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Attorneys' Fees

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ATTORNEYS' FEES

INTRODUCTION

In the United States, attorneys' fees are not awarded to the prevailing party unless a contractual agreement, a statute, or procedural rule provides otherwise.[1] The English Rule, on the other hand, provides that the loser pays both his costs and those of the successful litigant.[2] The American approach has garnered support and endured criticism; throughout time, numerous exceptions to the rule have evolved.[3]

This survey examines recent Tenth Circuit decisions concerning attorneys' fees.[4] Part I provides a brief history of the English Rule. Part I also details the background of the American Rule, including justifications, criticisms, and exceptions to the rule. Parts II and III explore two Tenth Circuit cases awarding attorneys' fees in which one party acted in bad faith.[5] Part IV explores choice-of-law problems in the context of a recent Tenth Circuit case.[6]

I. GENERAL BACKGROUND

In the English system the losing party pays his own fees, and in addition pays the fees of the prevailing litigant.[7] Historically, English courts have either awarded fees based on statutory guidelines or on a discretionary basis.[8] The Statute of Gloucester, enacted in 1275,[9] was the first to provide attorneys' fees, establishing that "whereas before time Damages were not taxed, but to the Value of the Issues of the Land; it is provided, that the Demandant may recover against the Tenant the Costs of

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1. Buder v. Sartore, 774 P.2d 1383, 1390 (Colo. 1989).

2. *See generally* Arthur L. Goodhart, *Costs*, 38 YALE L.J. 849 (1929) (providing a history of the manner in which costs are awarded in the English system).

3. *See* John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1578-93 (1993).

4. The survey period extended from September 1, 1996 through August 31, 1997.

5. Towerridge, Inc. v. T.A.O., Inc., 111 F.3d 758 (10th Cir. 1997); Martinez v. Roscoe, 100 F.3d 121 (10th Cir. 1996).

6. During the survey period, the Tenth Circuit also addressed attorneys' fees and tax returns. *See* Dye v. United States, 121 F.3d 1399 (10th Cir. 1997). In *Dye*, the court considered the characterization of attorneys' fees. The Tenth Circuit determined that these fees could be described as either capital gains or ordinary expenses on a tax return. *Id.* at 1411. However, the Tenth Circuit declined to determine the method of allocating the attorney fees in connection with these claims. *Id.* Although the court rejected the methods utilized by other appellate courts, the Tenth Circuit did not establish a method of allocation. *Id.* Finally, the court remanded the case for a determination of allocation. *Id.*

7. *See* Vargo, *supra* note 3, at 1569. The English Rule is sometimes called the "loser pays" rule. *Id.* In England, the term "costs" applies to fees paid to the court, to the solicitor, to counsel, expenses of witnesses, and all other necessary expenses. Goodhart, *supra* note 2, at 856-59.

8. Vargo, *supra* note 3, at 1570-71.

9. Goodhart, *supra* note 2, at 852 (citing Statute of Gloucester 6 Edw. I c. 1 (1275)).

his Writ purchased, together with the Damages abovesaid."[10] Courts construed this statute liberally and extended the doctrine to cover the legal costs of the parties.[11]

The law awarding costs to a prevailing defendant in a lawsuit evolved at a slower pace.[12] Initially, seeing a plaintiff fail in his case was considered rewarding enough for a successful defendant.[13] In 1531, England established a statutory provision awarding a prevailing defendant costs in certain suits.[14] Finally, in 1607, new legislation allowed a defendant to recover costs in all kinds of suits when he prevailed.[15]

In 1875, the English modified their statutory system significantly[16] so that judges could use their discretion in awarding costs.[17] Although the English have amended and expanded these rules, they are still in effect today.[18] In addition, the British judiciary recently devised a taxing system with which courts calculate the attorneys' fees a party must pay.[19] In this system the prevailing party's attorney must prepare a detailed list of the taxable expenses.[20] If the losing party agrees he pays the costs;[21] when the loser disagrees with the winner's calculations, both the plaintiff and defendant present their lists to a taxing master who determines the correct amount.[22]

The early American colonies rejected the English Rule.[23] Some commentators believe that frontier individualism and the notion of "the solitary folk-hero fighting for his rights" led to the development of the American Rule.[24] After the Revolution, a general resentment for the English fueled the colonists' rejection of the English legal models.[25] One commentator argues, however, that an inadvertent error actually led to the rejection of the English Rule.[26] In 1848, the New York legislature fixed the amount of attorneys' fees one could recover in actual amounts,

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10. *Id.*
11. *Id.*
12. *Id.* at 853.
13. *Id.*
14. *Id.* (citing 23 Hen. VIII c. 15 (1531)). Costs were available only in certain cases, including those for trespass, case, debt, contract covenant, and account actions.
15. *Id.* (citing 4 Jac. I c. 3 (1607)).
16. *Id.* at 854 (citing Supreme Court of Judicature Acts, 38 & 39 Vict. c.77 (1975)).
17. *See id.*
18. *Id.*
19. *See* Vargo, *supra* note 3, at 1571.
20. *Id.*
21. *Id*
22. *Id.*
23. *See* John V. Tunney, Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 640 (1974).
24. *Id.* at 641.
25. *Id.*
26. Albert A. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CAL. L. REV. 792, 798-99 (1966).

rather than by percentage of the amount recovered.[27] These amounts, considered nominal, were never adjusted.[28] "[I]t was this process of gradual forgetting rather than a deep-seated moral argument that has apparently caused the abolition of the prevailing party's right to the recovery of his counsel fees."[29]

Rather than ordering the loser to pay both parties' costs, the Supreme Court adopted the American Rule in 1796.[30] The rule stated that "absent a specific, contractual, statutory, or procedural rule providing otherwise," a prevailing party was not entitled to an award of attorneys' fees.[31] In such a case, each party must pay their own attorneys' fees.[32]

The American Rule reflected the colonists' suspicion of lawyers.[33] Members of the ruling class were reportedly jealous of attorneys' standing in the community.[34] In some colonies attorneys were forbidden to charge any fee.[35] Colonists believed the law was straightforward, and therefore, they considered lawyers unnecessary.[36]

Individual colonies enacted statutes in an effort to formalize the regulation of attorneys' fees.[37] Some colonies set attorneys' fees at a specific level, while others created fee schedules.[38] In Virginia the maximum an attorney could receive was fifteen shillings, or one hundred pounds of tobacco.[39] Other colonies set the amount an attorney could receive according to the service performed, for example an attorney could charge per line of typing in a document submitted on behalf of the client.[40] It was

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27. *Id.* at 799.

