they are accorded broad discretion in performing this task.²⁷⁰ In the past, however, the lower courts fre-

and disbursements as travel expenses, lodging expenses, and long-distance telephone calls. See, e.g., *Northcross v. Board of Educ.*, 611 F.2d 624, 639 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980); *Fairley v. Patterson*, 493 F.2d 598, 606 n.11 (5th Cir. 1974); *Dunten v. Kibler*, 518 F. Supp. 1146, 1152 n.5 (N.D. Ga. 1981); *Chrapliwy v. Uniroyal, Inc.*, 509 F. Supp. 442, 454-55 (N.D. Ind. 1981); *Population Servs. Int'l v. Carey*, 476 F. Supp. 4, 8 (S.D.N.Y. 1979); *Barth v. Bayou Candy Co.*, 379 F. Supp. 1201, 1205 (E.D. La. 1974); *James v. Beaufort County Bd. of Educ.*, 348 F. Supp. 711, 720 (E.D.N.C. 1971), aff'd, 465 F.2d 477 (4th Cir. 1972); cf. *McPherson v. School Dist. No. 1986*, 465 F. Supp. 749, 758 (S.D. Ill. 1978) (commuting time compensable at two-thirds of approved hourly rate); *Keyes v. School Dist. No. 1*, 439 F. Supp. 393, 409 (D. Colo. 1979) (commuting time of half hourly rate permitted). *Contra*, *NAACP v. Bell*, 448 F. Supp. 1164, 1168 (D.D.C. 1978) ("[h]ourly compensation for travel hours, above and beyond expenses is inappropriate"), *rev'd on other grounds sub nom.* *NAACP v. Civilletti*, 609 F.2d 514 (D.C. Cir. 1979), cert. denied, 447 U.S. 922 (1980); cf. *Entertainment Concepts, III, Inc., v. Maciejewski*, 514 F. Supp. 1378, 1381-82 (commuting time compensable at reduced rate, but hotel expenses, air travel, air freight, parking, and long-distance telephone calls not compensable).

²⁶⁹ Three statutes attempt to guide the court in its calculation of a reasonable attorney's fee. See Consumer Product Safety Commission Improvements Act, 15 U.S.C. § 2059(e)(4) (1976); Alaska Native Claims Settlement Act, 43 U.S.C. § 1619 (1976); Natural Gas Pipeline Safety Act, 49 U.S.C. § 1686(e) (1976). The Consumer Product Safety Act provides:

[A] reasonable attorney's fee is a fee (A) which is based upon (i) the actual time expended by an attorney in providing advice and other legal services in connection with representing a person in an action brought under this subsection, and (ii) such reasonable expenses as may be incurred by the attorney in the provision of such services, and (B) which is computed at the rate prevailing for the provision of similar services with respect to actions brought in the court which is awarding such fee.

15 U.S.C. 2059(e)(4) (1976). The Natural Gas Pipeline Safety Act contains a provision which is substantially the same. 49 U.S.C. § 1686(e) (1976). Similarly, the Alaska Native Claims Settlement Act provides:

The amount allowed for services shall be based on the nature of the service rendered, the time and labor required, the need for providing the service, whether the service was intended to be a voluntary public service or compensable, the existence of a bona fide attorney-client relationship with an identified client, and the relationship of the service rendered to the enactment of proposed legislation. The amount allowed shall not be controlled by an hourly charge customarily charged by the claimant.

43 U.S.C. § 1619(d)(2) (1976).

²⁷⁰ See, e.g., *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 716-17 (5th Cir. 1974). The standard for review of lower court fee awards is whether the district court abused its discretion. See, e.g., *O'Neil v. City of Lake Oswego*, 642 F.2d 367, 370 (9th Cir. 1981); *Gluck v. American Protection Indus., Inc.*, 619 F.2d 30, 32 (9th Cir. 1980); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717 (5th Cir. 1974).

There is considerable disagreement whether a district court must hold an evidentiary

quently failed to articulate how they ascertained the amount of fees they awarded.²⁷¹ Consequently, to foster uniformity and permit rational appellate inspection of such judicial discretion, several courts of appeals have enunciated standards to aid trial courts in their calculations.²⁷²

1. *Johnson* Factors

In *Johnson v. Georgia Highway Express, Inc.*,²⁷³ the Fifth Circuit enunciated twelve factors to be considered in calculating a fee award:²⁷⁴ (1) time and labor necessitated; (2) novelty and difficulty

hearing to determine a reasonable attorney's fee, and the fee application hearing has been characterized by one court as "an informational aid to the court," rather than "an adversarial process." *Farris v. Cox*, 508 F. Supp. 222, 227 n.16 (N.D. Cal. 1981). Thus, some courts have adopted the view that when the facts contained in the affidavits and briefs are sufficiently detailed to provide a basis for a fee award, no evidentiary hearing is required. *See Manhart v. City of Los Angeles*, 652 F.2d 904, 908 (9th Cir. 1981); *Lipscomb v. Wise*, 643 F.2d 319, 323 (5th Cir. 1981); *Murphy v. Kolovitz*, 635 F.2d 662, 664 (7th Cir. 1981); *Williams v. Alioto*, 625 F.2d 845, 849 (9th Cir. 1980) (per curiam). Other courts, however, have held that when there is evidence of a factual dispute, an evidentiary hearing is mandated. *See, e.g., King v. McCord*, 621 F.2d 205, 206 (5th Cir. 1980); *In re First Colonial Corp. of Am.*, 544 F.2d 1291, 1300 (5th Cir.), cert. denied, 431 U.S. 904 (1977); *Imprisoned Citizens Union v. Shapp*, 473 F. Supp. 1017, 1021 (E.D. Pa. 1979). Still other courts have held that when a motion for fees is opposed, a hearing ordinarily should be held. *See, e.g., Perkins v. Standard Oil Co.*, 399 U.S. 222, 223 (1970) (fee award under Clayton Act should "as a general rule" be fixed "after hearing evidence"); *Kargman v. Sullivan*, 589 F.2d 63, 67 (1st Cir. 1978); *Sargeant v. Sharp*, 579 F.2d 645, 647 (1st Cir. 1978); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 473-74 (2d Cir. 1974); *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 169 (3d Cir. 1973); *Ross v. Saltmarsh*, 500 F. Supp. 935, 948 n.16 (S.D.N.Y. 1980). *See also Iranian Students Ass'n v. Sawyer*, 639 F.2d 1160, 1163-64 (5th Cir. 1981) (following mooted of suit because of tender of relief sought, it was error to deny defendants a hearing on the merits in order to determine which party was prevailing party for purposes of fee award).

²⁷¹ *O'Neil v. City of Lake Oswego*, 642 F.2d 367, 371 (9th Cir. 1981); *Altman v. Central of Georgia Ry.*, 580 F.2d 659, 661 (D.C. Cir. 1978); *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975), cert. denied, 425 U.S. 951 (1976); *Mims v. Wilson*, 514 F.2d 106, 111 (5th Cir. 1975); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 473-74 (2d Cir. 1974); *see Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 720 (5th Cir. 1974); *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 170 (3d Cir. 1973); *see, e.g., Bunn v. Central Realty*, 592 F.2d 891, 892 (5th Cir. 1979) (per curiam); *Morrow v. Dillard*, 580 F.2d 1284, 1300-01 (5th Cir. 1978).

²⁷² *See notes 338-356, 313-319 and accompanying text infra.*

²⁷³ 488 F.2d 714 (5th Cir. 1974).

²⁷⁴ *Id.* at 717-19. In *Johnson*, the district court had awarded the prevailing plaintiffs less than one-half of the attorney's fees requested. Expressing no opinion as to the validity of the award, *id.* at 720, the Fifth Circuit held that the lower court's failure to set forth its reasons for awarding a reduced fee effectively precluded meaningful appellate review of the adequacy of the fee, and thus constituted an abuse of discretion. *Id.* Instructing the district court to reexamine its fee award, the court listed twelve factors to be considered in making

of the case; (3) quality of the legal representation; (4) counsel's inability to take on other employment; (5) comparable fees for similar work; (6) the presence of a fixed or contingency fee arrangement measuring counsel's fee expectations; (7) time restrictions; (8) the amount involved and the results obtained; (9) experience, reputation, and ability of counsel; (10) undesirability of the litigation; (11) nature and length of counsel's professional relationship with the client; and (12) awards in similar cases.²⁷⁵ Although the *Johnson* case arose under the fee-shifting provisions of Title VII, its twelve factor test has been applied in a variety of contexts²⁷⁶ in every federal circuit.²⁷⁷

such determination. *Id.* at 716-19. Notably, the twelve *Johnson* factors appear to be derived from and are virtually identical to the guidelines of the American Bar Association, which are set out in Disciplinary Rule 2-106(B) of the Code of Professional Responsibility. *See In re Permian Anchor Servs., Inc.*, 649 F.2d 763, 768 (10th Cir. 1981); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 719 (5th Cir. 1974). *See also* *Muscare v. Quinn*, 614 F.2d 577, 579 (7th Cir. 1980) (ABA guidelines are the pertinent factors to be considered in determining a reasonable attorney's fee under Fees Awards Act). For a detailed analysis of the *Johnson* factors as applied in civil rights litigation, see Comment, *Calculation of a Reasonable Award of Attorneys' Fees Under the Attorneys' Fees Awards Act of 1976*, 13 J. MAR. L. REV. 331, 346-76 (1980).

²⁷⁵ 488 F.2d 714, 717-19 (5th Cir. 1974). The first *Johnson* factor—time and labor required—has been held to contemplate several types of activity. Indeed, the *Johnson* Court itself distinguished between three categories of labor: (1) legal activity, including research, writing, and court appearances; (2) activities related to legal practice, including conferences and telephone calls; and (3) routine administrative activities unrelated to the law, including travel time, clerical work, and the compilation of statistics. *Id.* at 717. Accordingly, the courts have held that the cost of paralegal assistance may be included in a fee award. *See, e.g.,* *Dietrich Corp. v. King Resources Co.*, 596 F.2d 422, 426-27 (10th Cir. 1979); *Todd Shipyards Corp. v. Director, Office of Workers' Compensation Programs*, 545 F.2d 1176, 1182 (9th Cir. 1976). Other litigation expenses, such as secretarial costs, copying, and telephone bills, may also be included in an award. *See Wheeler v. Durham City Bd. of Educ.*, 585 F.2d 618, 623-24 (4th Cir. 1978); *Fairley v. Patterson*, 493 F.2d 598, 607 n.17 (5th Cir. 1974).

²⁷⁶ *See, e.g.,* *Campbell v. Cauthron*, 623 F.2d 503, 509 (8th Cir. 1980) (Fees Awards Act); *Mitchell v. Scheepvaart Maatschappij Trans-Ocean*, 579 F.2d 1274, 1281 n.10 (5th Cir. 1978) (Longshoreman's & Harbor Workers' Compensation Act, 33 U.S.C. § 928 (1976)); *Duval v. Midwest Auto City, Inc.*, 578 F.2d 721, 725 & n.6 (8th Cir. 1978) (Motor Vehicle Information & Cost Savings Act, 15 U.S.C. § 1989 (1976)); *Barber v. Kimbrell's Inc.*, 577 F.2d 216, 226 (4th Cir.), *cert. denied*, 439 U.S. 934 (1978) (Truth In Lending Act, 15 U.S.C. § 1640(a)(3) (1976)); *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976) (Labor Management Reporting & Disclosure Act, 29 U.S.C. § 501(b) (1976)); *Cleverly v. Western Elec. Co.*, 450 F. Supp. 507, 511-12 (W.D. Mo. 1978) (Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(b) (1976)); *Computer Statistics, Inc. v. Blair*, 418 F. Supp. 1339, 1349 (S.D. Tex. 1976) (Clayton Act, 15 U.S.C. § 15 (1976)).

²⁷⁷ *See, e.g.,* *Campbell v. Cauthron*, 623 F.2d 503, 509 (8th Cir. 1980); *Allen v. United States*, 606 F.2d 432, 435-36 (4th Cir. 1979); *Hampton v. Hanarahan*, 600 F.2d 600, 643 (7th Cir. 1979), *modified*, 446 U.S. 754 (1980); *Francia v. White*, 594 F.2d 778, 782 (10th Cir.

Even the *Johnson* court conceded, however, that its list of criteria could not "reduce the calculation of a reasonable fee to mathematical precision."²⁷⁸ Indeed, it has been noted that the extreme amount of discretion and subjectivity permitted by this approach renders it an impracticable means of ensuring uniform fee awards.²⁷⁹ Nevertheless, the First,²⁸⁰ Fourth,²⁸¹ Fifth,²⁸² and

1979); *Prate v. Freedman*, 583 F.2d 42, 48 (2d Cir. 1978); *Sargeant v. Sharp*, 579 F.2d 645, 647 (1st Cir. 1978); *Fountila v. Carter*, 571 F.2d 487, 496 (9th Cir. 1978); *Evans v. Sheraton Park Hotel*, 503 F.2d 177, 187-88 (D.C. Cir. 1974); *Johnson v. Snyder*, 470 F. Supp. 972, 974 (N.D. Ohio. 1979), *aff'd*, 639 F.2d 316 (6th Cir. 1981); *White v. Beal*, 447 F. Supp. 788, 796 (E.D. Pa. 1978).

²⁷⁸ *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 720 (5th Cir. 1974).

²⁷⁹ *Anderson v. Morris*, 658 F.2d 246, 249 (4th Cir. 1981); *see Copeland v. Marshall*, 641 F.2d 880, 890 (D.C. Cir. 1980); *Northcross v. Board of Educ.*, 611 F.2d 624, 642-43 (6th Cir.), *cert. denied*, 447 U.S. 911 (1980); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974); *Berger, supra* note 6, at 286-87; *Dawson, Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849, 927 & n.327 (1975); *Note, Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act, supra* note 35, at 372-73 & nn.164-69. Commonly articulated criticisms are that the twelve factors overlap considerably, *see, e.g., Northcross v. Board of Educ.*, 611 F.2d at 642, that they are imprecise, *see, e.g., Copeland v. Marshall*, 641 F.2d at 890, and that they are difficult to quantify, *see, e.g., Anderson v. Morris*, 658 F.2d at 249. Moreover, scholars have commented upon the failure of the *Johnson* approach to further rational and consistent fee adjudications. For example, one commentator has observed:

The fundamental problems with an approach that does no more than assure the lower courts will consider a plethora of conflicting and at least partially redundant factors is that it provides no analytical framework for their application. It offers no guidance on the relative importance of each factor, whether they are to be applied differently in different contexts, or, indeed, how they are to be applied at all.

Berger, supra note 6, at 286-87; *accord, City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974) (listing of factors constitutes "a conceptual amalgam . . . so extensive and ponderous that it is probably not employed in any precise way by those courts espousing adherence to it").

