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Timeliness of Post-Judgment Motions for Attorney's Fees Under the Civil Rights Attorney's Fees Awards Act

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TIMELINESS OF POST-JUDGMENT MOTIONS FOR ATTORNEY'S FEES UNDER THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT*†

INTRODUCTION

Under the American Rule litigants must pay for their own attorneys regardless of the outcome of the suit.[1] Courts and especially Congress, through statutory fee-shifting provisions, have created numerous exceptions to the Rule which benefit prevailing parties.[2] The most important of these statutory exceptions is the Civil Rights Attorney's Fees Awards Act of 1976 (Fees Act).[3] Most of the litiga-

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*As this note was in press the Supreme Court decided *White v. New Hampshire Department of Employment Security*, 455 U.S. ____, 102 S. Ct. 1162 (1982) in which the Court resolved one of the central issues discussed in this note. *See* ADDENDUM *infra*.

†The notewriter gratefully acknowledges the invaluable assistance and advice of Mr. E. Richard Larson, Staff Counsel, American Civil Liberties Union. For an excellent overview of the issues discussed in this note see E. R. LARSON, FEDERAL COURT AWARDS OF ATTORNEY'S FEES, 256-69 (1981).

1. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 247 (1975). In England, by contrast, unsuccessful litigants generally must bear the costs, including attorney's fees, of the successful party. *Id.* & n.180. *See generally* Goodhart, *Costs*, 38 YALE L.J. 849 (1929).

2. There are over one hundred statutory exceptions, some, if not most of which, Congress enacted to encourage private litigation to implement public policy. The judicially created exceptions include:

1) The "Common Benefit" or "Common Fund" Doctrine, which is an award of attorney's fees to a party who has preserved or recovered a fund for the benefit of others including himself. *See, e.g.*, Boeing Co. v. Van Gemert, 444 U.S. 472 (1980); Mills v. Electric Auto-Lite Co., 396 U.S. 375, 392 (1970); Trustees v. Greenough, 105 U.S. 527 (1881). As a general proposition, if a fee is to be had from a common fund, the court considers the fee request as collateral to the case and subject to no time limit. *See* notes 53-65 *infra* and accompanying text.

2) The "Bad Faith" Exception, which is an assessment of fees as a part of the fine to be levied on a defendant, or defendants, for willful disobedience of court orders; and an award of fees to the prevailing party when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *See, e.g.*, Hall v. Cole, 412 U.S. 1 (1973); Fleishman Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967); Vaughan v. Atkinson, 396 U.S. 527 (1962); Stacy v. Williams, 50 F.R.D. 52, 54 (N.D. Miss. 1970), *aff'd*, 446 F.2d 1366, 1367 (5th Cir. 1971); *see* notes 133-38 *infra* and accompanying text.

A third exception, the Private Attorney General Doctrine, was eliminated by the Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 271 (1975).

3. The Fees Act, 42 U.S.C. §1988 (1976) (as amended), provides in pertinent part:

. . . In any action or proceeding to enforce a provision of sections 1981, 1982,

tion and commentary surrounding statutory awards of attorney's fees have concentrated on two problems: determining who is the prevailing party[4] and, if an award is appropriate, what constitutes a reasonable fee.[5] Until recently courts have rarely considered whether they have the jurisdiction to make an award of attorney's fees.[6] Fee-shifting provisions notwithstanding, a court's lack of jurisdiction, if raised by astute counsel, could provide an insurmountable obstacle to the unwary litigant.

Whether a party will receive an award of attorney's fees might depend on whether a post-judgment or post-settlement request for fees must be made within a prescribed time limit. This timeliness

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1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], or in any civil action or proceedings, by or on behalf of the United States of America, to enforce or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et. seq.], 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.

The jurisdictional issue discussed in this note has been raised predominantly in Fees Act litigation and for that reason the primary focus will be on that litigation. It might be noted, however, that, since the Fees Act is typical of many fee-shifting provisions, the points made with regard to the Fees Act should apply to those statutes as well.

4. Although the Fees Act and many similar fee-shifting statutes allow an award of fees to the "prevailing party" without distinguishing between plaintiffs and defendants, courts award fees under these provisions under a dual standard. *Compare* Newman v. Piggie Park Enterprises, Inc. 390 U.S. 400 (1968) (prevailing plaintiff in Title II action "should ordinarily recover an attorney's fee unless special circumstances would render an award unjust") *and* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (same standard for prevailing plaintiff under Title VII) *with* Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) (prevailing defendant in Title VII action should recover fees only upon a finding that a plaintiff's action was frivolous, unreasonable or without foundation, even though not brought in subjective bad faith). Congress adopted this dual standard when it enacted the Fees Act. *See* S. Rep. No. 1011, 94th Cong., 2d Sess. 1, 2-4 (1976).