28. *Id.*

29. *Id.* On the other hand, Professor Luebsdorf argued that the New York legislature was aware that the award of fees was small compared to actual fees, and deliberately declined to increase the amount available. *See* John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW. & CONTEMP. PROBS. 9, 10 (1984).

30. Arcambel v. Wiseman, 3 U.S. 306 (1796).

31. Buder v. Sartore, 774 P.2d 1283, 1390 (Colo. 1989).

32. *Id.*

33. Tunney, *supra* note 23, at 640-41.

34. *Id.*

35. *Id.*

36. *Id.* Over time, however, lawyers gained more respect, and by the eighteenth century, many people hired attorneys to represent them.

37. *See* Vargo, *supra* note 3, at 1572.

38. *Id.* New York, Massachusetts, Virginia, North Carolina and New Hampshire set fees and cost recovery fees at the same level. *Id.*

39. Charles T. McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN. L. REV. 619, 620 (1931).

40. *See* Vargo, *supra* note 3, at 1573; *see also* Goodhart, *supra* note 2, at 873-74. A New York statute established the following fee schedule:

> Retaining fee, three dollars and seventy-five cents, to one counsel only;
> Perusing, amending, and signing every petition of appeal, and every answer to a petition of appeal, two dollars and fifty cents;
> Perusing and amending every other petition to the court, in a case where an appeal is pending, or in which a writ of error shall have been brought, one dollar and twenty-five cents;

unclear whether these fixed amounts represented the maximum an attorney could charge, or whether lawyers could charge more through a private contract with the client.[41] In addition, some colonies established an amount for a specific type of case, but reduced the amount if the parties entered into an out-of-court settlement.[42]

Following the Revolution, some states established schemes in which the prevailing litigant collected attorneys' fees.[43] This scheme, though similar to the English system, differed in that it did not consider complex taxation schemes addressed by the English. This left the prevailing American litigants to receive less in recovery than they might if they prevailed in England.[44]

Throughout the laissez faire era, attorneys contracted for their services in an effort to set their own charging scheme.[45] Contracting for services outside of the legislatively-established fee schedules influenced the establishment of the American Rule.[46] In 1789, Congress authorized federal courts to follow state law concerning fee awards.[47] Later, the Supreme Court set forth the American Rule in a case in admiralty.[48]

The 1789 Act and legislation expired by 1800, but Congress did not adopt other provisions related to attorneys' fees until 1853.[49] During the time between 1800 and 1853, federal courts examined state law to determine attorneys' fee issues.[50] Because different states had passed different types of legislation, the federal courts took an inconsistent approach to attorneys' fees.[51] Eventually, Congress passed the 1853 fee bill[52] al-

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Perusing, amending and settling every special pleading, entry or order, one dollar and fifty cents;
Attending the court to make or oppose a motion, or to present or oppose a petition, one dollar and twenty-five cents;
Arguing every special motion or petition, two dollars and fifty cents;
Arguing every cause, or attending for such argument pursuant to notice, three dollars and seventy-five cents;
But the foregoing fees shall be allowed only to one counsel on each side who shall have been actually employed and rendered the service charged.

Goodhart, *supra* note 2, at at 874.

41. *See* Vargo, *supra* note 3, at 1573.

42. *Id.*

43. *Id.* at 1573-74.

44. *Id.*

45. *Id.* at 1575.

46. *Id.*

47. Act of Sept. 29, 1789, ch. 21, 1 Stat. 93, 93-94 (repealed 1792); *see also* Vargo, *supra* note 3, at 1576.

48. Arcambel v. Wiseman, 3 U.S. 306 (1796).

49. *See* Vargo, *supra* note 3, at 1576.

50. *Id.*

51. *Id.*

52. *Id.* at 1577; Act of Feb. 26, 1853, ch. 80, 10 Stat. 161, 161-62 (codified at 28 U.S.C. § 1923(a) (1994)). The text as codified reads:

(a) Attorney's and proctor's docket fees in courts of the United States may be taxed as costs as follows:

lowing a party to collect docket fees up to twenty dollars.[53] This fee bill is still in effect today and provides that "absent either statutory or judicial exception, the winning party in litigation can recover only the twenty-dollar docket fee."[54]

Legal commentators offer several justifications for the American Rule. If a potential litigant thought she might have to pay the opposing counsels' fees if she lost, she may be discouraged from initiating a lawsuit.[55] Unable to afford the risk of paying the other party's attorneys' fees, she may elect not to sue, and consequently never have her day in court. This could have a chilling effect on those unable to pay, and may deter parties from bringing meritorious lawsuits.[56] Others support the American Rule because attorneys' fees are not considered foreseeable.[57] Unless damages are foreseeable, a person cannot be held liable for those costs.[58] If not foreseeable, those fees are not recoverable as damages.[59] In addition, the time and expense of assessing attorneys' fees may be burdensome for the judicial system.[60]

Despite these justifications, many oppose the American Rule, instead preferring the English System.[61] Critics argue that under the American Rule, people are actually encouraged to bring frivolous suits because no matter the outcome, parties only pay their own costs.[62] More specifically, a person would have no incentive to suspend a frivolous suit when

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$20 on trial or final hearing (including a default judgment whether entered by the court or by the clerk) in civil, criminal, or admiralty cases, except that in cases of admiralty and maritime jurisdiction where the libellant recovers less than $50 the proctor's docket fee shall be $10;

$20 in admiralty appeals involving not over $1,000;

$50 in admiralty appeals involving not over $5,000;

$100 in admiralty appeals involving more than $5,000;

$5 on discontinuance of a civil action;

$5 on motion for judgment and other proceedings on recognizances;

$2.50 for each deposition admitted in evidence.

(b) The docket fees of United States attorneys and United States trustees shall be paid to the clerk of court and by him paid into the Treasury.

(c) In admiralty appeals the court may allow as costs for printing the briefs of the successful party not more than: $25 where the amount involved is not over $1,000;

$50 where the amount involved is not over $5,000;

$75 where the amount involved is over $5,000.