The Fifth Circuit has attempted in recent years to furnish more guidance for the application of its *Johnson* factors. In *In re First Colonial Corp. of America*, 544 F.2d 1291 (5th Cir.), *cert. denied*, 431 U.S. 904 (1977), the court suggested that a trial judge first should ascertain from a statement of hours worked "the nature and extent of the services supplied by the attorney." *Id.* at 1299. Thereafter, according to the Fifth Circuit, the trial court should determine the customary hourly rate of compensation and multiply the number of hours reasonably expended by the normal hourly rate to ascertain an initial sum of reasonable compensation. *See id.* at 1300. The above steps encompass the first and fifth *Johnson* factors. *Anderson v. Morris*, 658 F.2d 246, 249 (4th Cir. 1981). Finally, the Fifth Circuit has indicated that the trial court should adjust the fee on the basis of the remaining *Johnson* factors, and should explain the role of each such factor. 544 F.2d at 1300. *See generally Johnson & Blackburn, First Colonial: The Fifth Circuit Makes a Definitive Statement on the Award of Attorneys' Fees in Bankruptcy*, 24 LOY. L. REV. 189 (1978); *see also Cooper Liquor, Inc. v. Adolph Coors Co.*, 624 F.2d 575, 582-83 (5th Cir. 1980). The Fifth Circuit also has directed the district courts to pay particular attention to the eighth *Johnson* factor—the amount involved and the results obtained—and the ninth *Johnson* factor—the ex-

Tenth²⁸³ Circuits continue to apply the bare *Johnson* guidelines, although several of such circuits also have held that the failure of a trial court to discuss each element of these guidelines constitutes an abuse of discretion.²⁸⁴ Recognizing the problems posed by the lack of a cohesive analytical method for application of the *Johnson* factors, other courts have searched for a standard to serve as a framework for structuring the deliberations of trial courts.²⁸⁵

perience, reputation and ability of counsel. 624 F.2d at 583. In addition, the circuit court has stated that lawyers who accept civil rights cases on a contingency fee basis "are entitled to be paid more when successful than those who are assured of compensation regardless of result." *Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981) (en banc).

²⁸⁰ See, e.g., *Palmigiano v. Garrahy*, 616 F.2d 598, 600-01 (1st Cir.), cert. denied, 449 U.S. 839 (1980); *Reynolds v. Coomey*, 567 F.2d 1166, 1167 (1st Cir. 1978); *King v. Greenblatt*, 560 F.2d 1024, 1026-28 (1st Cir. 1977), cert. denied, 438 U.S. 916 (1978).

²⁸¹ See, e.g., *Anderson v. Morris*, 658 F.2d 246, 248-49 (4th Cir. 1981); *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 (4th Cir.), cert. denied, 439 U.S. 934 (1978). The *Anderson* court held that it was impermissible for the district court to reduce a fee award because of the attractiveness of the case and the publicity that it had received. 658 F.2d at 248. The court observed that such an approach not only would be inconsistent with the *Johnson* guidelines but would fail to satisfy the mandate of the Fees Awards Act that lawyers are to be paid "as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.'" *Id.* (quoting S. REP. No. 94-1011, 94th Cong., 2d Sess. 6, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5908, 5913).

²⁸² See, e.g., *Knights of the Ku Klux Klan v. East Baton Rouge Parish School Bd.*, 643 F.2d 1034, 1041 (5th Cir. 1981) (per curiam); *Holmes v. Oxford Chems., Inc.*, 510 F. Supp. 915, 919 (M.D. Ala. 1981); *Engle v. A.C. Ellis Corp.*, 509 F. Supp. 630, 637-39 (S.D. Tex. 1980).

²⁸³ See, e.g., *Matter of Permian Anchor Servs., Inc.*, 649 F.2d 763, 768 (10th Cir. 1981); *Salone v. United States*, 645 F.2d 875, 879 (10th Cir. 1981); *Battle v. Anderson*, 614 F.2d 251, 258 (10th Cir. 1980).

²⁸⁴ See, e.g., *Bustamante v. First Fed. Sav. & Loan Ass'n*, 619 F.2d 360, 365 (5th Cir. 1980); *McGowan v. King, Inc.*, 616 F.2d 745, 747 (5th Cir. 1980); *Rose Pass Mines, Inc. v. Howard*, 615 F.2d 1088, 1091 (5th Cir. 1980); *Allen v. United States*, 606 F.2d 432, 435-36 (4th Cir. 1979); *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 (4th Cir.), cert. denied, 439 U.S. 934 (1978); *In re Colonial Corp. of America*, 544 F.2d 1291, 1298-99 (5th Cir.), cert. denied, 431 U.S. 904 (1977); *Evans v. Sheraton Park Hotel*, 503 F.2d 177, 188 (D.C. Cir. 1974). Although the circuit courts typically reverse and remand a case with appropriate instructions when the trial court has abused its discretion by failing to apply the *Johnson* guidelines, see, e.g., *O'Neill v. City of Lake Oswego*, 642 F.2d 367, 371 (9th Cir. 1981), the appellate courts have, on occasion, fixed the fee themselves in order to avoid further litigation and concomitant fee awards, see, e.g., *Morrow v. Finch*, 642 F.2d 823, 824-25 (5th Cir. 1981).

²⁸⁵ See notes 286-291, 313-319 and accompanying text *infra*. A novel approach to fee calculation, combining a cost-plus-profit formula with the *Johnson* factors, enjoyed a brief tenure in the D.C. Circuit, following its creation in *Copeland v. Marshall*, 594 F.2d 244, 251 (D.C. Cir. 1978), vacated, No. 77-1351, slip op. (June 29, 1979). On rehearing en banc, however, the *Copeland* court rejected the cost-plus-profit formula in favor of a "lodestar" approach. *Copeland v. Marshall*, 641 F.2d 880, 908 (D.C. Cir. 1980) (en banc); see notes 286-291 and accompanying text *infra* for a discussion of the lodestar approach.

The cost-plus-profit standard had favored "a principle of reimbursement to a firm for

2. *Lindy* Lodestar Test

In an effort to provide a clear and objective method for calculating reasonable attorney's fees, the Third Circuit, in *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*,²⁸⁶ espoused a two-step analysis. Under this approach, the trial court first must calculate the number of compensable hours that reasonably were spent by counsel to produce the successful litigation.²⁸⁷ The number of hours is then multiplied by the reasonable hourly rate for the attorney's services in order to generate a "lodestar" figure.²⁸⁸ After this objective foundation has been laid, the court may adjust the "lodestar" figure²⁸⁹ to reflect two subjective factors: the contingent nature of success,²⁹⁰ and the quality of

its costs, plus a reasonable and controllable margin for profit." 594 F.2d at 251 (emphasis added). This formula required a court to determine, at the outset, the salary, overhead costs, and return of profit to both partners and associates. *Id.* at 251-52. Because they reflected the "usual" compensation that a firm would receive from its commercial clients, these figures were adjusted in accordance with the *Johnson* factors to determine what a firm "should" receive in civil rights litigation. *Id.* 250-51.

The cost-plus-profit approach was rejected by the en banc *Copeland* court for several reasons. First, the court observed that the test posed considerable administrative difficulties. 641 F.2d at 896. The problems associated with allocation of overhead costs, calculation of costs associated with "imputed salaries" of firm partners, and the determination of a "reasonable" profit raised "the specter of a monumental inquiry on an issue wholly ancillary to the substance of the lawsuit." *Id.* Second, the court reasoned that the cost-plus-profit standard was "fundamentally inconsistent" with the congressional purpose behind statutory fee-shifting, *id.* at 897, and observed that Congress, in passing the Fees Awards Act, had understood and noted with approval that in the Title VII contest the appropriate standard was a "market value" approach. *Id.* (citing S. REP. No. 1011, *supra* note 34, at 6). Finally, the court noted that there was no evidence in the earlier panel opinions explaining why, in the typical case, rates established by market pressures would in fact differ from those achieved through the cost-plus-profit computation. *Id.* at 898.

²⁸⁶ 487 F.2d 161 (3d Cir. 1973) (*Lindy I*); see 540 F.2d 102 (3d Cir. 1976) (*Lindy II*).

²⁸⁷ 487 F.2d at 167; see notes 292-307 and accompanying text *infra*. The *Lindy* court stated that, in arriving at the number of compensable hours, the trial court must distinguish between different kinds of legal activities, such as pretrial discovery or settlement negotiations, and between the different classes of attorneys, such as senior partners or junior associates. 487 F.2d at 167.

²⁸⁸ 487 F.2d at 167-68. In determining the hourly rate, the *Lindy* court suggested using the attorney's normal billing rate since it is indicative of his legal reputation and status. *Id.* at 167.

²⁸⁹ See, e.g., *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255, 1276 (8th Cir.) (multiplier of 1.5, based upon the contingency nature and quality of the work, held excessive), *cert. denied*, 449 U.S. 1063 (1980); *Walker v. Robbins Hose Co. No. 1.*, 622 F.2d 692, 694 (3d Cir. 1980) (no increase on lodestar figure based upon contingency nature of case because attorneys undertook cause of action on a pro bono basis); *Bolden v. Pennsylvania State Police*, 491 F. Supp. 958, 966 (E.D. Pa. 1980) (20% increase in lodestar figure in recognition of excellent quality of attorney's services).

²⁹⁰ The *Lindy* court provided detailed guidance for evaluating whether the contingent

the attorney's work.²⁹¹

Unfortunately, the calculation of "reasonable number of compensable hours" and "reasonable hourly rate," the components of the lodestar figure, cannot perfunctorily be performed. Rather, numerous factors must be assessed in divining both figures. One such factor, impacting upon the determination of compensable hours, involves the means whereby the amount of time devoted by an attorney to his client's case may be ascertained. For instance, in cases involving attorneys who have not maintained contemporaneous hourly records, the courts generally have sanctioned the reconstruction of such records.²⁹² Frequently, however, a penalty is im-

nature of success warrants an increase in the lodestar figure. In this regard, the court indicated that the trial court should evaluate the plaintiff's burden, the risks assumed by the attorney in developing the case, and the delay in receipt of payment for services rendered. 540 F.2d at 117. The *Lindy* court further noted that an adequate analysis of the plaintiff's burden would, in turn, necessitate consideration of the legal and factual complexity of the case, the probability of the defendant's liability, taking into account the novelty of the claims asserted, and the likelihood of establishing the damages claimed. *Id.*

An adequate analysis of the attorney's risks, observed the court, would entail consideration of the number of attorney hours risked without guarantee of recompense, the amount of out-of-pocket expenses advanced for litigation costs, and the development of any prior special legal expertise in the type of litigation involved in the instant case. *Id.* The *Lindy* court contended that the last of these considerations is important because it may assist the court in "efficient conduct of the litigation, or . . . in articulating legal precepts and implementing sound public policy." *Id.*

²⁹¹ The quality of an attorney's representation, declared the *Lindy* court, may be considered in the nature of "a bonus or penalty," the entitlement to which must be established by the movant, with any increase or decrease in fees reflecting an unusual degree of skill or lack thereof. *Id.* at 118. More particularly, the court observed, the professionalism of the legal techniques employed by counsel should be evaluated; efficiency should be rewarded; and dilatoriness penalized. *Id.* In addition, the *Lindy* court suggested that the district court consider the result obtained in the litigation in terms of the potential relief available at the outset. *Id.* Finally, the court stated that the numerous considerations involved in the assessment of a fee award must be fully explained by the district court so as to permit meaningful appellate review. *Id.* at 117-18.

Interestingly, a strong argument can be made for the proposition that the *Johnson* approach, as it has developed in subsequent Fifth Circuit opinions, is really not far removed from the *Lindy* standard. See *Dowdell v. City of Apopka*, 521 F. Supp. 297, 302-03 (M.D. Fla. 1981); note 279 *supra*. It is interesting that *Dowdell*, which applied the Third Circuit's lodestar approach, was decided in Florida, previously part of the Fifth Circuit, but since October 1, 1981, now subsumed within the newly created Eleventh Circuit. *Dowdell* appears to be a departure from existing Fifth Circuit law, which perhaps *sub silentio*, see note 279 and accompanying text *supra*, but certainly never expressly, had adopted the lodestar approach. Thus, it may perhaps be viewed as an example of prompt judicial muscle-flexing designed to gauge the temper of the Court of Appeals for the Eleventh Circuit regarding the appropriate standard for calculating a reasonable fee award.

²⁹² See, e.g., *Ross v. Saltmarsh*, 521 F. Supp. 753, 761-62 (S.D.N.Y. 1981); *Vaughn v. Trotter*, 516 F. Supp. 902, 903-04 (M.D. Tenn. 1981).

posed for this omission, presumably to encourage the legal profession to maintain accurate and complete contemporaneous time records.²⁹³

Even when an attorney has complete contemporaneous records, the computation of "compensable hours" may nevertheless be complicated by the number of parties participating in the litigation. Instances of multiparty litigation are numerous, and, because each such situation is factually unique, the courts appear to have confronted them on a *sui generis* basis. Thus, when multiple defendants are involved in a case, a court may prorate the fee award to distribute equitably the number of hours spent litigating the claims against each defendant. In *Ingram v. Madison Square Garden Center, Inc.*,²⁹⁴ for example, the court held that a nonsettling defendant is liable for an equitable portion of the plaintiff's legal fees incurred from commencement of the suit until settlement.²⁹⁵ In addition, the court held that the nonsettling defendant should bear all attorney's fees incurred as a result of the trial in which he was the sole defendant.²⁹⁶ In another case in which the court was unable to allocate the time spent on legal issues involving multiple defendants because of the complexity of the issues, it held that it could, in its discretion, impose fees upon fewer than all of the defendants.²⁹⁷ In still other cases involving multiple attorneys, the district courts generally have held that they may, in their discretion, reduce the number of compensable hours to compensate for overstaffing or for the unnecessary duplication of counsels' efforts.²⁹⁸ Notably, the Sixth Circuit has adopted a novel approach

²⁹³ See, e.g., *Ross v. Saltmarsh*, 521 F. Supp. 753, 762 (S.D.N.Y. 1981) (10% penalty for total reconstruction); *Heigler v. Gatter*, 463 F. Supp. 802, 803-04 (E.D. Pa. 1978) (20% penalty imposed); *Kane v. Martin Paint Stores, Inc.*, 439 F. Supp. 1054, 1056 (S.D.N.Y. 1977) (10% penalty imposed), *aff'd mem.*, 578 F.2d 1368 (2d Cir. 1978).

²⁹⁴ 482 F. Supp. 918 (S.D.N.Y. 1979).

²⁹⁵ *Id.* at 928.

²⁹⁶ *Id.*

²⁹⁷ *Stenson v. Blum*, 512 F. Supp. 680, 683 (S.D.N.Y. 1981).