5. *See, e.g.*, Lindy Bros. Builders, Inc. v. American Radiator Standard Sanitary Corp., 540 F.2d 102 (3d Cir. 1976); Johnson v. Georgia Hwy. Express, Inc., 488 F.2d 174 (5th Cir. 1974). *See generally* Berger, *Court Awarded Attorney's Fees: What is Reasonable?*, 126 U. PA. L. REV. 281 (1977).

6. At least three plausible reasons exist for the lack of appellate focus on this jurisdictional issue. First, opposing counsel (usually defendants) simply may not have raised the issue. Also, courts just may have assumed jurisdiction from the apparent statutory mandate to award fees at their discretion. A third and more readily substantiated reason is that the district courts that have considered the jurisdictional question have proceeded to decide the fees issue on the merits anyway. *Hirschkop v. Snead*, 475 F. Supp. 59, 64 (E.D. Va. 1979), *aff'd on other grounds*, 646 F.2d 149, 150 (4th Cir. 1981). Then, on appeal, the circuit courts either ignore the jurisdictional issue or mention it without expressing a view, and from there, go straight to the merits. *E.g.*, Fase v. Seafarers Welfare and Pension Plan, 589 F.2d 112, 114 n.3 (2d Cir. 1978). Thus, not until recently, has jurisdiction to award attorney's fees been the focus of appellate review, albeit with inconsistent results.

issue has become a matter of conflicting opinion among the circuits. The problem centers around a debate as to whether attorney's fees are to be considered as part of the costs of litigation, as part of the judgment, or as a collateral claim. The Fees Act, like many other fee-shifting statutes, specifically states that attorney's fees are to be taxed "as part of the costs" of litigation.[7] Read literally, the Act presumably allows a prevailing litigant to make a motion for fees without any time constraints as with other costs under rules 54(d) and 58 of the Federal Rules of Civil Procedure.[8] Three circuits have taken this position.[9] The First Circuit and a district court in the Fourth Circuit recently took the opposite position by deeming fees as an integral part of the merits of the suit and thus subject to the

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7. 42 U.S.C. §1988 (1976). For examples of similar statutes *see* note 47 *infra*.

8. FED. R. CIV. P. 54(d) (1961) provides:

> Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

These costs are assessed according to 28 U.S.C. §1920 (1976) which provides:

> §1920. Taxation of costs
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> A judge or clerk of any court of the United States may tax as costs the following:
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> (1) Fees of the clerk and marshal;
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> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
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> (3) Fees and disbursements for printing and witnesses;
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> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
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> (5) Docket fees under section 1923 of this title.
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> A bill of costs shall be filed in the case, and upon allowance, included in the judgment or decree.

FED. R. CIV. P. 58 (1963) provides in pertinent part: Entry of Judgment. . . .Entry of judgment shall not be delayed for the taxing of costs.

9. Robinson v. Kimbrough, 659 F.2d 458, 464 (5th Cir. 1981) (Fees Act); Johnson v. Snyder, 639 F.2d 316, 317 (6th Cir. 1981) (*per curiam*) (Fees Act); Bond v. Stanton, 630 F.2d 1231, 1234 (7th Cir. 1980) (Fees Act); Van Ootegham v. Gray, 628 F.2d 488, 497 (5th Cir. 1980) (Fees Act); Knighton v. Watkins, 616 F.2d 795, 797-98 (5th Cir. 1980) (Fees Act); *accord*, Lowen v. Turnipseed, 505 F. Supp. 512, 513 (N.D. Miss. 1981) (Fees Act); Janicki v. Pizza, 501 F. Supp. 312, 313 (N.D. Ohio 1980) (Fees Act); Anderson v. Morris, 500 F. Supp. 1095, 1105-06 (D. Md. 1980), *aff'd per curiam*, 636 F.2d 55 (4th Cir. 1980) (Fees Act); *see also* Jones v. Dealers Tractor and Equip. Co., 634 F.2d 180, 181 (5th Cir. 1981) (Title VII); *but cf.* Stacy v. Williams, 50 F.R.D. 52, 54 (N.D. Miss. 1970), *aff'd*, 446 F.2d 1366, 1367 (5th Cir. 1971) (bad faith exception; held, FED. R. CIV. P. 59(e) applicable); *see* notes 133-38 *infra* and acompanying text.

ten-day limit set for alteration or amendment of judgments under rule 59(e).[10] Under this view, failure to request attorney's fees before entry of judgment, or within ten days of entry, divests a district court of jurisdiction to consider the attorney's fees issue.[11] Thus, a jurisdictional problem might arise depending on whether a court views attorney's fees as part of costs or as part of the remedies sought.