28 U.S.C. § 1923(a).

53. Vargo, *supra* note 3, at 1578.

54. *Id.*

55. M. Isabel Medina, Comment, *Award of Attorney Fees in Bad Faith Breaches of Contract in Louisiana—An Argument Against the American Rule*, 61 TUL. L. REV. 1173, 1178 (1987).

56. *Id.*

57. *Id.* at 1177.

58. *Id.*

59. *Id.* at 1176-77.

60. *Id.* The author noted, however, that this argument ignores prescribed fee schedules for determining attorneys' fees. *Id.* at 1203 n.30.

61. *See* Vargo, *supra* note 3, at 1590-91.

62. Calvin A. Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75, 78 (1964).

all the party is required to pay are his own costs.[63] The English system, on the other hand, operates to deter these suits because the litigant risks payment of both parties' costs.[64]

Others argue that a winner can never be made whole unless he can collect attorneys' fees.[65] When a person prevails in a lawsuit, she should not be penalized by having to pay her attorneys' fees.[66] In addition, many consider that a prevailing party should be reimbursed for her attorneys' fees because in bringing her successful lawsuit she has acted as a "private attorney general."[67] As a private attorney general, the prevailing party provides a "socially beneficial" advantage to the public by bringing the suit, or by defending her position.[68] Critics of the American Rule argue, however, that a person should not have to bear the costs if the lawsuit benefits public interest.[69]

Perhaps due to the weaknesses of the American Rule, exceptions developed quickly in American jurisprudence.[70] Parties in a contract may provide that if a dispute arises from that contract, one of the parties has to pay the other's attorneys' fees.[71] The "common fund" exception protects named litigants in class action lawsuits from bearing the costs of the lawsuit.[72] When funds have been set aside to benefit entities rather than the individual litigants, a court may dip into this fund when the court has control over the fund, and the fund beneficiaries are identifiable.[73] This exception is applied in commercial litigation, mass disaster lawsuits, and other class action suits.[74] The "substantial benefit" exception is similar, but applies to nonpecuniary benefits, including for example, the enforcement of a statute.[75] Finally, when a party enforces a final order through a contempt proceeding, he can collect those attorneys' fees for the enforcement of the contempt order.[76]

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63. *Id.*

64. *See* Vargo, *supra* note 3, at 1591.

65. F.D. Rich Co. v. United States, ex rel. Indus. Lumber Co., 417 U.S. 116, 129 (1994) (recognizing that winning litigants may not be made whole when forced to pay their own costs).

66. *See* Vargo, *supra* note 3, at 1591.

67. Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 662; *see* John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215 (1983) (discussing the private attorney general rationale).

68. Rowe, *supra* note 67, at 663.

69. *Id.*

70. Vargo, *supra* note 3, at 1578-93 (discussing the various exceptions).

71. *Id.*

72. *See, e.g.*, Enterprise Energy Corp. v. Columbia Gas Transmission Corp., 137 F.R.D. 240, 248 (S.D. Ohio 1991) (discussing awards of attorneys' fees in commercial litigation in which lawyers recovered for the benefit of a class).

73. Vargo, *supra* note 3, at 1581.

74. *Id.*

75. *Id.* at 1580 (stating that nonparties should help to bear the cost of the lawsuit).

76. *Id.* at 1583.

In addition, Congress established exceptions to the American Rule through legislation.[77] In response to an increasing amount of litigation, Congress enacted statutes penalizing parties for bringing a groundless, vexatious, or frivolous lawsuit.[78] Furthermore, under the Federal Rules of Civil Procedure, if an attorney signs a pleading that he knows is not grounded in either fact or law, a court may impose sanctions against the lawyer.[79] These statutes are characterized as punitive because they penalize either the parties or attorneys for acting in bad faith.[80] Many statutes allow an award of attorneys' fees to the prevailing litigant despite the absence of bad faith or vexatious actions.[81] These statutes assist individuals in bringing claims that they not would otherwise have the opportunity to litigate because of an inability to bear the costs.[82] These are described as incentive statutes. Because the American Rule is riddled with exceptions, coupled with many state and federal statutes allowing fee shifting, many issues surrounding attorneys' fees remain unresolved.

II. BAD FAITH CONDUCT AND ATTORNEYS' FEES

A. *Background*

Recognizing that courts are susceptible to parties' abuse of the litigation process, courts have embraced and expanded upon exceptions to the American Rule.[83] In 1993, the Supreme Court established that a party seeking to enforce a final judgment through a contempt action could collect attorneys' fees for the enforcement in *Toledo Scale Co. v. Com-*

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77. *See* Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?*, 47 LAW & CONTEMP. PROBS. 321 (1984) (discussing the extent of fee shifting legislation among the states and by Congress).

78. *See, e.g.*, 40 U.S.C. §§ 270a-e (1994) (The Miller Act). There are many other statutes that authorize such an award. An example of a state statute providing fee shifting appears in Colorado law:

> The general assembly recognizes that courts of record of this state have become increasingly burdened with litigation which is straining the judicial system and interfering with the effective administration of civil justice. In response to this problem, the general assembly hereby sets forth provisions for the recovery of attorney fees in courts of record when the bringing or defense of an action, or part thereof (including any claim for exemplary damages), is determined to have been substantially frivolous, substantially groundless, or substantially vexatious. All courts shall liberally construe the provisions of this article to effectuate substantial justice and comply with the intent set forth in this section.

COLO. REV. STAT. § 13-17-101 (1997).

79. FED. R. CIV. P. 11.

80. *See also* Jane P. Mallor, *Punitive Attorneys' Fees for Abuses of the Judicial System*, 61 N.C. L. REV. 613 (1983).

81. *See, e.g.*, 28 U.S.C. § 2412(d)(1994) (Equal Access to Justice Act); 29 U.S.C. § 1132(g)(1) (1994) (ERISA); 42 U.S.C. § 1988(b) (1994) (Civil Rights Statute); 5 U.S.C. § 552(a)(4)(E) (1994) (FOIA); 42 U.S.C. § 11607(b)(3) (1994) (International Child Abduction Act).

82. *See* Vargo, *supra* note 3, at 1588.