²⁹⁸ See, e.g., *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717 (5th Cir. 1974); *Steinberg v. Carey*, 470 F. Supp. 471, 478-79 & n.35 (S.D.N.Y. 1979); *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974), *rev'd on other grounds*, 436 U.S. 547 (1978); *cf. Farris v. Cox*, 508 F. Supp. 222, 225-26 (N.D. Cal. 1981) (triple-billing for appearances at deposition and at preliminary injunction hearing duplicative and requires fee reduction of billable hours); *Patterson v. Youngstown Sheet & Tube Co.*, 518 F. Supp. 1, 5-6 (N.D. Ind. 1980) (duplication of attorney effort evident when case was not complex and involved no novel legal issues or extensive trial work, but rather simple motion practice). *But see* *Ross v. Saltmarsh*, 521 F. Supp. 753, 762 (S.D.N.Y. 1981) (when alleged duplication of attorney time was necessitated by division of responsibility for substantive legal tasks, fee award reduction

for dealing with the problem of duplication of attorney services. In *Northcross v. Board of Education*,²⁹⁹ the circuit court stated that "[i]n complicated cases, involving many lawyers, we have approved the arbitrary but essentially fair approach of simply deducting a small percentage of the total hours to eliminate duplication of services."³⁰⁰ Such an approach, suggested Senior Judge Peck, was preferable to "pick[ing] out, here and there, the hours which were duplicative."³⁰¹

There are, of course, many other factors and rules to be considered in computing compensable hours. In not all instances, moreover, are the courts in accord. On the one hand, the courts generally agree that attorney's fees may be granted to successful litigants for services rendered on appeal.³⁰² Moreover, the time spent in litigating entitlement to a fee award and expended in preparation of the fee application typically is deemed to be compensable when fees are statutorily authorized.³⁰³ On the other

would be inappropriate); *Stenson v. Blum*, 512 F. Supp. 680, 684 (S.D.N.Y. 1981).

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

³⁰⁰ 611 F.2d at 636-37.

³⁰¹ *Id.* at 637; *accord*, *Hickman v. Valley Local School Dist. Bd. of Educ.*, 513 F. Supp. 659, 663 (S.D. Ohio 1981). Interestingly, in the narrow context of the counsel fee provision of the Truth In Lending Act (TILA), 15 U.S.C. § 1640 (1976), which provides for an award of attorney's fees "to enforce the foregoing liability," the Fifth Circuit has held that attorney time spent in defending against a compulsory counterclaim is not compensable. *Lacy v. General Finance Corp.*, 651 F.2d 1026, 1028-29 (5th Cir. 1981). In *Lacy*, the Fifth Circuit gave a relatively narrow reading to the term "foregoing liability." The court reasoned that since that term refers to claims established by the TILA, and since a plaintiff is not enforcing a TILA liability when defending against a state law compulsory counterclaim on the underlying debt, Congress did not intend to compensate time expended in defending against compulsory counterclaims. *Id.* at 1029.

³⁰² *See, e.g.*, *Southeast Legal Defense Group v. Adams*, 657 F.2d 1118, 1126 (9th Cir. 1981) (Fees Awards Act); *Ford v. New York Cent. Teamsters Pension Fund*, 642 F.2d 664, 665 (2d Cir. 1981) (ERISA); *Littlefield v. Deland*, 641 F.2d 729, 733 (10th Cir. 1981); *Suzuki v. Yuen*, 507 F. Supp. 819, 824 (D. Hawaii 1981); *Richerson v. Jones*, 506 F. Supp. 1259, 1263-64 (E.D. Pa. 1981) (Title VII); *Knutson v. Daily Review, Inc.*, 479 F. Supp. 1263, 1273 (N.D. Cal. 1979) (Clayton Act).

³⁰³ *See, e.g.*, *Balark v. Curtin*, 655 F.2d 798, 802-03 (7th Cir. 1981); *Bagby v. Beal*, 606 F.2d 411, 416 (3d Cir. 1979); *Weisenberger v. Huecker*, 593 F.2d 49, 53 (6th Cir.), *cert. denied*, 444 U.S. 880 (1979); *Lund v. Affleck*, 587 F.2d 75, 77 (1st Cir. 1978); *Prandini v. National Tea Co.*, 585 F.2d 47, 53 (3d Cir. 1978); *Souza v. Southworth*, 564 F.2d 609, 614 (1st Cir. 1977); *Bradford v. Blum*, 507 F. Supp. 526, 534 (S.D.N.Y. 1981); *Bolden v. Pennsylvania State Police*, 491 F. Supp. 958, 964 (E.D. Pa. 1980). *But see* *Boe v. Colello*, 447 F. Supp. 607, 610 (S.D.N.Y. 1978); *Kulkarni v. Nyquist*, 446 F. Supp. 1274, 1281 (N.D.N.Y. 1977). *See generally* *The Second Circuit Review—1978-79 Term, The Civil Rights Attorney's Fees Awards Act: Expansion and Contraction*, 46 BROOKLYN L. REV. 865, 870-71 n.26 (1980). In *Prandini*, the court explained the policy considerations favoring compensation for time spent preparing a fee application as follows:

hand, there is a split of authority in the circuits concerning the extent to which hours expended on unsuccessful claims should be compensated in the fee award. Under one view, a prevailing party may recover fees only for the preparation and presentation of those claims upon which he had prevailed.³⁰⁴ Another view, however, posits that, absent assertion of a frivolous claim, a plaintiff who had prevailed on the case as a whole is entitled to recover fees for all time reasonably expended by his attorney.³⁰⁵ This liberal approach is premised, at least in part, upon a desire to encourage attorneys to take, in good faith, the most advantageous position possible on their clients' behalf.³⁰⁶ Interestingly, there is yet a third view concerning whether and to what extent hours devoted to litigating unsuccessful claims may be compensated. Such approach holds that a fee reduction for unsuccessful claims is not appropriate when the claims were "part and parcel" of one matter, but is appropriate when the claims asserted "are truly fractionable."³⁰⁷

Of course, once the number of compensable hours has been determined, the second component of the lodestar figure—the rea-

If an attorney is required to expend time litigating his fee claim, yet may not be compensated for that time, the attorney's effective rate for all the hours expended on the case will be correspondingly decreased. Recognizing this fact, attorneys may become wary about taking Title VII cases, civil rights cases, or other cases for which attorneys' fees are statutorily authorized. Such a result would not comport with the purpose behind most statutory fee authorizations, *viz.*, the encouragement of attorneys to represent indigent clients and to act as private attorneys general in vindicating congressional policies.

585 F.2d at 530.

³⁰⁴ *Busche v. Burkee*, 649 F.2d 509, 522 (7th Cir. 1981); *Muscara v. Quinn*, 614 F.2d 577, 580 (7th Cir. 1980); *Hughes v. Repko*, 578 F.2d 483, 487 (3d Cir. 1978); *Skomorucha v. Wilmington Hous. Auth.*, 518 F. Supp. 657, 658-59 (D. Del. 1981); *Planned Parenthood Ass'n v. Commonwealth of Pa.*, 508 F. Supp. 567, 570 (E.D. Pa. 1980); *Greater St. Louis Health Sys. Agency v. Teasdale*, 506 F. Supp. 23, 42 (E.D. Mo. 1980).

³⁰⁵ *Northcross v. Board of Educ.*, 611 F.2d 624, 636 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); *accord*, *Planned Parenthood Ass'n v. Ashcroft*, 655 F.2d 848, 872 (8th Cir. 1981); *Mosley v. General Motors Corp.*, 508 F. Supp. 171, 172 (E.D. Mo. 1981); *Suzuki v. Yuen*, 507 F. Supp. 819, 824 (D. Hawaii 1981); *Mader v. Crowell*, 506 F. Supp. 484, 487 (M.D. Tenn. 1981); *Croushorn v. Board of Trustees*, 518 F. Supp. 9, 44 (M.D. Tenn. 1980); *Brady v. Washington County*, 509 F. Supp. 538, 542-43 (E.D. Tenn. 1980).

³⁰⁶ *Northcross v. Board of Educ.*, 611 F.2d at 636.

³⁰⁷ *Copeland v. Marshall*, 641 F.2d 880, 892 n.18; (D.C. Cir. 1980); *Church of Scientology v. Cazares*, 638 F.2d 1272, 1291 (5th Cir. 1981); *Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981) (court must consider relationship of claims that resulted in judgment with claims that were rejected and contribution, if any, made to success by investigation and prosecution of entire case); *Lamphere v. Brown Univ.*, 610 F.2d 46, 47 (1st Cir. 1979); *Dowdell v. City of Apopka*, 521 F. Supp. 297, 300-02 (M.D. Fla. 1981); *Blake v. Hoston*, 513 F. Supp. 663, 664-66 (D.D.C. 1981).

sonable hourly rate—must be assessed. Again, as with the determination of compensable hours, the specifics involved in ascertaining a reasonable hourly rate are the subject of some controversy. Generally, in calculating a reasonable hourly rate for an attorney's services, the courts use an "historic," or contemporaneous time figure, which compensates the attorney at a rate that would have been reasonable at the time his services were rendered.³⁰⁸ Nevertheless, in an effort to take into account delay in payment in cases in which services had been rendered over a long period of time, several courts have inserted "current" rates into the hourly rate equation.³⁰⁹ Still other courts continue to use the historic rate, but have increased the contingency multiplier to compensate for inflation.³¹⁰

The determination of a reasonable hourly rate for attorney compensation also is dependent upon the status of the person whose time is being charged to the plaintiff. Thus, the courts have held that the work product of secretaries, paralegals, and law student interns does not warrant the same rate of compensation as that of an attorney.³¹¹ The courts also have recognized a difference between in-court and out-of-court time, and have compensated the former at a higher rate than the latter.³¹²

³⁰⁸ See, e.g., *Bolden v. Pennsylvania State Police*, 491 F. Supp. 958, 964 (E.D. Pa. 1980); *Vecchione v. Wohlgenuth*, 481 F. Supp. 776, 790 (E.D. Pa. 1979).

³⁰⁹ See, e.g., *Van Germert v. Boeing Co.*, 516 F. Supp. 412, 417 (S.D.N.Y. 1981); *Chrapliwy v. Uniroyal, Inc.*, 509 F. Supp. 442, 457-58 (N.D. Ind. 1981); *Mader v. Crowell*, 506 F. Supp. 484, 487 (M.D. Tenn. 1981). In *Mader*, the plaintiffs argued that the fee award not only should be calculated using "current" rates, but should also be adjusted upward to compensate for the decreased purchasing power of current dollars paid for prior work. *Id.* The district court rejected that argument, observing that the inflation increase was implicit in plaintiffs' counsel's current billing rates. *Id.* Indeed, the court held that to permit a fee award reflecting more than the attorney's current hourly rate would result in a windfall to plaintiff's counsel. *Id.*

³¹⁰ See, e.g., *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 117 (3d Cir. 1976); *Weiss v. Drew Nat'l Corp.*, 465 F. Supp. 548, 552-53 (S.D.N.Y. 1979); *In re Equity Funding Corp of Am. Sec.*, 438 F. Supp. 1301, 1331 (C.D. Cal. 1977). For a general discussion of the different approaches and relative policy considerations at issue, see *Chrapliwy v. Uniroyal, Inc.*, 509 F. Supp. 442 (N.D. Ind. 1981).

³¹¹ See, e.g., *City of Detroit v. Grinnel Corp.*, 495 F.2d 448, 473 (2d Cir. 1974); *Ross v. Saltmarsh*, 521 F. Supp. 753, 762-64 (S.D.N.Y. 1981); *Kane v. Martin Paint Stores, Inc.*, 439 F. Supp. 1054, 1055-56 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1368 (2d Cir. 1978); *Blank v. Talley Indus., Inc.*, 390 F. Supp. 1, 4 (S.D.N.Y. 1975).

³¹² See, e.g., *Corpus v. Estelle*, 605 F.2d 175, 180 n.10 (5th Cir. 1979), *cert. denied*, 445 U.S. 919 (1980); *Miller v. Carson*, 563 F.2d 741, 756 (5th Cir. 1977); *Dunten v. Kibler*, 518 F. Supp. 1146, 1152 & n.4 (N.D. Ga. 1981); *Langdon v. Drew Mun. Separate School Dist.*, 512 F. Supp. 1131, 1139 (N.D. Miss. 1981). The *Langdon* court relied in part upon the fact that Congress, in the Criminal Justice Act (CJA), 18 U.S.C. § 3006A(d) (1976), had seen fit to compensate in-court time at \$30 an hour, one-third more than the \$20 an hour awarded for

Irrespective of the difficulties inherent in applying the *Lindy* lodestar test, and although the test was developed in the context of common fund cases, the *Lindy* standard has been deemed useful in determining fee awards pursuant to several federal statutes.³¹³ Indeed, the need for a coherent framework within which to evaluate reasonable fee awards is such that the Third Circuit's lodestar approach has been seized upon and applied to federal statutory fee provisions by courts in the Second,³¹⁴ Seventh,³¹⁵ Eighth,³¹⁶ Ninth,³¹⁷ and District of Columbia Circuits.³¹⁸ Notably, some deci-

out-of-court time. *See* 512 F. Supp. at 1139. The CJA governs fee awards to attorneys of indigent criminal defendants. 18 U.S.C. § 3006A(d) (1976). It has been held to be an abuse of discretion for a district court to consider the CJA rates when determining a reasonable attorney's fee under the Fees Awards Act. *See* *Gurule v. Wilson*, 635 F.2d 782, 793 (10th Cir. 1980).

³¹³ *See, e.g.*, *Walker v. Robbins Hose Co. No. 1, Inc.*, 622 F.2d 692, 693 (3d Cir. 1980) (Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976)); *Prandini v. National Tea Co.*, 585 F.2d 47, 49 (3d Cir. 1978) (Civil Rights Act of 1964, § 706(k), 42 U.S.C. § 2000e-5(k) (1976)); *Pitchford Scientific Instruments Corp. v. Pepi, Inc.*, 440 F. Supp. 1175, 1177 (W.D. Pa. 1977) (Clayton Act, § 4, 15 U.S.C. § 15 (1976)), *aff'd*, 582 F.2d 1275, *cert. denied*, 440 U.S. 981 (1979); *Keca Music, Inc. v. Dingus McGee's Co.*, 432 F. Supp. 72, 74 (W.D. Mo. 1977) (Copyright Act, 17 U.S.C. § 116 (1976)).

³¹⁴ The *Lindy* standard was adopted by the Second Circuit in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 470-73 (2d Cir. 1974) (*Grinnell I*) and *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093, 1098 (2d Cir. 1977) (*Grinnell II*). It has since consistently been applied by lower courts in the Second Circuit. *See, e.g.*, *Northeastern Tel. Co. v. American Tel. & Tel. Co.*, 497 F. Supp. 230, 251 (D. Conn. 1980), *rev'd on other grounds*, 651 F.2d 76 (2d Cir. 1981); *Beech Cinema, Inc. v. Twentieth Century-Fox Film Corp.*, 480 F. Supp. 1195, 1197 (S.D.N.Y. 1979), *aff'd*, 622 F.2d 1106 (2d Cir. 1980). Moreover, the Second Circuit has supplemented the *Lindy* standard by urging trial judges to consider the relative wealth of the parties and, in the case of a potential fee award to a defendant, the vindictiveness or good faith of the plaintiff in prosecuting the action. *See, e.g.*, *Cohen v. West Haven Bd. of Police Comm'rs.*, 638 F.2d 496, 505 (2d Cir. 1980); *Faraci v. Hickey-Freeman Co.*, 607 F.2d 1025, 1028 (2d Cir. 1979); *Thomas v. Board of Educ.*, 505 F. Supp. 102, 104 (N.D.N.Y. 1981); *Fisher v. Fashion Inst. of Technology*, 491 F. Supp. 879, 888 (S.D.N.Y. 1980).