A claim for attorney's fees may be characterized in at least two other ways. One view holds that a fee application presents a collateral and independent issue to be decided in a separate proceeding, a request for which has no time limit.[12] Fee applications also could be considered as integral to the merits but nonetheless not governed by a time limit. Courts reach this result by holding that the underlying substantive judgment will not be final, and therefore not appealable under §1291,[13] until the court awards attorney's fees.[14] The timeliness of a request for attorney's fees thus depends on how a court characterizes the finality of the underlying judgment and the finality and appealability of fee awards, as well as whether fees are costs, an integral part of the merits or a collateral and independent claim.

This note consists of a survey of the background and current

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10. White v. New Hampshire Dep't of Emp. Sec., 629 F.2d 697 (1st Cir. 1980), *rev'd and remanded*, 455 U.S.___, 102 S. Ct. 1162 (1982); Hirschkop v. Snead, 475 F. Supp. 59 (E.D. Va. 1979), *aff'd on other grounds*, 646 F.2d 149, 150 (4th Cir. 1981).

FED. R. CIV. P. 59(e) (1946) provides: Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

11. White v. New Hampshire Dep't of Emp. Sec., 629 F.2d at 699. *See* notes 111-126 *infra* and accompanying text.

12. Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939) (common fund exception); Obin v. District No. 9 of Int'l Ass'n, Etc., 651 F.2d 574 (8th Cir. 1981) (Title VII). *See* notes 53-88 *infra* and accompanying text.

13. 28 U.S.C. §1291 (1976) provides:

Final decision of district courts

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct reivew may be had in the Supreme Court.

14. Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1936) (Title VII); Boeing v. Van Gemert, 444 U.S. 472 (1980) (common fund); Croker v. Boeing Co., 662 F.2d 975 (3d Cir. 1981) (Fees Act; Title VII); Glass v. Pfeffer, 657 F.2d 252 (10th Cir. 1981) (Fees Act); Gurule v. Wilson, 635 F.2d 782 (10th Cir. 1980) (Fees Act); Johnson v. University of Bridgeport, 629 F.2d 828 (2d Cir. 1980) (Title VII); Richerson v. Jones, 551 F.2d 918 (3d Cir. 1977) (Title VII). *See* notes 89-109 *infra* and accompanying text.

status of this timeliness issue in each of these four contexts and an examination of the competing policies which underlie the conflicting positions taken by the courts.[15] One section is devoted to an analysis of the potential problems created when courts apply the rule 59(e) time limit on post-judgment or post-settlement fee requests.[16] An outline of proposals follows in an effort to suggest an approach that accounts for the various concerns such as finality of judgments, judicial economy and piecemeal appeals.[17] Inasmuch as fee awards differ substantially from the routine assessment of costs, and because the application of rule 59(e) to post-judgment or post-settlement fee motions may raise appellate procedure problems as well as a potential ethical dilemma for attorneys, fee applications should be considered as collateral and independent claims to be decided in proceedings subsequent to the final resolution of the merits of the case. Under this analysis, there should be no time limit, apart from an implicit requirement of reasonableness, on post-judgment or post-settlement motions for attorney's fees.

CHARACTERIZATIONS OF FEE APPLICATIONS FOR TIMELINESS PURPOSES

Requests for attorney's fees fall into four categories. No time limit will apply to attorney's fees if they are characterized: 1) as costs; or 2) as collateral and independent of the merits of the case; or 3) as so integral to the merits that lack of a decision on the fees issues deprives a judgment of finality. If the fee request does not fall within one of these three categories, courts consider fees to be one of the remedies sought. Under this fourth categorization, should a judgment or order be silent as to fees, a claimant must move to amend the judgment or order within ten days under rule 59(e). Failure to so move divests the district court of jurisdiction to award attorney's fees. Parties seeking fees under the Fees Act frequently argue that no time limit ought to apply to their claim because the Fees Act expressly characterizes attorney's fees as costs or, alternatively, that their fee request presents a collateral and independent claim.