83. *See generally* Goodloe Partee, Note, *Procedure—Sanctions—Federal Procedural Rules Do Not Displace Inherent Powers of Court to Award to Award Attorney's Fees for Bad Faith Conduct*, Chambers v. NASCO, Inc., 111 S. Ct. 2123 (1991), 14 U. ARK. LITTLE ROCK L.J. 107 (1991) (discussing a Supreme Court case to illustrate the general acceptance of the bad faith exception).

puting Scale Co.[84] In *Toledo Scale*, the Court noted that the trial court did not abuse its discretion when it "impose[d] as a penalty, compensation for the expenses incurred by the successful party to the decree in defending its rights in the [trial] court."[85] While other courts have expanded on this general proposition, fee shifting in enforcement proceedings remains a recognized exception to the American Rule.[86]

Similarly, courts embraced the exception of fee shifting in cases where bad faith conduct has occurred. In *Chambers v. NASCO, Inc.*, the Supreme Court reviewed the bad faith exception to the American Rule.[87] Chambers entered into a purchase agreement with NASCO to sell his television station facility and broadcast license for $18 million.[88] After the parties entered into the agreement, Chambers expressed his desire to terminate the agreement.[89] He informed NASCO, the buyer, that he would not file the necessary papers with the Federal Communications Commission, and in response the buyer initiated a suit for specific performance.[90] To protect the radio station, the seller and his attorney transferred the station to the seller's sister through a trust.[91] Neither Chambers or his attorney informed the court until the trust documents were signed despite the judge specifically questioning the attorney about the possibility of a transfer to a third party.[92] Ignoring warnings about their unethical conduct, Chambers and his attorney continued to abuse the judicial process.[93]

Eventually the case evolved into one addressing a federal court's power to award attorney's fees when one party has acted in bad faith.[94] The Supreme Court reiterated that courts have broad discretion to impose sanctions on parties, and articulated that the purpose of the bad faith exception included policing the parties, and the court.[95] Determining that the district court sanctioned Chambers for the fraud perpetrated on the

84. 261 U.S. 399 (1923).

85. *Toledo Scale*, 261 U.S. at 428.

86. *See* Vargo, *supra* note 3, at 1583 (discussing three cases which expanded this general rule); *see also* Sheila's Shine Prods., Inc. v. Sheila Shine, Inc., 485 F.2d 114, 130-31 (5th Cir. 1973) (allowing an award of discovery expenses where party incurred costs in determining whether the other party acted in contempt); Crane v. Gas Screw Happy Pappy, 367 F.2d 771, 775 (7th Cir. 1966) (awarding fees to a party based on the other party's defiance of prior court orders); *In re* Fed. Skywalk Cases, 97 F.R.D. 370, 378 (W.D. Mo. 1983) (awarding fees when one party made ex parte communications with plaintiffs in violation of disciplinary rules).

87. Chambers v. Nasco, Inc., 501 U.S. 32 (1991).

88. *Id.* at 35-36.

89. *Id.*

90. *Id.* at 36.

91. *Id.* at 36-37.

92. *Id.* at 37-39.

93. *Id.* at 38-39. Chambers denied the validity of a preliminary injuction issued by the trial court, filed meritless motions and refused to close the sale, even when ordered by the court. *Id.* The judge warned Chambers and his attorney many times throughout this process. *Id.*

94. *Id.* at 42.

95. *Id.* at 46.

court, and not for the breach of contract, the Supreme Court affirmed the sanction and the award of attorneys' fees to NASCO.[96] The Court, however, expressly declined to reach the issue of sanctioning purely prelitigation bad faith.[97]

B. Martinez v. Roscoe[98]

1. Facts

In 1993, the district court issued an injunction prohibiting the defendants, who were owners of an apartment complex, from engaging in certain activities not specified by the court.[99] Two years later, the plaintiffs, tenants in the same apartment complex, sought to enforce this injunction after the defendants failed to comply with the order.[100] Not only did the court find that the defendants violated the order, but the court issued another injunction and awarded the plaintiffs' attorneys' fees.[101]

The defendants appealed the case to the Tenth Circuit, requesting reconsideration of the attorneys' fee award. Specifically, the defendants argued that the court erred in awarding the plaintiffs attorney's fees based on the defendants' bad faith.[102] The defendants asserted that punishment for violation of the court order should have been addressed in a contempt proceeding, rather than through the bad faith exception to attorneys' fees.[103] In the alternative, the defendants argued the court should not have awarded attorneys' fees when the legal services were provided by a publicly-funded legal aid program.[104]

2. Decision

The court disposed of both arguments with only minor discussion.[105] After determining that the lower court's findings were not clearly erro-

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96. *Id.* at 54. The Court expressly declined to explore whether bad faith prior to the initiation of litigation should be considered. *Id.* at 54 n.16. The dissenting justices would have refused to extend the bad faith exception to prelitigation behavior. *Id.* at 59 (Scalia, J., dissenting). In his dissent, Scalia explored the bad faith exception and other inherent powers of the judiciary. *Id.* (Scalia, J., dissenting). He stressed, however, that the court's inherent conduct should not "'reach beyond the court's confines' that does not 'interfer[e] with the conduct of trial.'" *Id.* at 60 (Scalia, J., dissenting) (quoting Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 798 (1987)). Justice Kennedy also wrote a dissenting opinion. *Id.* at 60 (Kennedy, J., dissenting). Kennedy asserted that the majority opinion could be read to extend to prelitigation conduct, and opposed such an extension. *Id.* at 74 (Kennedy, J., dissenting). He agreed that sanctioning prelitigation bad faith exceeded the bad faith exception. *Id.* (Kennedy, J., dissenting).

97. *Id.* at 72.

98. 100 F.3d 121 (10th Cir. 1996).

99. *Martinez*, 100 F.3d at 122.

100. *Id.*

101. *Id.*

102. *Id.* at 123.

103. *Id.*

104. *Id.* at 124.