³¹⁵ To date the Seventh Circuit has not adopted any uniform approach to fee awards. Nevertheless, several district courts within that circuit have used the *Lindy* standard. *See, e.g.*, *Chrapliwy v. Uniroyal, Inc.*, 509 F. Supp. 442, 450 (N.D. Ind. 1981); *Bogges v. Hogan*, 410 F. Supp. 443, 445 (N.D. Ill. 1976); *Liebman v. J.W. Petersen Coal & Oil Co.*, 63 F.R.D. 684, 690-91 (N.D. Ill. 1974). *See also In re Folding Carton Antitrust Litigation*, 84 F.R.D. 245, 255-63 (N.D. Ill. 1979) (comprehensive summary of the law and history of attorney's fee awards in the Seventh Circuit).

³¹⁶ The Eighth Circuit has applied the *Lindy* standard to fee awards in antitrust cases. *See, e.g.*, *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255, 1274 (8th Cir. 1980); *Grunin v. International House of Pancakes*, 513 F.2d 114, 127 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975). Interestingly, however, the circuit court apparently favors the *Johnson* factors outside of the antitrust context. *See, e.g.*, *Hameed v. Ornamental Iron Workers Local 396*, 637 F.2d 506, 523 (8th Cir. 1980); *Brown v. Bathke*, 588 F.2d 634, 637 (8th Cir. 1978).

³¹⁷ Historically, the Ninth Circuit has applied the *Johnson* factors. *See, e.g.*, *Fountila v.*

sions have gone so far as to permit "a post-*Lindy* discretionary adjustment," so as to further the "important substantive purposes" of the particular statutory provision under consideration.³¹⁹

IV. RECOVERY OF ATTORNEY'S FEES FROM GOVERNMENTAL ENTITIES AND OFFICERS: THE IMMUNITY DOCTRINES

The discretionary nature of fee awards demonstrates that a party who prevails in an action is not necessarily entitled to recover attorney's fees. Even when fees are otherwise recoverable, however, an award may be denied when the adverse party is a governmental body or officer. Such is the nature of the various immunity doctrines which have developed under the common law and through constitutional amendment. The central inquiry in cases involving the government, therefore, is whether there has been a waiver of the immunity doctrine precluding fee recovery. This section of the Note first will describe the Equal Access to Justice Act, a broad waiver of the federal government's immunity from fee shifting. The Note then will discuss the question whether fees are recoverable from state governments despite the immunity accorded them by the eleventh amendment. Finally, the Note will consider the extent to which the common law insulates legislators and officers of the judiciary from fee shifting.

Carter, 571 F.2d 487, 496 (9th Cir. 1978); *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976). Nevertheless, while the circuit court has not adopted definitively the *Lindy* standard, a panel of the court in *Brandenburger v. Thompson*, 494 F.2d 885, 890 n.7 (9th Cir. 1974), suggested in dictum that the district court, on remand, might consider the factors listed in *Lindy I*. Accordingly, a number of lower courts in the Ninth Circuit have employed the lodestar approach. *See, e.g.*, *Knutson v. Daily Review, Inc.*, 479 F. Supp. 1263, 1270-71 & n.11 (N.D. Cal. 1979); *In re Equity Funding Corp. of Am. Sec.*, 438 F. Supp. 1303, 1326-27 (C.D. Cal. 1977); *Lockheed Minority Solidarity Coalition v. Lockheed Missiles and Space Co.*, 406 F. Supp. 823, 831 (N.D. Cal. 1976).

³¹⁸ *Copeland v. Marshall*, 641 F.2d 880, 890-94 (D.C. Cir. 1980) (en banc); *Davis v. Bolger*, 512 F. Supp. 61, 65-66 (D.D.C. 1981); *see note 70 and accompanying text supra*.

³¹⁹ *Hughes v. Repko*, 578 F.2d 483, 492 (3d Cir. 1978) (Garth, J., concurring); *See, e.g.*, *Bolden v. Pennsylvania State Police*, 491 F. Supp. 958, 966 (E.D. Pa. 1980) (30% increase in lodestar figure because of the "tangible benefits flowing directly to the citizenry" in response to plaintiff's civil rights desegregation cause of action); *Knutson v. Daily Review, Inc.*, 479 F. Supp. 1263, 1270, 1278-79 (N.D. Cal. 1979) (25% decrease in lodestar figure because nominal nature of damages recovered outweighed plaintiff's establishment of novel and potentially significant principle of law); *National Ass'n of Regional Medical Programs, Inc. v. Weinberger*, 396 F. Supp. 842, 851 (D.D.C. 1975) (100% incentive bonus in accordance with considerable public benefit of the litigation), *rev'd*, 551 F.2d 340 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 930 (1977). *See also Mary & Crystal v. Ramsden*, 635 F.2d 590, 601-03 (7th Cir. 1980) (40% reduction in fee award by trial judge to bring total compensation into more reasonable relation with nominal monetary recovery not an abuse of discretion).

A. Fee Awards Against the United States

The doctrine of sovereign immunity³²⁰ consistently has been construed to prohibit the assessment of costs or attorney's fees against the United States absent explicit congressional authorization.³²¹ In 1948, Congress partially waived this immunity by pro-

³²⁰ The precise origin of the sovereign immunity of the federal government has not been established. One theory is that the doctrine originated in the English common-law belief that "the King can do no wrong." See, e.g., *Feres v. United States*, 340 U.S. 135, 139 (1950); cf. *Kiefer & Kiefer v. Reconstruction Fin. Corp.*, 306 U.S. 381, 388 (1939) (federal immunity may be derived from the Crown's immunities). One interpretation of this phrase was that the sovereign was incapable of committing a wrong. See I W. BLACKSTONE, COMMENTARIES 239, 241-42. See also 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 25.01, at 436 (1958). Other authorities, however, have contended that the phrase was an exhortation to the monarch "as the foundation of justice and equity . . . not [to] refuse to redress wrongs when petitioned to do so by his subjects." 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 8 (3d ed. 1944); see Jaffe, *Suits Against Government and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 3 (1963). The other theory concerning federal immunity originally was espoused by Justice Holmes, who stated that "there can be no legal right as against the authority on which the right depends." *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907). In *Kawananakoa*, Justice Holmes considered this a "logical and practical" ground for upholding a sovereign's immunity. 205 U.S. at 353.

Commentators have asserted that the doctrine of sovereign immunity is an unwarranted extension of English principles, see, e.g., Borchard, *State and Municipal Liability in Tort—Proposed Statutory Reform*, 20 A.B.A.J. 747, 748 (1934), and is ill-suited to the American democratic system, see, e.g., *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 59 (1944) (Frankfurter, J., dissenting). See also Jaffe, *supra*, at 4. In *Great Northern*, Justice Frankfurter declared that sovereign immunity "undoubtedly runs counter to modern democratic notions of the moral responsibility of the State." 322 U.S. at 59 (Frankfurter, J., dissenting). It has been asserted that since the concept of sovereign immunity was based upon the King's status as a "unitary sovereign," the doctrine is inapposite in the United States since the American political system does not confer unitary sovereignty upon any of the three branches of government. Jaffe, *supra*, at 45. See generally Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1484-93 (1962); Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 387, 396-435 (1970).

Notwithstanding scholarly criticism of the principle of sovereign immunity, the proposition that the United States may not be sued without its consent remains deeply embedded in American jurisprudence. See *Cunningham v. Macon & Brunswick R.R.*, 109 U.S. 446, 451 (1883); 3A J. MOORE, FEDERAL PRACTICE ¶ 20.07 [3], at 20-62 (2d ed. 1948); Armstrong & Cockrill, *The Federal Tort Claims Bill*, 9 LAW & CONTEMP. PROB. 327, 331 (1942). In *Cunningham*, the Supreme Court declared:

It may be accepted as a point of departure unquestioned, that neither a State nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court by the Constitution.

109 U.S. at 451.

³²¹ See, e.g., *EEOC v. Kenosha Unified School Dist. No. 1*, 620 F.2d 1220, 1226-27 (7th Cir. 1980); *Leesona Corp. v. United States*, 599 F.2d 958, 968-70 (Ct. Cl.), cert. denied, 444

viding for the taxing of costs and various nominal legal fees against the United States.³²² These provisions have been strictly interpreted to insulate the federal government from all other fee awards, even in the equitable "bad faith"³²³ and "common fund or benefit"³²⁴ situations. This limitation on fee shifting, coupled with the expense of appellate practice, often deterred individuals and small businesses from seeking review of adverse and unreasonable

U.S. 991 (1979); *Natural Resources Defense Council, Inc. v. EPA*, 484 F.2d 1331, 1332 (1st Cir. 1973); *Walling v. Norfolk S. Ry.*, 162 F.2d 95, 96 (4th Cir. 1947). The courts have held, with respect to the Fees Awards Act, that the federal government is immune from fee awards. *See, e.g.*, *Shannon v. HUD*, 577 F.2d 854, 855-56 (3d Cir.), *cert. denied*, 439 U.S. 1002 (1978). It has been suggested that the courts' reluctance to award money judgments against the United States originates from the principle that "public moneys cannot be paid out except under an appropriation by Congress." 162 F.2d at 96. *But cf.* *Red School House, Inc. v. Office of Economic Opportunity*, 386 F. Supp. 1177, 1196-98 (D. Minn. 1974) (court awarded attorney's fees against federal agency upon finding implicit congressional authorization for such fee award).

³²² *See* 28 U.S.C. § 1920 (1976 & Supp. III 1979); *id.* § 2412 (1976), *amended by* Pub. L. No. 96-481, 94 Stat. 2325 (1980) (codified in 5 U.S.C. § 504 (Supp. IV 1980) and 28 U.S.C.A. § 2412(a) (West Supp. 1981)). Section 2412 provides in part:

Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action.

28 U.S.C.A. § 2412 (West Supp. 1981). Section 1920 provides for the recovery of various nominal legal costs. *Id.* § 1920 (1976 & Supp. III 1979).

³²³ *See, e.g.*, *Gibson v. Davis*, 587 F.2d 280, 281 (6th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979); *Rhode Island Comm. on Energy v. General Serv. Admin.*, 561 F.2d 397, 405 (1st Cir. 1977); *Glover Constr. Co. v. Andrus*, 451 F. Supp. 1102, 1110 (E.D. Okla. 1978), *aff'd*, 591 F.2d 554 (10th Cir. 1979), *aff'd*, 446 U.S. 608 (1980). *See generally* notes 14-22 and accompanying text *supra*.

³²⁴ *See, e.g.*, *American Ass'n of Marriage and Family Counselors, Inc. v. Brown*, 593 F.2d 1365, 1369 & n.13 (D.C. Cir. 1979) (dictum); *Pealo v. Farmers Home Admin.*, 562 F.2d 744, 748 (D.C. Cir. 1977). *See generally* notes 6-13 and accompanying text *supra*. Courts have awarded attorney's fees against the government in some common fund situations by reasoning that when the government is a mere stakeholder of the funds, fee awards do not deplete the public treasury. *See, e.g.*, *Lafferty v. Humphrey*, 248 F.2d 82, 84-85 (D.C. Cir.), *cert. denied*, 355 U.S. 869 (1957). In recent cases, however, the "stakeholder" fiction has been closely scrutinized and frequently discarded. *See National Ass'n of Regional Medical Programs v. Mathews*, 551 F.2d 340, 343 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 954 (1977); *National Council of Community Mental Health Centers, Inc. v. Mathews*, 546 F.2d 1003, 1007-08 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 954 (1977). The *National Association* court, for example, noted that since the funds involved were "part of . . . [a] congressional appropriation" and eventually would lapse back into the federal treasury, they belonged to the government. 551 F.2d at 343. In *National Council*, the court viewed the "disposition of . . . unexpended funds" as conclusively establishing federal ownership, concluding therefore that they were insulated from a fee award. 546 F.2d at 1007.

governmental actions.³²⁵ Attempting to correct this inequity, Congress enacted the Equal Access to Justice Act (the Act).³²⁶

1. Equal Access to Justice Act

Despite assertions that the Act lacks a solid foundation in public policy,³²⁷ its legislative history clearly indicates that the goal of the statute is to encourage litigation by private citizens against the United States.³²⁸ Congress found that if it subjected federal authorities to judicial scrutiny, private litigants would engage in the public function of "refining and formulating public policy."³²⁹ The Act was intended to foster such activity by ameliorating the deterrent effect of burdensome legal fees.³³⁰ Moreover, by exposing governmental authorities to liability for fee awards, Congress endeavored to elicit bureaucratic accountability and to curtail unreasonable regulation and enforcement procedures.³³¹ Two mecha-

³²⁵ *E.g.*, CONF. REP. No. 96-1434, 96th Cong., 2d Sess. 21, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 5003, 5010 [hereinafter cited as CONF. REP. No. 96-1434]; H.R. REP. No. 96-1418, 96th Cong., 2d Sess. 5, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 4984, 4984 [hereinafter cited as H.R. REP. No. 96-1418]; 125 CONG. REC. S10,920 (daily ed. July 31, 1979) (remarks of Sen. Thurmond); *id.* at S10,917 (remarks of Sen. Goldwater); *id.* at S10,915 (remarks of Sen. Dole); *id.* at S10,914 (remarks of Sen. DeConcini).

³²⁶ Pub. L. No. 96-481, 94 Stat. 2325 (1980) (codified in 5 U.S.C. § 504 (Supp. IV 1980) and 28 U.S.C.A. § 2412 (West Supp. 1981)).

³²⁷ *See, e.g.*, *Hearings on the Equal Access to Justice Act of 1979, S. 265 Before the Subcommittee on Improvements in Judiciary Machinery of the Comm. on the Judiciary*, 96th Cong., 1st Sess. 53 (1979) [hereinafter cited as *1979 Hearings*] (statement of Raymond S. Calamaro).

³²⁸ *See* CONF. REP. No. 96-1434, *supra* note 325, at 21; H.R. REP. No. 96-1418, *supra* note 325, at 5-6; S. REP. No. 96-253, 96th Cong., 1st Sess. 5-6 (1979) [hereinafter cited as S. REP. No. 96-253].

³²⁹ *E.g.*, H.R. REP. No. 96-1418, *supra* note 325, at 10; S. REP. No. 96-253, *supra* note 328, at 5-6.

³³⁰ *See, e.g.*, S. REP. No. 96-253, *supra* note 328, at 5-6; 125 CONG. REC. S10,916 (daily ed. July 31, 1979) (remarks of Sen. Domenici); 125 CONG. REC. S10,922 (daily ed. July 31, 1979) (remarks of Sen. Nelson).