Fee Motions as Requests for Costs Subject to No Time Limit

Whether a fee request is to be considered a request for costs

15. *See* notes 18-170 *infra* and accompanying text.
16. *See* notes 171-209 *infra* and accompanying text.
17. *See* notes 210-248 *infra* and accompanying text.

depends on a court's definition of costs. Under rule 54(d) the prevailing party is entitled to costs subject to certain exceptions.[18] The jurisdiction of a court to assess a particular litigation expense as costs must be found in a federal statute, court rule or in the general custom or practice of the court.[19] As noted, the Fees Act specifically defines fees "as part of the costs."[20] Furthermore, the Act does not specify a time limit for fee requests.[21] Under these circumstances, a request for attorney's fees should be subject only to rules 54(d) and 58 and therefore should not be restricted to any time limit.

Ample precedent exists for the proposition that an award of fees is a part of costs under the Fees Act. The Supreme Court, while having yet to decide the timeliness issue, has nonetheless approved the legislative decision to authorize fee awards under the Fees Act as items of cost. In *Hutto v. Finney*,[22] the Court relied on congressional authority to authorize fees as costs to hold that the eleventh amendment imposed no bar to a prevailing party recovering attorney's fees from a state. The Court stated that precedent justified the congressional decision to authorize fees as items of cost.[23] The Court took notice of the English practice of requiring the losing party to pay the counsel fees of the successful litigant.[24] The Court also referred to the federal statutory definition of costs that allows an award of $100 in counsel fees in certain admiralty cases.[25] While inflation had made the amount trivial, the Court stated that

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18. 6 MOORE'S FEDERAL PRACTICE ¶ 54.77 (1) (1976).

19. *Id.*

20. 42 U.S.C. §1988 (1976) (as amended); *see* note 3 *supra*.

21. *Id.* But the Act does not necessarily require a party to wait until the end of the litigation either. The legislative history indicates that fees may be awarded pendente lite. H.R. Rep. No. 1558, 94th Cong., 2d Sess. 8 (1976). *See generally* Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act*, 80 COLUM. L. REV. 346, 357-59 (1980).

Congress has on occasion specified a time limit on fee requests. *See* Equal Access to Justice Act, Pub. L. No. 96-481, §204(a), 94 Stat. 2327 (amending 5 U.S.C. §504 and 28 U.S.C. §2412) (30 day time limit); *see* notes 213-16 *infra* and accompanying text.

22. Hutto v. Finney, 437 U.S. 678, 700 (1978); *accord*, Fitzpatrick v. Bitzer, 427 U.S. 445, 456-57 (1976) (Title VII; held, award of attorney's fees against state has only an ancillary effect on state treasury of the sort permitted by *Edelman v. Jordan*, 415 U.S. 651, 668 (1974)). The crucial fact for the Court in both *Hutto* and *Fitzpatrick* was the presence of express congressional authorization of attorney's fees as items of cost. *See also* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

23. Hutto v. Finney, 437 U.S. at 697.

24. *Id. See* note 1 *supra*.

25. *Id.* The Court referred to the allowance of $100 in attorney's fees for admiralty cases involving more than $5000 under 28 U.S.C. §1923(a) (1976). *Id.* at 697 n.29.

"the principle of allowing such awards against all parties has undiminished force."[26] This provision exemplifies that Congress has in the past considered attorney's fees to be an item of costs. Based on the statutory authorization of attorney's fees as costs, the Supreme Court held that under the Fees Act "costs" included reasonable attorney's fees, at least for eleventh amendment purposes.[27]

In the context of the timeliness of a fee request under the Fees Act, three courts of appeal have recently held that attorney's fees are "costs" within the meaning of rules 54(d) and 58, which have no timing requirement.[28] The Fifth Circuit, in *Knighton v. Watkins*,[29] reached this conclusion by relying on the express language of the Fees Act which provides that attorney's fees are part of costs. The court distinguished an earlier case[30] in which it had applied the rule 59(e) ten-day limitation to a motion for attorney's fees based on the bad faith exception. In that case the court held that an award of attorney's fees should be sought as a part of the litigation itself.[31] The crucial distinction for the Fifth Circuit in *Knighton* was that, where the Fees Act applies, fees are costs by legislative command. The court pointed out that, since attorney's fees could be awarded