105. *Id.* at 123-24.

neous, the court addressed the contempt argument.[106] The court stated, "we are not impressed with defendants' argument that they may be punished in a separate contempt proceeding for the same conduct punished here. This claim of some possible future unspecified detriment is too speculative for our consideration."[107]

The court found there was not sufficient evidence to address the issue of reasonableness of the award.[108] Finally, the court considered the award for services provided through legal aid.[109] The purpose of awarding attorneys' fees, the court asserted, is to sanction the party who acted in bad faith.[110] Therefore, the court construed "no reason to distinguish between attorneys who are paid by a party and attorneys who are paid with public funds."[111]

C. *Analysis*

Surprisingly, the court did not appear to consider addressing possible issues of res judicata.[112] For example, if the plaintiff filed a separate contempt proceeding, under the historical exception relating to contempt proceedings, a court could award attorneys' fees.[113] On the other hand, the court in *Martinez* specifically articulated the reasons for awarding attorneys' fees—to punish the defendant for acting in bad faith. Therefore, if

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106. *Id.*

107. *Id.* at 123-24.

108. *Id.* at 124. The defendants argued that the fees were unreasonable. *Id.* However, it appears that they made only generalized statements regarding the award and did not present any evidence. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* The court held in accord with several other courts, which have upheld the fees award to publicly-funded programs. *Id.* (citing Blum v. Stenson, 465 U.S. 886, 894-95 (1984) (awarding attorneys' fees pursuant to 42 U.S.C. § 1988 to private nonprofit legal services organization); New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 70 n.9 (1980) (awarding attorneys' fees to public interest legal services provider in Title VII action); Rodriguez v. Taylor, 569 F.2d 1231, 1244-46 (3d Cir. 1977) (awarding attorneys' fees to nonprofit, federally-funded legal services provider in ADEA); Torres v. Sachs, 538 F.2d 10, 12 (2d Cir. 1976) (recognizing that Congress placed no limit on amount payable to publicly-funded organization under a federal statute which provided for award of fees in voting rights case)).

112. *See* 28 U.S.C. § 1738 (1994). This statute provides one articulation of the rule:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Id.

113. *See* Vargo, *supra* note 3, at 1583.

there were a separate contempt order, it is unlikely the defendants would be punished for the same behavior under the res judicata doctrine. Furthermore, the parties might never pursue a contempt proceeding, and the defendants' action might go unpunished.[114]

The purpose behind the bad faith exception remains punishment of a party for bringing a frivolous lawsuit.[115] As the Tenth Circuit determined, it is irrelevant that a legal aid attorney represented the prevailing party, though some may argue that the prevailing party is unjustly enriched. The support for the Tenth Circuit's determination was not very persuasive, however, and could easily be distinguished from previous case law. Namely, this case involved a judicially-created exception to the American Rule, rather than a statute specifically authorizing fee shifting. The court did punish bad faith behavior, however, and this result operates to justify the extension of the bad faith exception.

III. MILLER ACT AND BAD FAITH

A. *Background*

In 1935, Congress enacted the Miller Act to meet the concerns of individuals who were subcontractors on projects for the United States.[116] Congress addressed the subcontractors' concerns that there was no guarantee of payment because they were not in privity of contract with the United States by requiring contractors to furnish a bond to their subcontractors for jobs over $2,000.[117]

Although the Miller Act does not expressly provide for attorneys' fees, the Supreme Court established a bad faith exception to the Miller

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114. *See* Martinez v. Roscoe, 100 F.3d 121, 123 (10th Cir. 1996).

115. *See, e.g.*, Medina, *supra* note 55, at 1197.

116. 40 U.S.C. §§ 270a-e (1986).

117. *See* Joseph E. Edwards, *Recovery of Attorneys' Fees in Miller Act (40 U.S.C.A. §§ 270a-270e) Litigation*, 4 A.L.R. FED. 685 (1970). The Miller Act provides:

> (a) Type of bonds required
>
> Before any contract for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":
>
> (1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.
>
> (2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

40 U.S.C. §§ 270a.

Act in 1974.[118] In *F.D. Rich v. United States ex rel Industrial Lumber Co.*, a subcontractor agreed to supply plywood for several of the contractor's projects.[119] After the contractor fell behind on several payments, the subcontractor initiated a Miller Act claim.[120] The court of appeals held that if state law allowed an award of attorneys' fees under the Miller Act so should the federal court.[121] Because California allowed for attorneys' fees in this type of case, the court awarded attorneys' fees.[122]

The Supreme Court rejected the appellate court's justification.[123] Examining the purpose of the Miller Act, the Supreme Court found that the intent of the act was to protect subcontractors working for the government.[124] The Court found that the Miller Act created a federal cause of action, and therefore, the Court preferred to establish a uniform federal rule rather than relying on state law.[125] Unless the Court established a uniform rule, the Court feared that subcontractors would not always be compensated, even when their claim was successful.[126] The Court also noted that in Miller Act cases, construction can occur in more than one state, causing confusion as to which state's law applies.[127] Finally, although the Court recognized the bad faith exception to the American Rule, the Court found that no bad faith occurred in *F.D. Rich*.[128]

B. Towerridge, Inc. v. T.A.O., Inc.[129]

1. Facts

Towerridge, a subcontractor, agreed to complete most of the asphalt and concrete work for the prime contractor, T.A.O.[130] While Towerridge worked, the parties consistently disagreed as to whether the work was on schedule, and which party was at fault for any delays.[131] Due to these disputes, Towerridge sought damages, claiming that money was due on

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118. *See* F.D. Rich Co. v. United States ex rel. Indus. Lumber Co., 417 U.S. 116 (1974). The Court inferred Congress' intent in establishing the Miller Act included the award of attorneys' fees when bad faith occurred. *Id.* at 128. Without fee shifting, claimants under the Miller Act would never be fully compensated. *Id.* They would always have to pay for legal representation. *Id.* The bad faith exception would help eliminate that concern. *Id.*

119. *Id.* at 118.

120. *Id.* at 120.

121. *Id.*

122. *Id.*

123. *Id.* at 127.

124. *Id.*

125. *Id.* at 126-29

126. *Id.* at 128.

127. *Id.*

128. *Id.* at 129.

129. 111 F.3d 758 (10th Cir. 1997).

130. *Towerridge*, 111 F.3d at 761.