³³¹ 125 CONG. REC. S10,914 (daily ed. July 31, 1979) (remarks of Sen. DeConcini). Significantly, a proposal to create a system of mandatory minimum fee awards was contemplated as a means of deterring unreasonable agency action and of encouraging suits against the United States. *See 1979 Hearings, supra* note 327, at 19 (statement of Jim Zwerg); *id.* at 43 (comment of Sen. DeConcini); *id.* at 89 (statement of Jay Dushoff). The suggestion was rejected, however, for fear that it would have a potentially chilling effect upon legitimate regulation and enforcement efforts. H.R. REP. No. 96-1418, *supra* note 325, at 13-14. Another program which had been considered was the funding of citizen participation in agency proceedings. *See 1979 Hearings, supra* note 327, at 47-48 (statement of Raymond S. Calamaro). *See generally* Lenny, *The Case for Funding Citizen Participation in the Administrative Process*, 28 AD. L. REV. 483, 484-90 (1976); Mogel, *Award of Attorneys' Fees in Administrative Proceedings—Is It In The Public Interest?*, 49 MISS. L.J. 271, 271-84 (1978);

nisms are employed by the Act in furtherance of the aforementioned objectives. First, the Act partially abrogates federal immunity from fee shifting by subjecting the United States to all "common law and statutory exceptions to the American rule."³³² Thus, the bad faith³³³ and common fund³³⁴ doctrines apply in litigation against the United States "to the same extent" that they apply to private parties.³³⁵ Second, the Act provides that the federal government shall be liable for "fees and other expenses"³³⁶ awarded by a court³³⁷ or an adjudicative officer at an adversarial administrative hearing³³⁸ upon application³³⁹ by a prevailing

Comment, *Funding Public Participation in Agency Proceedings*, 27 AM. U.L. REV. 981, 988-1010 (1978). For other proposed reforms, see Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

³³² Equal Access to Justice Act, Pub. L. No. 96-481, § 202(c)(2), 94 Stat. 2325 (1980).

³³³ See notes 14-22 and accompanying text *supra*.

³³⁴ See notes 6-13 and accompanying text *supra*.

³³⁵ 28 U.S.C.A. § 2412(b) (West Supp. 1981). The House Committee on the Judiciary noted that the Act would permit fee awards against the federal government pursuant to all statutory exceptions to the American rule. See H.R. REP. No. 96-1418, *supra* note 325, at 17. The Act, therefore, appears to supercede those decisions holding that fee-shifting statutes do not apply to the United States. See, e.g., NAACP v. Civiletti, 609 F.2d 514, 518-19 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 922 (1980); cf. United Handicapped Fed'n v. André, 622 F.2d 342, 348 n.6 (8th Cir. 1980) (treating the issue as an open question).

³³⁶ Recoverable fees include costs incurred in preparing studies or projects for purposes of the litigation and the reasonable expenses of expert witnesses, 5 U.S.C. § 504(b)(1)(A) (Supp. IV 1980); 28 U.S.C.A. § 2412(d)(2)(A) (West Supp. 1981), although the compensation of expert witnesses may not exceed the rate paid by the government for its most highly paid expert. *Id.* In order to ensure that "each agency [is] accountable for its actions," H.R. REP. No. 96-1418, *supra* note 325, at 16, and to deter unreasonable governmental action, see, e.g., 1979 Hearings, *supra* note 327, at 2 (opening statement of Sen. DeConcini) ("the most persuasive way to make an agency assume a more reasonable posture is to affect its pocket-book"); 125 CONG. REC. S10,920 (daily ed. July 31, 1979) (remarks of Sen. Thurmond); *id.* at S10,923 (remarks of Sen. Bayh), a fee award may be paid out of the budget of the federal agency involved in the litigation. 5 U.S.C. § 504(d)(1) (Supp. IV 1980); 28 U.S.C.A. § 2412(d)(4)(A) (West Supp. 1981).

³³⁷ 28 U.S.C.A. § 2412(d)(1)(A) (West Supp. 1981).

³³⁸ 5 U.S.C. § 504(a)(1) (Supp. IV 1980). The requirement of an adversarial administrative hearing is designed to ensure that the Act will benefit those litigants with "a concrete interest at stake," but who nevertheless are deterred by the considerable time and expense involved in pursuing administrative remedies. H.R. REP. No. 96-1418, *supra* note 325, at 14. The hearing will be sufficiently adversarial within the meaning of the Act if the administrative agency declares a position, see CONF. REP. No. 96-1434, *supra* note 325, at 23, and if the United States is "represented by counsel or otherwise." 5 U.S.C. § 504(b)(1)(C) (Supp. IV 1980). Although the statute expressly excludes governmental actions concerning rate fixing and the granting or renewal of licenses, see *id.*, proceedings which deal with the suspension or modification of licenses fall within the ambit of the act. H.R. REP. No. 96-1418, *supra* note 325, at 15.

³³⁹ 5 U.S.C. § 504(a)(2) (Supp. IV 1980); 28 U.S.C. § 2412(d)(1)(B) (West Supp. 1981). A party must apply for fees within 30 days of a final disposition. *Id.* The application must

party.³⁴⁰ The magnitude of fee recovery in these cases is based upon prevailing market rates and the nature of the litigation, although the maximum hourly rate is seventy-five dollars,³⁴¹ subject

show that the applicant is the prevailing party, *see* note 340 *infra*, demonstrate that the financial eligibility requirements for an award are met, *see id.*, and itemize the expenses sought to be reimbursed. *Id.* The party must also allege that the government's position was "not substantially justified." *Id.* If the government does not oppose the petition, "an award should generally be made." H.R. REP. No. 96-1418, *supra* note 325, at 13, 16.

³⁴⁰ 5 U.S.C. § 504(a)(2) (Supp. IV 1980). The section of the Act permitting awards to prevailing parties applies to all cases pending on October 1, 1981, or commenced between that date and October 1, 1984. *See* Equal Access to Justice Act, Pub. L. No. 96-481, § 204(c), 94 Stat. 2329 (1980). This section is experimental and will be evaluated after its automatic repealer in 1984. H.R. REP. No. 96-1418, *supra* note 325, at 16; S. REP. No. 96-253, *supra* note 328, at 8. The provisions subjecting the United States to fee shifting according to common-law or statutory rules, *see* 28 U.S.C.A. § 2412(a)-(c) (West Supp. 1981), are not subject to the 1984 repealer. *See* Pub. L. No. 96-481, § 204(c), 94 Stat. 2329 (1980).

Notably, Congress intended the scope of the prevailing party concept under the Act to be consistent with judicial interpretations of the phrase under existing fee-shifting statutes. *E.g.*, CONF. REP. No. 96-1434, *supra* note 325, at 21; H.R. REP. No. 96-1418, *supra* note 325, at 11; S. REP. No. 96-253, *supra* note 328, at 7. Indeed, congressional committees have specifically adopted many of the theories under which a party may be considered to have prevailed, including favorable settlements, *see, e.g.*, CONF. REP. No. 96-1434, *supra* note 325, at 21; H.R. REP. No. 96-1418, *supra* note 345, at 11 S. REP. No. 96-253, *supra* note 328, at 7, voluntary dismissals, *see, e.g.*, CONF. REP. No. 96-1434, *supra* note 325, at 21-22, substantial victory, *see, e.g., id.* at 22, and interim awards. *See, e.g.*, H.R. REP. No. 96-1418, *supra* note 325, at 11. For a discussion of these theories in the context of other fee-shifting statutes, *see* notes 38-52 & 93-124 and accompanying text *supra*. Notably, the catalyst approach, *see* notes 53-72 and accompanying text *supra*, has not received express legislative approval in the context of the Equal Access to Justice Act. It remains to be seen whether this theory will be adopted in this context through judicial construction.

Regardless of the theory under which victory is claimed, a party seeking to qualify for a fee award must be (1) an individual whose net worth is not in excess of \$1,000,000, (2) a corporation, partnership, association or sole owner of an unincorporated business whose net worth is not in excess of \$5,000,000, or (3) the sole owner of an unincorporated business, or a corporation, partnership, association or organization with 500 employees or less. 5 U.S.C. § 504(b)(1)(B) (Supp. IV 1980). The above criteria must have been met either when the action was initiated or when the adverse determination occurred. *Id.*

Interestingly, several spokesmen from both the government and the private sector have asserted that the net worth figures are inappropriate. *See* 1979 *Hearings*, *supra* note 327, at 53; *Equal Access to Justice Act, Hearings on S.265, H.R. 6429 and H.R. 7208 by the Subcomm. on Courts, Civil Liberties and the Administration of Justice*, 96th Cong., 2d Sess. (1980).

³⁴¹ 5 U.S.C. § 504(b)(1)(A) (Supp. IV 1980); 28 U.S.C.A. § 2412(d)(2)(A) (West Supp. 1981). In determining whether an award exceeds the hourly maximum, only amounts going toward actual compensation of the attorney are considered. Overhead and incidental expenses are excluded from the calculation. H.R. REP. No. 96-1418, *supra* note 325, at 15. Moreover, since prevailing market rates are used to assess the fee, agreements between the attorney and his client are not considered. *Id.*; 125 CONG. REC. S10,923 (daily ed. July 31, 1979) (remarks of Sen. Kennedy). Notably, an argument has been made that the \$75 hourly maximum is prejudicial to lawyers located in major cities. 1979 *Hearings*, *supra* note 327, at 88 (statement of Jay Dushoff). Thus, it has been suggested that the prevailing rates within

to adjustment for special considerations.³⁴² Fees may not be awarded, however, upon a governmental showing of substantial justification for its position,³⁴³ or upon proof of special circumstances which would render an award unjust.³⁴⁴

each community should be the basis for computing awards under the Act. *Id.* at 16 (statement of Ed Bolding). Others have proposed the use of multipliers to encourage attorneys to agree to represent litigants suing under the Act. *See id.* at 20 (statement of Prof. Winston D. Woods). *See generally* notes 289-291 and accompanying text *supra*.

³⁴² 5 U.S.C. § 504(b)(1)(A) (Supp. IV 1980); 28 U.S.C.A. § 2412(d)(2)(A) (West Supp. 1981). An award may exceed the \$75 hourly maximum when a court finds special justification, such as an "increase in the cost of living" or a "limited availability of qualified attorneys." 5 U.S.C. § 504(b)(1)(A) (Supp. IV 1980); 28 U.S.C.A. § 2412(d)(2)(A) (West Supp. 1981).

³⁴³ 5 U.S.C. § 504(a)(1) (Supp. IV 1980); 28 U.S.C.A. § 2412(d)(1)(A) (West Supp. 1981). The burden of proving substantial justification was placed upon the government primarily because of the "tendency to place the burden of proof on the party who has readier access to and knowledge of the facts in question." S. REP. NO. 96-253, *supra* note 328, at 6. Indeed, the legislators deemed it appropriate to place this burden upon the United States because it is much easier for the government to demonstrate its own reasonableness than for a private party to prove arbitrariness. *Id.*; H.R. REP. NO. 96-1418, *supra* note 325, at 10-11. Although some individuals have interpreted the Act as requiring that substantial justification be presumed to be lacking, *see, e.g.*, 125 CONG. REC. S10,915 (daily ed. July 31, 1979) (remarks of Sen. Dole); 1979 *Hearings, supra* note 327, at 49 (statement of Raymond S. Calamaro), the consensus of opinion is to the contrary, *see, e.g.*, H.R. REP. NO. 96-1418, *supra* note 325, at 11; S. REP. NO. 96-253, *supra* note 328, at 7; 125 CONG. REC. S10,918 (daily ed. July 31, 1979) (remarks of Sen. Ford).

The "substantial justification" inquiry focuses upon governmental positions and actions during the course of the proceedings. H.R. REP. NO. 96-1418, *supra* note 325, at 11. In *Alspach v. District Director of Internal Revenue*, 50 U.S.L.W. 2383 (D. Md. Nov. 27, 1981), the court attempted to discern what is meant by a government's "position." The *Alspach* petitioners had sought to enjoin the IRS from collecting a tax assessment upon the ground that the statutory notice requirements were not observed. *Id.* Shortly thereafter, upon learning the relevant facts, the government consented to dismissal of the action, and the petitioners sought attorney's fees. *Id.* After acknowledging that the Act's legislative history rendered little assistance, the court determined that Congress' intention "was to extend application of existing common law and statutory exceptions to the American rule on attorneys' fees to the Government." *Id.* Significantly, after noting the similarity between the statute's terminology and Federal Rule 37(a)(4), the court interpreted the term "position" to mean "the Government's actions or positions in prosecuting or defending litigation, not . . . [the] actions upon which suit is based." *Id.* (emphasis added).

³⁴⁴ 5 U.S.C. § 504(a)(1) (Supp. IV 1980); 28 U.S.C.A. § 2412(d)(1)(A) (West Supp. 1981). Congress created the special circumstances exception as a "safety valve" to preclude fee awards when the government has "advanc[ed] in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts." S. REP. NO. 96-253, *supra* note 328, at 7; *see* 125 CONG. REC. S10,923 (daily ed. July 31, 1979) (remarks of Sen. Kennedy). Another circumstance which may lead to the denial or reduction of an award is the prevailing party's dilatory conduct. 5 U.S.C. § 504(a)(3) (Supp. IV 1980); 28 U.S.C.A. § 2412(d)(1)(C) (West Supp. 1981).

When an administrative officer determines that fees should be awarded, a party seeking review of the decision may petition the federal court to which an appeal ordinarily would lie. 5 U.S.C. § 504(c)(2) (Supp. IV 1980). Congress provided that such review is discretionary,

Although the Act's standard of "substantial justification" has been praised for its susceptibility to judicial interpretation,³⁴⁵ it also has been denounced as a vague concept which is difficult to apply.³⁴⁶ It appears both characterizations are accurate. The term "substantial justification" originated in Rule 37 of the Federal Rules of Civil Procedure³⁴⁷ as the standard for determining whether sanctions should be imposed upon parties who have abused the discovery process.³⁴⁸ Thus, numerous courts have applied and construed the phrase.³⁴⁹ Judicial interpretation in this context, however, primarily is based upon the specific facts of given cases, and a few general rules have been articulated.³⁵⁰

The legislative history of the Equal Access to Justice Act states that "[t]he test of whether or not a [g]overnment action is substantially justified is essentially one of reasonableness."³⁵¹ It

however, in order "to protect the inundation of the federal courts by routine appeals from fee determinations." H.R. REP. NO. 96-1418, *supra* note 325, at 16. Similar concerns motivated Congress to preclude review of a court's denial of leave to appeal. *Id.* An agency's decision will be reversed or modified only upon a showing that the adjudicative officer abused his discretion. 5 U.S.C. § 504(c)(2) (Supp. IV 1980).

³⁴⁵ 125 CONG. REC. S10,914 (daily ed. July 31, 1979) (remarks of Sen. DeConcini).

³⁴⁶ *See, e.g., 1979 Hearings, supra* note 327, at 10-11 (statement of Michael Hawkins); *id.* at 45 (statement of Raymond S. Calamaro); *id.* at 162 (statement of Federal Maritime Commission); *id.* at 165 (statement of the National Labor Relations Board).

³⁴⁷ H.R. REP. NO. 96-1418, *supra* note 325, at 13; 125 CONG. REC. S10,914 (daily ed. July 31, 1979) (remarks of Sen. DeConcini); *see* FED. R. CIV. P. 37.

³⁴⁸ FED. R. CIV. P. 37; *see, e.g., In re Air Crash Disaster, 90 F.R.D. 613, 620 (N.D. Ill. 1981); White v. Beloginis, 53 F.R.D. 480, 481 (S.D.N.Y. 1971); Lizza & Sons, Inc. v. Diminico & Pallotta, Inc., 23 F.R.D. 143, 144 (D. Mass. 1959).*

³⁴⁹ The Senate Judiciary Committee's reliance upon judicial construction of the phrase "substantially justified" in the discovery context is underscored by its rejection of an amendment which would have substituted the language "reasonably justified." *See* S. REP. NO. 96-253, *supra* note 328, at 8.

³⁵⁰ *See, e.g., Whitehouse Inv., Ltd. v. Bernstein, 51 F.R.D. 163, 165-67 (S.D.N.Y. 1970); Palma v. Lake Waukomis Dev. Co., 48 F.R.D. 366, 369 (W.D. Mo. 1970); Brunswick Corp. v. Chrysler Corp., 291 F. Supp. 118, 122 (E.D. Wis. 1968).* Although some courts construing rule 37 have equated substantial justification with "reasonable" justification, *see, e.g., SCM Societa Commerciale S.P.A. v. Industrial & Commercial Research Corp., 72 F.R.D. 110, 112 n.3 (N.D. Tex. 1976)*, other courts have applied the rule without elaborating upon its meaning. *See, e.g., Surg-O-Flex of America, Inc. v. Bergen Brunswick Co., 76 F.R.D. 654, 655 (D. Conn. 1977); Humphreys Exterminating Co. v. Poulter, 62 F.R.D. 392, 394 (D. Md. 1974); Technitrol, Inc. v. Digital Equip. Corp., 62 F.R.D. 91, 93 (N.D. Ill. 1973).*

³⁵¹ H.R. REP. NO. 96-1418, *supra* note 325, at 10; *accord*, CONF. REP. NO. 96-1434, *supra* note 325, at 22; S. REP. NO. 96-253, *supra* note 348, at 6; 125 CONG. REC. S10,914 (daily ed. July 31, 1979) (remarks of Sen. DeConcini); 125 CONG. REC. at S10,918 (remarks of Sen. Ford); 125 CONG. REC. at S10,923 (remarks of Sen. Kennedy). Several of the legislators used the term "reasonableness" synonymously with the phrase "substantial justification." *See, e.g., 125 CONG. REC. at S10,915* (remarks of Sen. Culver); *Id.* at S10,922 (remarks of Sen. Bayh); *id.* at S10,924 (remarks of Sen. Warner).

seems that a mere absence of bad faith³⁵² will not suffice to demonstrate that the government's position "had a reasonable basis both in law and fact."³⁵³ Conversely, a presumption of nonjustification will not arise from the mere fact that the government lost its case.³⁵⁴ The legislative history of the Act, however, indicates that a judgment on the pleadings, a directed verdict, a dismissal of a similar claim in a prior suit,³⁵⁵ or a settlement which materially differs from the character of the pleadings in nature or amount,³⁵⁶ may evince a lack of substantial justification.

It is submitted that all doubts as to the sufficiency of the government's justification for its position should be resolved in favor of a prevailing plaintiff. Such an approach not only would comport with Congress' intention that the government have the burden of proof in this regard,³⁵⁷ but would be in furtherance of the underlying purposes of the Act.³⁵⁸ In this regard, the courts should not be overly accommodating of proffered justifications, since such an approach could thwart the Act's goal of encouraging private litigation against the government. Moreover, a lenient construction of the substantial justification standard would frustrate the congressional objective of curtailing unreasonable governmental activities.

B. Fee Awards Against the States

In 1793, the Supreme Court interpreted article III of the Constitution to permit the federal courts to entertain suits between a state of the union and a citizen of another state.³⁵⁹ Fearing that

³⁵² During the hearing preceding passage of the Act, it was recognized that under the rule 37 standard of substantial justification, "more than the mere absence of bad motive" must be shown before sanctions for violating discovery rules can be imposed. See 1979 Hearings, *supra* note 327, at 49 (statement of Raymond S. Calamaro). At least one individual has likened the Act's requirement of substantial justification to the showing of good faith necessary to trigger the qualified immunity of government officials. See *id.* at 22 (statement of Prof. Winston D. Woods). See generally *Wood v. Strickland*, 420 U.S. 308, 322 (1975).

³⁵³ H.R. REP. NO. 96-1418, *supra* note 325, at 10.

³⁵⁴ *Id.* at 11; S. REP. NO. 96-253, *supra* note 328, at 7.

³⁵⁵ CONF. REP. NO. 96-1434, *supra* note 325, at 22; H.R. REP. NO. 96-1418, *supra* note 325, at 11; S. REP. NO. 96-253, *supra* note 328, at 6-7.

³⁵⁶ CONF. REP. NO. 96-1434, *supra* note 325, at 22.

³⁵⁷ See note 343 *supra*.

³⁵⁸ See notes 329-331 and accompanying text *supra*.

³⁵⁹ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 466 (1793). The *Chisholm* Court felt that the plain language of article III contemplated the exercise of federal jurisdiction over the states. *Id.* at 466-67. Justice Iredell dissented, asserting that the states enjoyed a common-law sovereign immunity derived from England, *id.* at 437 (Iredell, J., dissenting), and the

this decision would lead to a compromise of their sovereignty,³⁶⁰ the states proposed and ratified the eleventh amendment, which provides that the federal judicial power does not extend to suits against the states.³⁶¹ This century has borne witness to a gradual erosion of this state immunity. Since it is obvious that an entity must be subject to suit before the federal courts can award fees, each limitation of this immunity doctrine bears great significance to those who seek to recover their legal costs from a state defendant.

In *Ex Parte Young*,³⁶² the first decision to assail the citadel of eleventh amendment immunity, the Supreme Court held that suits involving alleged unconstitutional actions of state officials could be heard by the federal judiciary.³⁶³ The Court based its holding upon

people of the state. *Id.* at 448 (Iredell, J., dissenting). He concluded, therefore, that a state is not subject to suit absent its consent or a specific congressional provision to the contrary. *Id.* at 449 (Iredell, J., dissenting). Commentators have noted that it is uncertain whether the framers of the Constitution really intended to abrogate state sovereign immunity. *See, e.g., Comment, Suits Against State Officials: Attorney's Fees and the Eleventh Amendment*, 53 TEX. L. REV. 85, 86 & n.7 (1974) [hereinafter cited as *State Officials*]. Although Hamilton declared that "[t]he power of determining causes . . . between one State and the citizens of another" is essential to peace among the states, THE FEDERALIST No. 80, at 501 (A. Hamilton), he also maintained that "[i]t is inherent in the nature of [a state's] sovereignty not to be amenable to the suit of an individual *without its consent* Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States" *Id.* No. 81, at 511 (A. Hamilton) (emphasis in original).

³⁶⁰ Professor Tribe has noted that the states vehemently opposed the *Chisholm* decision in part because they feared the prospect of suits based upon Revolutionary War debts. *See* Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Power Issues in Controversies about Federalism*, 89 HARV. L. REV. 682, 683 (1976).

³⁶¹ The eleventh amendment provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI. Having been proposed 2 days after the Court announced its decision in *Chisholm*, the eleventh amendment was ratified within 5 years. *See* C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 64-67 (1972). Notably, although the *Chisholm* opinion indicated that it was doubtful whether the article III power of the federal judiciary extended to suits against a state by its *own* citizens, *see* *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 469 (1793), the eleventh amendment has been construed to preclude such actions. *See* *Hans v. Louisiana*, 134 U.S. 1, 20 (1890).

³⁶² 209 U.S. 123 (1907).

³⁶³ *See id.* at 159. The significant issue in *Young* was whether the federal courts had jurisdiction to enjoin the attorney general of Minnesota from enforcing an unconstitutional state statute. *Id.* at 149. Holding that the federal judiciary has such authority, the Court reasoned that "the use of the name of the State to enforce an unconstitutional act" strips the official of his governmental status and subjects him to liability in his individual capacity since "[t]he State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *Id.* at 159-60. *See also* *United States v. Lee*, 106

the fiction that "the State in its sovereign or governmental capacity" was not a party to the proceeding.³⁶⁴ Although it limited the impact of the eleventh amendment, this fiction was not extended to suits for pecuniary relief. Indeed, the courts in such cases abandoned the *Young* fiction and prohibited monetary relief upon the ground that the state was the real party in interest,³⁶⁵ and therefore, could not be sued absent a waiver of immunity.³⁶⁶

The traditional practice of precluding even nominal cost awards without express consent³⁶⁷ was thrust into uncertainty after the Supreme Court summarily affirmed a fee award against a state.³⁶⁸ The lower courts interpreted this action as a signal that awards of costs could be made incident to the federal judiciary's power under *Ex Parte Young* to grant injunctive relief against state officials.³⁶⁹ In *Edelman v. Jordan*,³⁷⁰ however, the Supreme Court held that when a judgment requires the payment of funds from a state treasury, mere characterization of the remedy as "injunctive" or "equitable" will not suffice to preclude application of the eleventh amendment.³⁷¹ Rather, the Court stated, the important inquiry is whether a money judgment "is in practical effect

U.S. 196 (1882); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824).

³⁶⁴ 209 U.S. at 159.

³⁶⁵ See, e.g., *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577 (1946); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945); *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944). Noting that the "nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding," the *Ford* Court held that in an action for money damages, "the State is the real, substantial party in interest," and accordingly, is protected by the eleventh amendment. 323 U.S. at 464; see 327 U.S. at 577; 322 U.S. at 53.

³⁶⁶ See, e.g., *Missouri v. Fiske*, 290 U.S. 18, 24 (1933); *Gunter v. Atlantic Coast Line R.R.*, 200 U.S. 273, 284 (1906); *Clark v. Barnard*, 108 U.S. 436, 447 (1883). In order to waive its immunity under the eleventh amendment, a state must clearly demonstrate an intention to become subject to suit in federal courts. See, e.g., *Ruman v. Commonwealth of Pa., Dep't of Revenue*, 462 F. Supp. 1355, 1359 (M.D. Pa.), *aff'd mem.*, 612 F.2d 574 (3d Cir. 1979), *cert. denied*, 446 U.S. 964 (1980). The courts will not find such an intention by implication absent convincing evidence. *E.g.*, *Riggle v. State*, 577 F.2d 579, 582 (9th Cir. 1978); *Zentgraf v. Texas A & M Univ.*, 492 F. Supp. 265, 272 (S.D. Tex. 1980); *Safeco Ins. Co. v. Guyton*, 443 F. Supp. 10, 12 (C.D. Cal. 1978); see *Edelman v. Jordan*, 415 U.S. 651, 678 & n.19 (1974).

³⁶⁷ See *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70, 73-74 (1927) (dictum) (citing *United States v. Boyd*, 46 U.S. (5 How.) 29, 51 (1847)); *United States v. McLemore*, 45 U.S. (4 How.) 286, 288 (1846); *The Antelope*, 25 U.S. (12 Wheat.) 546, 550 (1827).

³⁶⁸ *Amos v. Sims*, 409 U.S. 942 (1972), *aff'g mem.*, *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala. 1972) (per curiam).

³⁶⁹ See, e.g., *Brandenburger v. Thompson*, 494 F.2d 885, 888 (9th Cir. 1974).

³⁷⁰ 415 U.S. 651 (1974).

³⁷¹ *Id.* at 666.

indistinguishable in many aspects from an award of damages against the State.³⁷² The Court concluded that since prospective relief requiring the expenditure of funds has a mere "ancillary effect on the state treasury"³⁷³ it is permissible. Conversely, retroactive equitable relief, which requires the state to pay money to the plaintiff "as a form of compensation," was held to be barred by the eleventh amendment.³⁷⁴ This distinction left courts divided concerning the proper characterization of fee awards.³⁷⁵

In *Fitzpatrick v. Bitzer*,³⁷⁶ a more definitive articulation concerning the propriety of a fee award against a state emerged, although the Court did not decide whether fee awards fall within the "ancillary effect" doctrine of *Edelman*.³⁷⁷ In *Fitzpatrick*, the plaintiffs sued under Title VII of the Civil Rights Act of 1964 for retroactive retirement benefits and for prospective equitable relief and attorney's fees.³⁷⁸ The Supreme Court permitted all three types of relief despite its interpretation of the scope of the eleventh amendment in *Edelman*.³⁷⁹ In support of its decision, the Court emphasized that Title VII contains explicit congressional authorization for the federal judiciary to entertain suits against the states and to provide all of the relief sought by the plaintiffs.³⁸⁰ Moreover, the Court found that the eleventh amendment did not circumscribe Congress' power in this regard because Title VII was enacted pursuant to the authority granted by the fourteenth amendment to enforce its provisions "by appropriate legislation."³⁸¹ The Court

³⁷² *Id.* at 668.

³⁷³ *Id.*

³⁷⁴ *Id.* The Court observed that when prospective relief is granted under *Ex Parte Young*, it is inevitable that the state will suffer some "fiscal consequences." *Id.* at 667-68. When a state incurs costs "not as a necessary consequence of compliance in the future . . . but as a form of compensation," however, it is indistinguishable from awards of money damages. *Id.* at 668.

³⁷⁵ Compare *Thonen v. Jenkins*, 517 F.2d 3, 7-8 (4th Cir. 1975) (*Edelman* decision permits recovery of attorney's fees) with *Jordan v. Gilligan*, 500 F.2d 701, 709 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975) (*Edelman* holding did not remove eleventh amendment bar to fee recovery).

³⁷⁶ 427 U.S. 445 (1976).

³⁷⁷ *Id.* at 456-57.

³⁷⁸ *Id.* at 449-450.

³⁷⁹ *Id.* at 447-48. The Court noted that all parties to the action conceded that the relief sought was "in fact indistinguishable from that sought . . . in *Edelman*." *Id.* at 452. Nevertheless, the Court observed that because *Fitzpatrick* involved congressional authorization for the monetary relief sought, *Edelman* did not control. *Id.*

³⁸⁰ *Id.* at 447-48, 452.

³⁸¹ *Id.* at 453 & n.9.

concluded that since the "principle of state sovereignty" embodied in the eleventh amendment is "necessarily limited" by the powers granted to Congress in the fourteenth amendment, the state could not claim immunity from the relief sought.³⁸²

In *Hutto v. Finney*,³⁸³ the Supreme Court answered two questions left unanswered by its *Edelman* and *Fitzpatrick* decisions. First, the Court held that express statutory language is not a prerequisite to a finding that Congress had abrogated the States' eleventh amendment immunity.³⁸⁴ Examining the Civil Rights Attorney's Fees Awards Act, the *Hutto* Court divined an adequate implied waiver of immunity both from the broad language of the Act and from its legislative history.³⁸⁵ Comparing the inherent power of the federal courts to assign costs among litigants³⁸⁶ with the power of Congress to include attorney's fees "as part of the costs,"³⁸⁷ the Court noted that "it would be absurd to require [Congress to make] an express reference to state litigants whenever . . . a new item . . . is added to the category of taxable costs."³⁸⁸ The second significant aspect of the *Hutto* decision was its holding that fee awards may be considered ancillary to a court's injunctive power, within the meaning of the *Edelman* opinion, when they are

³⁸² *Id.* at 456. The Court noted:

When Congress acts pursuant to § 5 [of the fourteenth amendment], not only is it exercising [legislative] authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.