131. *Id.*

the contract.[132] The jury found in favor of Towerridge, and further found that T.A.O. acted in bad faith.[133] Accordingly, the district court awarded Towerridge attorneys' fees.[134] On appeal, T.A.O. challenged the award of attorney fees.[135] T.A.O. argued that the court could not award attorneys' fees for prelitigation bad faith.[136]

2. Decision

Initially, the court noted that the Miller Act allowed an award of attorneys' fees, including awards for bad faith conduct.[137] The court examined the purpose and source of the bad faith exception to determine whether the exception applied to prelitigation bad faith.[138] Finding that the purpose was to punish abuses of the judicial process, the court determined that the Miller Act did not apply to prelitigation behavior.[139] The court distinguished prelitigation behavior from behavior during judicial proceedings, noting that "[b]ecause the origin of the bad-faith exception is the federal judiciary's necessary and inherent power to police proceedings before it, . . . we find it unlikely that exception reaches to bad-faith conduct not occurring during the course of the litigation itself."[140] The court distinguished the claim before it from one in which there was bad faith during prelitigation, along with bad faith during the litigation itself.[141] In such a case, courts are divided as to whether to consider the prelitigation behavior.[142]

Finally, the court clarified that it did not condone any of T.A.O.'s behavior that resulted from bad faith.[143] The court refused, however, to extend the exception to the American Rule to include prelitigation conduct because to do so "risk[ed] swallowing of the Rule . . . ."[144] The court noted that to expand the exception so much "could open the door to fee shifting in the ordinary tort or contract case" and therefore could go beyond its scope and purpose.[145]

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132. *Id.* at 762.
133. *Id.* at 760.
134. *Id.*
135. *Id.*
136. *Id.* at 765.
137. *Id.*
138. *Id.* at 766. The court examined a Supreme Court decision to determine the purpose of the act. *See* Chambers v. NASCO, Inc., 501 U.S. 32 (1991). In that case, the Supreme Court did not expressly decide this question, but alluded to what their decision would have been. *See id.* at 53. The court also noted that in *Chambers*, the dissent shared the same view regarding prelitigation bad faith. *Towerridge*, 111 F.3d at 766.
139. *Towerridge*, 111 F.3d at 766.
140. *Id.* at 766.
141. *Id.* at 767 n.6.
142. *Id.*
143. *Id.* at 769.
144. *Id.*
145. *Id.* (quoting Jane P. Mallor, *Punitive Attorneys' Fees for Abuses of the Judicial System*, 61 N.C. L. REV. 613, 634 (1983)).

C. *Other Circuits*

Several other circuits have held in accordance with *Towerridge*.[146] The Fifth Circuit addressed the question of prelitigation bad faith in *Galveston County Navigation District No. 1 v. Hopson Towing Co.*[147] As a result of the defendant's failure to open a drawbridge, a tug boat collided with the bridge and subsequently sued the drawbridge operator.[148] The plaintiffs were awarded $20,000 in attorneys' fees.[149] The trial court based its attorneys' fees award on the defendant's refusal to pay damages in an amount to which both parties stipulated, thereby causing the plaintiffs to incur attorneys' fees in an effort to recover those damages.[150] The Fifth Circuit held, however, that "[n]ot acting 'in an equitable manner'" was not grounds for an award of attorney's fees.[151] While the defendants may have acted in bad faith with regard to the underlying tort, there was no evidence that the defendants acted in bad faith throughout the lawsuit.[152] The Fifth Circuit distinguished this case from one in which a party took a position maliciously, failed to comply with discovery requests, or otherwise abused the litigation process.[153]

In the Eighth Circuit, *Lamb Engineering & Construction Co. v. Nebraska Public Power District*[154] clarified the issue of prelitigation bad faith.[155] In *Lamb*, the court examined a contract between a public power

146. *See* Lamb Eng'g & Constr. Co. v. Nebraska Pub. Power Dist., 103 F.3d 1422 (8th Cir. 1997); Galveston County Navigation Dist. No. 1 v. Hopson Towing Co., 92 F.3d 353 (5th Cir. 1996); Association of Flight Attendants v. Horizon Air Indus., Inc, 976 F.2d 541 (9th Cir. 1992) (en banc); Woods v. Barnett Bank of Ft. Lauderdale, 765 F.2d 1004 (11th Cir. 1985); Shimman v. Int'l Union of Operating Eng'rs, 744 F.2d 1226 (6th Cir. 1984); Nemeroff v. Abelson, 620 F.2d 339 (2d Cir. 1980).

147. 92 F.3d 353 (5th Cir. 1996).

148. *Hopson Towing*, 92 F.3d at 354.

149. *Id.* at 355.

150. *Id.* at 359.

151. *Id.*

152. *Id.*

153. *Id.*; *see also Association of Flight Attendants*, 976 F.2d at 549-50 (finding no reason to construe the exception broadly, the court limited the application of the bad faith exception to actions occurring during the litigation itself); *Woods*, 765 F.2d at 1004 (holding that bad faith must occur in the course of the litigation itself, because "[v]exatious conduct inherent in the fraudulent acts that make up the . . . cause of action cannot be the basis for an attorney's fee award because punitive damages are not available . . . ."); *Shimman*, 744 F.2d at 1226 (examining the rationale for the American Rule, the Court stated that "[t]o allow an award of attorney fees based on bad faith in the act underlying the substantive claim would not be consistent with the rationale behind the American Rule . . ."); *Nemeroff*, 620 F.2d at 339 (implying that the bad faith exception only applies to litigation conduct by noting that claims must be without merit).

154. 103 F.3d 1422 (8th Cir. 1997).

155. Prior to this decision, the Eighth Circuit's decisions could be read to allow attorneys' fees in the prelitigation context. *See* Richardson v. Communications Workers of Am., 530 F.2d 126 (8th Cir. 1976) (1976) (agreeing with the district court that the defendant union acted in bad faith in representing the plaintiffs in the employment context leading up to trial, rather than during litigation).

district and a contractor, Lamb, to refurbish electric lines.[156] Lamb experienced difficulties in carrying out the contract.[157] Eventually, the power district terminated the contract, and Lamb brought action against the public power district.[158]

The district court expressly awarded attorneys' fees because of prelitigation bad faith conduct.[159] The Eighth Circuit concluded that an award of prelitigation attorneys' fees was not in accord with Nebraska law.[160] After examining federal law, the Eighth Circuit also concluded "that the district court's inherent power to award attorney fees as a sanction for bad faith conduct does not extend to pre-litigation conduct."[161] Despite its holding, however, the court stated that prelitigation conduct could be considered when examining attorneys' fees; however, prelitigation conduct alone could not be a basis for a fee award.[162]

D. *Analysis*

In *NASCO*, the Supreme Court interpreted the bad faith exception narrowly, prohibiting courts from sanctioning purely prelitigation bad faith conduct. The Tenth Circuit has followed this approach accordingly. The court left undecided, however, whether a court can consider prelitigation bad faith conduct when it is coupled with bad faith conduct during the litigation itself.

The Eighth Circuit's approach addressed prelitigation bad faith.[163] That court permitted consideration of prelitigation bad faith behavior when awarding attorneys' fees for bad faith conduct during litigation.[164] This approach operates to eradicate bad faith, and allows courts to take all the factors into account when sanctioning a party. Unless a court considers prelitigation bad faith, a party could act in bad faith up to the filing of a lawsuit with impunity. If this party also acted in bad faith during the litigation, the party would only face sanctions for the litigation behavior and not be punished for other bad faith conduct.

Those actions which could be considered prelitigation conduct are extensive. For example, parties often discuss the possibility of initiating a lawsuit. During this time, parties collect background information and conduct research to assess whether litigation is a viable option. Negotiation often occurs during this stage as well. Bad faith during this time

156. *Lamb*, 103 F.3d at 1427.

157. *Id.* The two parties have markedly different accounts concerning the breakdown of the contract. *See id.* at 1427-28.

158. *Id.* at 1429.

159. *Id.* at 1434.

160. *Id.*

161. *Id.* at 1437. The court distinguished *Richardson*, determining that certain acts of the union were in the context of the litigation. *Id.* at 1436.

162. *Id.* at 1435.

163. *See id.* at 1422.

164. *Id.* at 1437.

goes unpunished and courts will not even consider the behavior when addressing bad faith awards.

Therefore, equity requires that courts be permitted to consider both the prelitigation behavior and the litigation behavior when bad faith has occurred throughout both stages. If one party does not comport with good faith requirements during this crucial time, not only could unnecessary lawsuits be filed, but the other party might incur vast amounts of fees during this phase. These fees would be a direct result of the other party's bad faith. When this occurs the party who has acted in bad faith should bear the costs associated with his bad faith conduct.

IV. CHOICE OF LAW AND ATTORNEY'S FEES

A. *Background*

Following the Supreme Court's decision in *Erie R. Co. v. Tompkins*,[165] federal courts sitting in diversity have generally applied federal procedural law and state substantive law.[166] No federal common law exists and because common law generally governs substantive issues, courts apply state law in those cases.[167] This result encourages uniformity in both state substantive law and federal procedural law.[168]

The Supreme Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*,[169] caused confusion among lower federal courts in situations when courts must determine which state law applies in a fee shifting situation.[170] Some commentators argued this confusion was a result of unclear language in *Alyeska*.[171] In *Alyeska*'s footnote 31, the Supreme Court indicated that a federal court sitting in diversity should apply state fee shifting laws, provided those laws reflect the policy of the state.[172] Courts have interpreted that to mean they are always to apply state fee shifting laws.[173] Because some, though not all fee shifting laws

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165. 304 U.S. 64 (1938).

166. *See* Jeffrey A Parness, *Choices About Attorney Fee-Shifting Laws: Further Substance/Procedure Problems Under* Erie *and Elsewhere*, 49 U. PITT. L. REV. 393, 394 (1988).

167. *Erie*, 304 U.S. at 78.

168. *See* Parness, *supra* note 166, at 394.

169. 421 U.S. 240 (1938).

170. *See* John G. Hanlin, *Choice of Law in the Interpretation of Insurance and Reinsurance Contracts*, 2 MD. J. CONTEMP. LEGAL ISSUES 15 (1991); Parness, *supra* note 166; Partee, *supra* note 83, at 107.

171. Parness, *supra* note 166, at 393.

172. *Aleyeska*, 421 U.S. at 260 n.31. The Court stated:

> A very different situation is presented when a federal court sits in a diversity case. '(I)n an ordinary diversity case where the state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed.'

Id.

173. Parness, *supra* note 166, at 414.

are procedural, this interpretation is inconsistent with the language from *Erie* which directed a federal court to use only federal procedural law.[174]

Procedural fee shifting laws generally govern litigation conduct, while substantive fee shifting laws relate to remedies available for specific claims.[175] This becomes relevant when attempting to harmonize *Erie* and *Alyeska*.[176] For example, if a fee shifting law is considered procedural, then under *Erie*, a court would use federal fee shifting laws.[177] On the other hand, when a fee shifting law is substantive, under *Alyeska*, a court would apply the state's fee shifting law.[178] Under this analysis, attorneys' fees in the context of a contract would be substantive because they relate to a remedy available from the specific contract claim, which comprises the substantive claim. When courts apply only state fee shifting laws, the language from *Erie* becomes moot.

In 1989, the Tenth Circuit addressed the issue of which state's law a court should use when sitting in diversity and determining attorneys' fees.[179] They decided this issue in a contract suit in *Bill's Coal Co v. Board of Public Utility*.[180] After the parties reached a settlement agreement, the purchaser filed for declaratory judgment as to nonliability in the federal district court in Missouri.[181] Subsequently, the sellers filed a breach of contract claim in an Oklahoma federal district court.[182] Eventually, the Oklahoma court transferred the sellers' action to the court in Missouri, but the Missouri court transferred the actions back to Oklahoma.[183] After several procedural phases the case went before the Tenth Circuit, which addressed which state's law was applicable to resolve the issue of attorneys' fees.[184]

Finding that attorneys' fees must be determined by state law and that an award of attorney's fees was substantive, the Tenth Circuit court applied Missouri law because the substantive law of that contract was Missouri law.[185] The Tenth Circuit determined that "[i]n diversity cases generally, and certainly in this circuit, attorney fees are determined by

174. Bill's Coal Co. v. Board of Pub. Util., 887 F.2d 242 (1989).
175. Parness, *supra* note 166, at 401.
176. *Id* at 402.
177. *Id.* at 414.
178. *Id.* at 411-12.
179. *Bill's Coal*, 887 F.2d at 245.
180. *Id.* at 242.
181. *Id.* at 243.
182. *Id.*
183. *Id.*
184. *Id.* at 245. The district court originally found that the sellers had breached the contract and the case was dissolved. *Id.* at 249. However, the Tenth Circuit reversed and remanded that dissolution. *Id.* The district court, on remand, applied Missouri law with regard to attorneys' fees. *Id.* The sellers appealed. *Id.*
185. *Id.* at 246.

state law and are substantive for diversity purposes."[186] The Tenth Circuit did not, however, decide which state's choice-of-law rules to apply.[187]

Bill's Coal created some confusion regarding choice-of-law rules. Courts agreed that attorneys' fees were substantive and the law that governed the contract should govern the underlying lawsuit. Courts were unclear, however, which state's choice-of-law rules should be applied in the first instance.