427 U.S. at 456 (citations and footnote omitted).

³⁸³ 437 U.S. 678 (1978).

³⁸⁴ *Id.* at 697-98.

³⁸⁵ *Id.* at 693-94. The Court noted that the Fees Awards Act, by its own terms "applies to 'any' action brought to enforce certain civil rights laws." *Id.* at 694; see 42 U.S.C. § 1988 (1976), as amended by Act of Oct. 21, 1980, Pub. L. No. 96-481, 94 Stat. 2330. Moreover, the Court observed that the legislative history accompanying the Act expressly stated that Congress intended attorney's fees to be obtainable from state and local governments. 437 U.S. at 694 (citing S. REP. No. 1011, *supra* note 34, at 5).

³⁸⁶ 437 U.S. at 696. The Court noted that it is well settled that the federal judiciary can assess costs against the states. *Id.* (citing *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70, 74 (1927)).

³⁸⁷ 437 U.S. at 695-96. The *Hutto* Court referred to numerous statutes which allow for recovery of attorney's fees as part of costs. *Id.* at 697 n.28 (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 260 n.33 (1975)).

³⁸⁸ 437 U.S. at 696-97.

imposed pursuant to the traditional bad faith exception to the American rule against fee awards.³⁸⁹

The Supreme Court's pronouncements concerning congressional circumscription of the eleventh amendment assume added importance in light of the recent *Maine v. Thiboutot*³⁹⁰ opinion. Although *Thiboutot* did not directly involve the eleventh amendment,³⁹¹ the Court's holding considerably expanded the availability of fee awards against states. In *Thiboutot*, the Supreme Court held that Congress intended section 1983 of Title 42, which provides for the redress of rights "secured by the Constitution and laws" of the United States,³⁹² to encompass purely statutory violations of federal law as well as violations of constitutional and civil rights.³⁹³ Moreover, the Court construed the Fees Awards Act to permit fee shifting in all section 1983 suits, regardless of whether the underlying claim was predicated upon a constitutional violation.³⁹⁴

In a vigorous dissent to the *Thiboutot* decision, Justice Powell

³⁸⁹ *Id.* at 690-92. The *Hutto* Court upheld the district court's authority to assess fees against the state for failing to comply with various orders. *Id.* at 689. The Court stated that in exercising their authority under *Edelman*, "federal courts are not reduced to issuing injunctions against state officers and hoping for compliance." *Id.* at 690. When a state official does not obey a judicial order, the Court noted, contempt sanctions may issue, including incarceration and remedial fines. *Id.* at 690-91. The Court observed that the power to award fees for bad faith, like the imposition of fines, "is properly treated as ancillary to the federal court's power to impose injunctive relief." *Id.* at 691.

³⁹⁰ 448 U.S. 1 (1980).

³⁹¹ *Id.* at 9 n.7. Because the plaintiffs in *Thiboutot* brought suit in the judicial system of the state of Maine, no eleventh amendment issues were presented. *Id.*

³⁹² 42 U.S.C. § 1983 (1976 & Supp. III 1979). Section 1983 provides:

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

Id.

³⁹³ 448 U.S. at 4. The plaintiffs in *Thiboutot* had alleged that the state of Maine violated their rights under federal law by enforcing a restrictive interpretation of the Social Security Act. *Id.* at 3. The Supreme Court noted that the central issue in the case was whether Congress intended to provide a remedy for such a claim under section 1983. *Id.* at 4. Observing that Congress did not qualify the phrase "and laws" when it enacted section 1983, the Court stated that the "plain language of the statute" demonstrated that the claim should be cognizable. *Id.* Moreover, the Court focused upon several of its prior decisions which had interpreted section 1983 as providing a remedy for both constitutional and statutory violations. *Id.*

³⁹⁴ *Id.* at 8-10. In construing the Fees Awards Act, the Court again relied upon the plain meaning of the statutory language. *Id.* at 9. The Court also noted that "[t]he legislative history is entirely consistent with the plain language" of the Act. *Id.*

contended that the majority had placed insufficient emphasis upon the historic backdrop of civil rights legislation and, consequently, had extended section 1983 well beyond its original functions.³⁹⁵ Justice Powell stated that the Court's interpretation of both section 1983 and the Fees Awards Act constituted a drastic expansion of state governmental liability which could "virtually eliminate the 'American Rule' in suits against [state and local] officials."³⁹⁶ Indeed, the Justice noted, the Court's holding would permit a section 1983 suit to be maintained whenever any of a multitude of social welfare provisions were implicated, except in the rare instance where the federal statute in issue provided for an exclusive remedy.³⁹⁷

There is little doubt that the *Thiboutot* Court's expansive interpretation of section 1983 will have a significant impact upon the availability of fee awards against state officials. Cases involving alleged deprivations of rights created by federal and state cooperative programs, for which no express private right of action exists, may now yield recovery of legal fees if the pleadings assume a civil rights posture.³⁹⁸ Notwithstanding its broad scope, however, it must be recognized that *Thiboutot* involved only statutory interpretation and congressional intent. Indeed, it remains to be seen whether such an expansive interpretation of legislative power runs afoul of the eleventh amendment.

In *Maher v. Gagne*,³⁹⁹ the Supreme Court partially resolved the constitutional tension created by *Thiboutot*. In *Maher*, the plaintiff sued under section 1983, alleging that Connecticut's im-

³⁹⁵ *Id.* at 14-19 (Powell, J., dissenting). Observing that the phrase "and laws" arose out of an 1874 revision of the civil rights laws, Justice Powell noted that it was the intention of the revisers to maintain the substantive law existing prior to the revision. *Id.* at 16-19. Justice Powell further posited that since the Civil Rights Act previously had been held to be coextensive with its jurisdictional counterpart, 28 U.S.C. § 1343(3) (1976), *see* 448 U.S. at 19-20 (Powell, J., dissenting), the scope of section 1983 should be limited to causes of action arising under the Constitution or civil rights statutes as set forth in the jurisdictional provision. *Id.* at 20-22 (Powell, J., dissenting).

³⁹⁶ *Id.* at 12 (Powell, J., dissenting).

³⁹⁷ *Id.* at 22 & n.11 (Powell, J., dissenting).

³⁹⁸ *See* *Maine v. Thiboutot*, 448 U.S. 1, 22-24 (1980) (Powell, J., dissenting). In the wake of *Thiboutot*, alert plaintiffs' attorneys have been filing amended complaints to complement statutory allegations with civil rights claims. *See, e.g.,* *Davis v. HUD*, 627 F.2d 942, 946 n.1 (9th Cir. 1980) (alleged violation of Housing and Urban Development Act of 1974 supplemented by section 1983 action); *Yapalater v. Bates*, 494 F. Supp. 1349, 1354 (S.D.N.Y. 1980) (section 1983 action added to claim of violation of Title XIX of the Social Security Act), *aff'd per curiam*, 644 F.2d 131 (2d Cir. 1981).

³⁹⁹ 448 U.S. 122 (1980).

plementation of the Aid to Families with Dependent Children program violated the Social Security Act as well as the equal protection and due process clauses of the Constitution.⁴⁰⁰ The parties entered into a consent decree which, although not purporting to adjudicate the merits of the claim, did afford the plaintiff most of the relief sought.⁴⁰¹ After concluding, on the authority of *Thiboutot*, that Congress intended fees to be awarded in this type of case, the Court held that the enforcement power of the fourteenth amendment permits Congress to award fees when a "plaintiff prevails on a wholly statutory, noncivil rights claim pendent to a substantial constitutional claim."⁴⁰² The fact that the constitutional claim remained unadjudicated did not persuade the Court that the fee award was barred by the eleventh amendment. Indeed, the Court stated that in passing appropriate legislation to enforce the guarantees of the fourteenth amendment, Congress "clearly . . . [is] not limited to awarding fees only when a constitutional or civil rights claim is actually decided."⁴⁰³

Notably, the *Maher* Court did not resolve the issue of whether the Fees Awards Act would apply to a purely statutory noncivil rights claim against a state.⁴⁰⁴ Nevertheless, it is submitted that even if Congress intended the Fees Awards Act to apply to all federal statutes,⁴⁰⁵ the analyses enunciated in *Thiboutot* and *Maher* are limited to situations in which awards are granted for statutory deprivations of civil rights. Indeed, it is suggested that the Court cannot rely upon the fourteenth amendment's enforcement authority in noncivil rights cases and must, in such cases, find an alternative source of congressional power sufficient to circumvent eleventh

⁴⁰⁰ *Id.* at 124-25.

⁴⁰¹ *Id.* at 126 & n.8.

⁴⁰² *Id.* at 132; *see, e.g.,* *Lund v. Affleck*, 587 F.2d 75, 76-77 (1st Cir. 1978); *Seals v. Quarterly County Court*, 562 F.2d 390, 393-94 (6th Cir. 1977); *Keith v. Volpe*, 501 F. Supp. 403, 406-07 (C.D. Cal. 1980). *See also* *Bond v. Stanton*, 555 F.2d 172, 174 (7th Cir. 1977), *cert. denied*, 438 U.S. 916 (1978).

⁴⁰³ 448 U.S. at 132-33. The *Maher* Court held that an award of attorney's fees may be based upon an undecided substantial constitutional claim only when the dispositive statutory claim and the unresolved constitutional issue have "a common nucleus of operative fact." *Id.* at 132 n.15 (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)); *see* H.R. REP. No. 1558, *supra* note 38, at 4 n.7. *See also* *Anderson v. Redman*, 474 F. Supp. 511, 515 (D. Del. 1979).

⁴⁰⁴ 448 U.S. at 130.

⁴⁰⁵ *See, e.g.,* S. REP. No. 1011, *supra* note 34, at 5. The Judiciary Committee observed that fee awards are essential to the effective enforcement of those statutes to which the Fees Awards Act applies. *Id.* The report also referred to parties who "vindicate . . . fundamental rights" but it did not define those rights as constitutional or statutory. *See id.*

amendment immunity.⁴⁰⁶

Although the eleventh amendment remains a formidable obstacle to litigants suing for violations of those federal laws which do not implicate civil rights, *Thiboutot* and *Maher* undeniably present major inroads into a state's constitutional insulation from liability for fee awards in all other section 1983 cases. In order to avoid fee shifting under the rules announced in these cases a state may advance a number of arguments. First, counsel may urge the court to decide all constitutional issues squarely against the litigant seeking fees, thereby precluding an award.⁴⁰⁷ This approach may not meet with success in many cases, however, because of the well-settled principle that cases should be resolved in such a way as to avoid unnecessary constitutional rulings.⁴⁰⁸ A state might also argue that a contested statute is outside the ambit of section 1983. The Supreme Court noted the availability of such an approach in the recent case of *Pennhurst State School and Hospital v. Halderman*.⁴⁰⁹ In *Pennhurst*, the Court declared that the Developmen-

⁴⁰⁶ Several cases, which have explored Congress' authority to abrogate a state's eleventh amendment immunity, have indicated that such power extends well beyond the enforcement clause of the fourteenth amendment. In *Parden v. Terminal Ry.*, 377 U.S. 184 (1964), the Court engaged in a two-pronged analysis in finding that the state of Alabama had waived its immunity from suit under the Federal Employer's Liability Act. *See id.* at 196-97. The Court first found that Congress intended to subject the states to suit under the Act, and then concluded that Alabama consented to this incursion upon its sovereignty by continuing to operate a railroad after the effective date of the statute. *Id.* at 191-93. Although the *Parden* case was decided upon the ground that the state had consented to suit by its conduct, the Court's opinion also suggested that since "the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce," the doctrine of immunity could not "stand in the way of regulation" undertaken pursuant to that authority. *Id.* at 191-92.

After *Parden* was decided, the courts evolved a hybrid analysis for determining whether the eleventh amendment precluded the assertion of federal jurisdiction in a given situation. Pursuant to this approach, the courts first determined whether the statute permitting suit was enacted through a valid exercise of congressional power, and then decided whether there was sufficient evidence of a legislative intention to subject the states to suit. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 454-56 (1976). Following this lead, recent decisions have found support for limitations of state immunity in various constitutional grants of power and parallel statutory schemes. *See, e.g., Peel v. Florida Dep't of Transp.*, 600 F.2d 1070, 1081 (5th Cir. 1979) (act involving veteran's rights authorizing suit against state was within legitimate scope of war power and validly abrogated eleventh amendment immunity); *Mills Music, Inc. v. Arizona*, 591 F.2d 1278, 1285-86 (9th Cir. 1979) (state cannot assert immunity to "nullify the rights reserved and protected by Congress, acting pursuant to the Copyright and Patent Clause").

⁴⁰⁷ *See, e.g., Meriwether v. Sherwood*, 514 F. Supp. 433, 436 (S.D.N.Y. 1981). *See also Haywood v. Ball*, 634 F.2d 740, 743 (4th Cir. 1980).

⁴⁰⁸ *See, e.g., Hagans v. Lavine*, 415 U.S. 528, 547 (1974).

⁴⁰⁹ 451 U.S. 1 (1981).

tally Disabled Assistance and Bill of Rights Act of 1975⁴¹⁰ does not create a private right of action,⁴¹¹ reasoning that since the provision was merely a congressional encouragement for states to adopt programs benefitting the disabled, it did not create legal responsibility for noncompliance.⁴¹² Significantly, the Court stated that it was "at least an open question" whether a state participating in a disability program would be subject to liability under section 1983 for its failure to "assure" compliance with the conditions of the Act.⁴¹³ A third, and perhaps the most effective method of alleviating the impact of *Thiboutot* is to assert that the underlying statute provides an exclusive remedy, thus foreclosing a fee award based upon a civil rights statute. This option, first suggested by Justice Powell in his dissent in *Thiboutot*,⁴¹⁴ was mentioned by the *Pennhurst* majority⁴¹⁵ and has been considered by the lower courts.⁴¹⁶

Notwithstanding the availability of the foregoing methods to avoid liability for fees, it is suggested that the courts should strive to adhere to the principles enunciated in *Thiboutot* and *Maher*. It is conceded that strict application of the holdings of these cases will result in an expansion of state liability for attorney's fees.⁴¹⁷ Nevertheless, it is submitted that, in so doing, the federal judiciary will be performing the role that Congress contemplated when it enacted the Fees Awards Act.⁴¹⁸

C. Legislative and Judicial Immunity

The doctrines of legislative⁴¹⁹ and judicial immunity⁴²⁰ have

⁴¹⁰ 42 U.S.C. §§ 6001-6080 (1976 & Supp. III 1979).

⁴¹¹ 451 U.S. at 18-27.

⁴¹² *Id.*

⁴¹³ *Id.* at 28.

⁴¹⁴ See *Maine v. Thiboutot*, 448 U.S. 1, 22 & n.11 (1980) (Powell, J., dissenting).

⁴¹⁵ 451 U.S. at 28.

⁴¹⁶ See, e.g., *Tatro v. Texas*, 516 F. Supp. 968, 981-85 (N.D. Tex. 1981).

⁴¹⁷ See, e.g., *Maine v. Thiboutot*, 448 U.S. 1, 12 (1980) (Powell, J., dissenting).

⁴¹⁸ See note 385 and accompanying text *supra*.

⁴¹⁹ The doctrine of legislative immunity, as it exists today in the United States, is firmly rooted in the English common law. Although Sir Thomas More could make only a tentative claim of immunity in 1523, *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951), the doctrine gained full legal recognition when it was incorporated into the English Bill of Rights, which provides "[t]hat the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament." 1 W. & M., Sess. 2, ch. II. The privilege apparently had its origins in a desire "to prevent intimidation by the executive and accountability before a possibly hostile judiciary." *United States v. Johnson*, 383 U.S. 169, 181 (1966).

In this country, the importance of the common-law tradition was sustained by the fram-

existed at common law for centuries. The concept of insulating members of these branches of government from liability arose from the belief that it is unjust to hold an official liable for using discretion which he is legally bound to exercise, and from the fear that the imposition of liability would intimidate officers of government, preventing them from exercising "the decisiveness and the judgment required by the public good."⁴²¹ While the doctrine of legislative immunity shields legislators from civil liability,⁴²² the scope of

ers of the United States Constitution, who provided that "for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place." U.S. CONST. art. 1, § 6, cl. 1. Two interrelated rationales have been identified as underlying the Speech or Debate Clause. One rationale is that the separation of powers established by the Founders is fostered by preventing the intrusion of the executive or judicial branches of government into the protected affairs of the legislature. *United States v. Gillock*, 445 U.S. 360, 369 (1980); see *United States v. Johnson*, 383 U.S. 169, 178-79 (1966). A second rationale involves the protection of legislative independence. *United States v. Gillock*, 445 U.S. 360 (1980); see *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502-03 (1975). The first of these rationales clearly is unique to the American legal system, and has led the Supreme Court to comment that "[a]lthough the Speech or Debate Clause's historic roots are in English history, it must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government rather than the English parliamentary system." *United States v. Brewster*, 408 U.S. 501, 508 (1972).

⁴²⁰ The doctrine of judicial immunity originated in the English common law. See generally *Block, Stump v. Sparkman and the History of Judicial Immunity*, 1980 DUKE L.J. 879, 881-96; *Feinman & Cohen, Suing Judges: History and Theory*, 31 S.C.L. REV. 201 (1980). See also *Note, Immunity of Federal and State Judges from Civil Suit—Time for a Qualified Immunity?*, 27 CASE W. RES. 727, 727-29, 743-46 (1977); *Note, Liability of Judicial Officers Under Section 1983*, 79 YALE L. J. 322, 323-26 (1969). The policy underlying judicial immunity was articulated in *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872), wherein the Supreme Court observed that it was "a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him [should] be free to act upon his own convictions, without apprehension of personal consequences to himself." *Id.* at 347.

⁴²¹ *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974); see *Jaffe, Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 223 (1963). In *Scheuer*, the Supreme Court held that in a section 1983 suit, as in any other suit, a qualified immunity, rather than an absolute immunity, attached to officers of the executive branch of government. 416 U.S. at 247. The extent of such qualified immunity, the court stated, depends upon "the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." *Id.*

⁴²² See, e.g., *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502-03 (1975). The parameters of the legislative privilege are now fairly clear. The privilege has been construed broadly by the Supreme Court to encompass not merely "words spoken in debate," but anything "generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881). In addition, the Court has held that if a legislator's actions fall within the "sphere of legitimate legislative activity," *Doe v. McMillan*, 412 U.S. 306, 312 (1973) (quoting *Gravel v. United States*, 408 U.S. 606, 624 (1972)), the absolute prohibitions of the speech or debate clause are deemed to be invoked. E.g., *Doe v. McMillan*, 412 U.S. 306, 312-13 (1973); *United States v. Brewster*,

the judicial immunity doctrine remains uncertain. It is clear that judicial officers are immune from actions for damages,⁴²³ but there

408 U.S. 501, 515-16 (1972); *Barr v. Matteo*, 360 U.S. 564, 569 (1959). Moreover, the broad construction accorded the clause by the Court has shielded legislators "not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (per curiam). In the federal sphere, congressmen have been held to be immune not only from actions for damages or prospective relief, *see, e.g., Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502-03 (1975), but also from criminal prosecution, *see United States v. Johnson*, 383 U.S. 169, 185 (1966) (prosecution may not draw into question the legislative acts of congressman or his motives for performing them).

Many states have granted immunity to state legislators through constitutional provisions which parallel the United States Constitution in purpose and construction. *See Tenney v. Brandhove*, 341 U.S. 367, 373-75 (1951). In the state realm, legislators also have been accorded immunity from civil actions carried out in the sphere of legitimate legislative activity. *Id.* at 376 (state legislator's common-law absolute immunity from civil suit was not abrogated by passage of Civil Rights Act of 1871). Significantly, however, in the criminal field, the Supreme Court has held that a state's speech or debate clause is "a limit only on the prosecutorial powers of that State." *United States v. Gillock*, 445 U.S. 360, 374 (1980). Since Congress has not seen fit to accord a state legislator who is prosecuted under federal law the same evidentiary privileges available to a member of Congress, the Court has held that a state legislator's legislative immunity may not be invoked in a federal criminal prosecution. *Id.*

⁴²³ *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978); *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347, 351 (1872). In *Bradley*, the Supreme Court held that judges are not liable in civil actions for their judicial acts, "even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." *Id.* at 351. This principle was later held to be applicable in section 1983 suits, since the legislative history offered no indicia of a contradictory congressional intention. *Pierson v. Ray*, 386 U.S. 547, 554 (1978). The *Bradley* Court drew a vital distinction between an "excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter." 80 U.S. (13 Wall.) at 351. Only in the latter type of case will a judge be subject to liability. *Id.* at 351-52. A judge will not lose his right to invoke judicial immunity merely because his action was "in error, was done maliciously, or was in excess of his authority." *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978). The *Stump* case provided an interesting analysis of the appropriate scope of judicial immunity. *See generally Block, supra* note 420, at 910-25; Rosenberg, *Stump v. Sparkman: The Doctrine of Judicial Impunity*, 64 VA. L. REV. 833 (1978); Note, *A Judge Can Do No Wrong: Immunity is Extended for Lack of Specific Jurisdiction—Stump v. Sparkman*, 27 DEPAUL L. REV. 1219 (1978). In *Stump*, a judge approved the involuntary sterilization of a 15-year-old girl. 435 U.S. at 351-53. The Supreme Court applied the principle articulated in *Bradley*, and concluded that because the judge had not acted in the clear absence of all jurisdiction, he was immune from an action for damages. *Id.* at 359. In reaching this conclusion, the Court reasoned that the existing statutory authority for the sterilization of institutionalized persons did not "warrant the inference that a court of general jurisdiction has no power to act on a petition for sterilization of a minor in the custody of her parents." *Id.* at 358. The Court placed great significance upon the fact that there was no statute or case law prohibiting the judge from granting a petition for sterilization. *Id.* The Court also rejected the argument that the judge should be subject to suit because of his commission of serious procedural errors, reasoning that any attempt to overcome the judge's immunity by pointing to the erroneous exercise of his authority was foreclosed by *Bradley*. *Id.* at 359.

is disagreement among the federal circuits as to whether judges can be subject to injunctive or declarative actions.⁴²⁴ The Supreme Court's recent decision in *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*⁴²⁵ demonstrated that these distinctions and unsettled questions are significant in the context of the Fees Awards Act.

In *Consumers Union*, the plaintiffs alleged that the Virginia Supreme Court violated their civil rights by promulgating a rule in the Virginia Code of Professional Responsibility which prohibited advertising by attorneys.⁴²⁶ A three-judge district court ultimately enjoined the rule's enforcement⁴²⁷ and awarded attorney's fees against the Virginia court pursuant to the Fees Awards Act.⁴²⁸ On appeal, the United States Supreme Court vacated the award, hold-

⁴²⁴ Many circuits impose injunctive and declarative liability upon judicial officers. *Ciudadanos Unidos De San Juan v. Hidalgo County Grand Jury Comm'rs*, 622 F.2d 807, 813 n.16 (5th Cir. 1980), *cert. denied*, 450 U.S. 964 (1981); *Harris v. Harvey*, 605 F.2d 330, 335 n.7 (7th Cir. 1979), *cert. denied*, 445 U.S. 938 (1980); *Heimbach v. Village of Lyons*, 597 F.2d 344, 347 (2d Cir. 1979) (*per curiam*); *Timmerman v. Brown*, 528 F.2d 811, 814 (4th Cir. 1975); *Louis v. Supreme Court of Nevada*, 490 F. Supp. 1174, 1182 (D. Nev. 1980). Without actually deciding this issue, some circuits have indicated that they agree with the general trend imposing prospective liability upon judges. *See, e.g., Kelsey v. Fitzgerald*, 574 F.2d 443, 444 (8th Cir. 1978) (*per curiam*); *Shipp v. Todd*, 568 F.2d 133, 134 (9th Cir. 1978) (*per curiam*); *Briggs v. Goodwin*, 569 F.2d 10, 15 n.4 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978). Several lower courts, however, have granted judges absolute immunity from all liability. *See, e.g., Town of Hopkins v. Cobb*, 466 F. Supp. 1215, 1218 (D.S.C. 1979); *Atchley v. Greenhill*, 373 F. Supp. 512, 514-15 (S.D. Tex. 1974), *aff'd*, 517 F.2d 692 (5th Cir. 1975), *cert. denied*, 424 U.S. 915 (1976); *Mackay v. Nesbett*, 285 F. Supp. 493, 503 (D. Alaska 1968), *aff'd on other grounds*, 412 F.2d 846 (9th Cir.), *cert. denied*, 396 U.S. 960 (1969).

In addressing this issue, the courts generally have looked to the policy considerations underlying the judicial immunity doctrine. In *Town of Hopkins*, for example, the court granted immunity from all forms of liability, declaring that "[t]o create an artificial distinction between injunctive and monetary relief against the judiciary would be preposterous and utterly defeat the purpose for which the rule of immunity was created." 466 F. Supp. at 1218. Conversely, in *Adams v. Supreme Court of Pa.*, 502 F. Supp. 1282 (M.D. Pa. 1980), the court ruled that an expansion of judicial immunity to bar prospective relief was inappropriate because it would not further the doctrine's purpose of encouraging judicial activity by allaying fear of "personal consequences." *Id.* at 1286. The court reasoned that injunctive and declarative relief do not entail such consequences. *Id.* Similarly, in *United States v. Clark*, 249 F. Supp. 720 (S.D. Ala. 1965), the court held that there is no sound policy to justify the immunization of judicial officials when mere injunctive relief is sought since it "will only prevent the doing of what there is no right to do." *Id.* at 728 (citation omitted).

⁴²⁵ 446 U.S. 719 (1980), *vacating and remanding* *Consumers Union of United States, Inc. v. American Bar Ass'n*, 470 F. Supp. 1055 (E.D. Va. 1979).

⁴²⁶ 446 U.S. at 724-26.

⁴²⁷ *Id.* at 726-27. While the original district court case was pending, the Supreme Court, in *Bates v. State Bar*, 433 U.S. 350 (1977), ruled that prohibitions on attorney advertising are violative of the first amendment. *Id.* at 384.

⁴²⁸ 446 U.S. at 728.

ing, *inter alia*, that the district court erred by predicating the award upon acts which fell within the scope of legislative immunity.⁴²⁹ Upon noting that legislators enjoy absolute immunity from suits for monetary, declaratory, and injunctive relief,⁴³⁰ the Court reasoned that because the Virginia court had acted in its rulemaking capacity, it should be accorded an equal measure of immunity.⁴³¹ The Court observed, moreover, that Congress did not intend to abrogate absolute legislative immunity in enacting the Fees Awards Act,⁴³² but rather, that the statute was designed to permit fee shifting against officials subject to prospective equitable relief.⁴³³ Because officials who enforce the law fall squarely within this description, the Court noted that the Virginia judiciary could be held liable for a fee award based upon its enforcement function, despite its legislative immunity.⁴³⁴ Thus, the Court remanded the case for a fee award predicated on this ground.⁴³⁵

Notably, the *Consumers Union* Court did not decide whether prospective equitable relief is barred under the *judicial* immunity doctrine.⁴³⁶ Nevertheless, citing the *Consumers Union* Court's view that Congress intended the Fees Awards Act to authorize fee awards against officials who are subject to such relief,⁴³⁷ the Third Circuit, in *Morrison v. Ayoob*,⁴³⁸ held that the statute does permit fee awards against judicial officers who had acted in their official capacities.⁴³⁹ Irrespective of the Seventh Circuit's stance, it is suggested that the practitioner should act cautiously in relying upon

⁴²⁹ *Id.* at 738.

⁴³⁰ *Id.* at 732; see notes 441 & 444 *infra*.

⁴³¹ 446 U.S. at 738. The *Consumers Union* Court agreed with the lower court's dissenting opinion, which had stated that the challenged activity of the Virginia court was legislative in nature because it did "not arise out of a controversy which must be adjudicated, but instead out of a need to regulate conduct for the protection of all citizens." *Id.* at 731 (quoting 470 F. Supp. at 1064 (dissenting opinion)).

⁴³² 446 U.S. at 738-39.

⁴³³ *Id.*

⁴³⁴ *Id.* at 736. The Court observed that although prosecutors and other law enforcement officials enjoy absolute immunity from damage awards, *id.* (citing *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976)), they are subject to suits for injunctive relief. 446 U.S. at 736 (citing *Gerstein v. Pugh*, 420 U.S. 103, 106-07 (1975)).

⁴³⁵ 446 U.S. at 739.

⁴³⁶ The Court noted that although it had never addressed the question of whether judicial immunity bars prospective equitable and declaratory relief, the courts of appeals apparently were divided on the issue. *Id.* at 735; see note 424 and accompanying text *supra*.

⁴³⁷ 446 U.S. at 738-39.

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

⁴³⁹ 627 F.2d at 672 & n.2.

the *Morrison* decision, for although *Morrison* comports with the *Consumers Union* opinion, its holding necessarily is contingent upon Supreme Court ratification of the principle that judicial immunity does not bar awards of equitable relief. Until this issue definitively is resolved, the concomitant question of fee shifting against justicial officers will remain unsettled.

V. CONCLUSION

The historic American rule against awards of attorney's fees largely has been eliminated by legislative fiat. Indeed, fee awards presently are sanctioned by many statutes and, perhaps unavoidably, judicial interpretations of the operation of such statutes vary considerably. Hence, the practitioner litigating a fees issue faces a formidable task in determining, *inter alia*, the necessary preconditions to a fee award, the size of such an award, and the persons and entities against whom such an award may be assessed. It is hoped that this Note affords some insight into these issues and will be of assistance to the practitioner engaged in their resolution.

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