B. Boyd Rosene and Associates, Inc. v. Kansas Municipal Gas Agency[188]

1. Facts

The defendants prevailed on an appeal from a district court ruling.[189] The defendants sought attorneys' fees as prevailing parties, pursuant to an Oklahoma statute, but the district court ruled that each party must bear their own costs.[190] The defendants then sought en banc consideration of which state's law should apply to determine an award of attorneys' fees.[191] The lower courts agreed that attorneys' fees were substantive and that Missouri law governed the parties' contract.[192] The issue before the Tenth Circuit, however, required the court to determine which state's choice-of-law rules applied: Missouri or Oklahoma.[193]

2. Decision

The court asserted, as in *Bill's Coal*, that attorneys' fees were substantive for diversity purposes, therefore, courts must apply the substantive law of the state which governs the contract.[194] However, the court noted that generally in diversity cases, a federal court should apply the substantive law of the forum state.[195] Therefore, "[r]ather than automatically applying the law of the state providing the substantive contract law, a district court must first apply the forum state's choice-of-law rules in resolving attorney's fees issues."[196] The court then remanded the case for application of Oklahoma's choice-of-law rules.[197]

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186. *Id.* (quoting In Matter of King Resources Co., 651 F.2d 1349, 1353 (10th Cir. 1981)).
187. *Id.* at 243.
188. 123 F.3d 1351 (10th Cir. 1997).
189. *Boyd Rosene*, 123 F.3d at 1351.
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*

C. *Other Circuits*

In other jurisdictions, this area of the law appears to be settled. Many courts reiterated the accepted notion that federal procedural rules and state substantive rules govern in diversity cases.[198] For example, in *Mentor Insurance Co. v. Brannkasse*,[199] the Second Circuit applied the choice-of-law rules of the forum state, New York, that was determined by an agreement of the parties.[200] The court noted that under New York law, parties may agree what law applies, and therefore the court did not need to address the issue.[201]

The Eighth Circuit also held that a federal court sitting in diversity must apply the choice-of-law rules of the forum state.[202] In that case, the forum state generally recognized stipulations made by the parties in their contract.[203] In addition, the First Circuit applied the forum's choice-of-law principles in a contract suit to determine which state's substantive law applied.[204] In that case the trial court judge applied Massachusetts' choice-of-law provisions to determine that Massachusetts law, rather than California law, applied and the appellate court did not disturb this finding.[205]

On the other hand, the Seventh Circuit, in *Heller International Corp. v. Sharp*[206] held that a district court sitting in diversity should have applied the substantive law and the choice-of-law rules of the state in which it sits.[207] In that case, however, the forum was Illinois, and because the parties had already agreed that Illinois law governed, there was no real choice-of-law question.[208]

D. *Analysis*

Choice-of-law rules are generally well settled coming from long standing civil procedure cases such as *Erie R. Co. v. Tompkins*.[209] Courts apply federal procedural law and state substantive law. Due to ambiguity created by *Alyeska*, however, courts have been perplexed as to how to treat attorneys' fees because they can be considered as either procedural

198. For example, many courts cited *Erie* for the proposition that a federal court sitting in diversity must apply the substantive law of the forum state, including choice-of-law principles. Erie R. Co. v. Tompkins 304 U.S. 64 (1938); *see* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

199. 996 F.2d 506 (2d Cir. 1993).

200. *Mentor Ins.*, 996 F.2d at 513.

201. *Id.* at 513-14.

202. Overholt Crop Ins. Serv. Co. v. Travis, 941 F.2d 1361, 1366 (8th Cir. 1991).

203. *Id.*

204. Computer Sys. Eng'g, Inc. v. Qantel Corp., 940 F.2d 59 (1st Cir. 1984).

205. *Id.* at 70.

206. 974 F.2d 850 (7th Cir. 1992).

207. *Heller*, 974 F.2d at 856.

208. *Id.*

209. 304 U.S. 64 (1938).

or substantive issues, as evidenced by the Tenth Circuit's decision in *Bill's Coal.*

The Tenth's Circuit approach is consistent with other state's efforts to harmonize choice-of-law problems that arose from *Erie* and *Alyeska.* This approach may, however, burden a court to apply the forum state's choice-of-law provisions, and then another state's substantive law.

The Seventh Circuit's approach, which applied both the substantive law and the choice-of-law rules from the forum state, is a possible alternative. While providing a bright line rule, this approach ignores the fact that the substantive law of the forum state may differ from the substantive law of the contract as in *Boyd Rosene*, which occurs often when parties entered in to a contract with the intent that a certain state's law shall govern. If a federal court were to only apply the forum state's law, the intent of the parties to the contract would not realized.

Applying the forum state's choice-of-law rules in the first instance serves two purposes. First, it gives the federal court state substantive law with regard to choice-of-law rules. Second, it allows the substantive law governing the contract to be applied to the contractual part of the dispute, and generally, this law has been agreed upon by the parties.

CONCLUSION

The American Rule and its exceptions continues to evolve throughout the United States. Many issues are left unresolved, but the Tenth Circuit appears to be in accord with the majority of jurisdictions. During the survey period, the Tenth Circuit clarified important areas of the law, including that the bad faith exception is applicable even if a party could be punished through a contempt proceeding. However, the bad faith exception cannot be used to punish bad faith actions taken prior to the initiation of litigation. In addition, the Tenth Circuit clarified choice-of-laws analyses utilized to determine which state's fee shifting laws should apply in diversity cases.

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