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26. *Id.*

27. *Id.* at 700. Several courts of appeal have recognized that the Supreme Court in *Hutto* attached significance to Congress' characterizaton of fees as costs under §1988, but have not been persuaded that fees should be costs for timeliness purposes. *See* Obin v. District No. 9 of Int'l Ass'n, Etc., 651 F.2d 574, 580 n.7 (8th Cir. 1981) ("The Court's holding [in Hutto] that 'a federal court may treat a State like any other litigant when it assesses costs,' [citation omitted] should not be read as dispositive of whether attorney's fees awarded under §1988 fall within the specific types of 'costs' contemplated by Rules 54(d) and 58."); *accord*, Croker v. Boeing Co., 662 F.2d 975, 982-83 (3d Cir. 1981); White v. New Hampshire Dep't of Emp. Sec., 629 F.2d at 703. Moreover, in other contexts, the Court has held that the statutory authorization of "costs" does not include attorney's fees. *See, e.g.*, Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980); *see* note 48 *infra*.

28. Robinson v. Kimbrough, 659 F.2d 458, 464 (5th Cir. 1981) (Fees Act); Johnson v. Snyder, 639 F.2d 316, 317 (6th Cir. 1981) (*per curiam*) (Fees Act); Bond v. Stanton, 630 F.2d 1231, 1234 (7th Cir. 1980) (Fees Act); Van Ootegham v. Gray, 628 F.2d 488, 497 (5th Cir. 1980) (Fees Act); Knighton v. Watkins, 616 F.2d 795, 797-98 (5th Cir. 1980) (Fees Act); *accord*, Lowen v. Turnipseed, 505 F. Supp. 512, 513 (N.D. Miss. 1981) (Fees Act); Janicki v. Pizza, 501 F. Supp. 312, 313 (N.D. Ohio 1980) (Fees Act); Anderson v. Morris, 500 F. Supp. 1095, 1105-06 (D. Md. 1980), *aff'd per curiam*, 636 F.2d 55 (4th Cir. 1980) (Fees Act); *see also* Jones v. Dealers Tractor and Equip. Co., 634 F.2d 180, 181 (5th Cir. 1981) (Title VII).

29. 616 F.2d 795, 797 (5th Cir. 1980).

30. Stacy v. Williams, 446 F.2d 1366 (5th Cir. 1971) (bad faith exception; rule 59(e) applied); *see* notes 133-38 *infra* and accompanying text.

31. *Id.*

only to prevailing parties and only in the discretion of the district court,[32] attorney's fees under the Fees Act would ordinarily be sought only after litigation.[33] The court concluded that, under these circumstances, "a motion for attorney's fees is unlike a motion to alter or amend a judgment. It does not imply a change in the judgment, but merely seeks what is due because of the judgment. It is, therefore, not governed by the provisions of Rule 59(e)."[34]

To lend further support to its conclusion the Fifth Circuit noted the typical practice of handling costs.[35] The appropriate time for assessing costs is after decision on the merits,[36] and rule 54(d) does not specify a time limit within which motions for costs must be made.[37] While there is a five-day limit within which an objection to an award of costs must be made,[38] this period may not only be

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32. A number of factors guide the discretion of the district court in making awards for attorney's fees. *See, e.g.*, Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974); *see* note 71 *infra*.

33. Knighton v. Watkins, 616 F.2d at 797. *See* Gore v. Turner, 563 F.2d 159, 163 (5th Cir. 1977). In *Gore*, a class action in which injunctive relief and attorney's fees were awarded, the court recited the general principle that, "in the absence of a local rule requiring proof of attorney's fees during trial, the successful party need not prove them until after trial." WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: *Civil* §2679 (1973).

34. Knighton v. Watkins, 616 F.2d at 797; *contra*, White v. New Hampshire Dep't of Emp. Sec., 629 F.2d 697, 701-02 (1st Cir. 1980) *rev'd and remanded*, 455 U.S.____, 102 S. Ct. 1162 (1982) (fees are not costs, but integral to the merits and thus subject to FED. R. CIV. P. 59(e)); Hirschkop v. Snead, 475 F. Supp. 59 (E.D. Va. 1979), *aff'd on other grounds*, 646 F.2d 149, 150 (4th Cir. 1981) (fees integral to merits and subject to FED. R. CIV. P. 59(e)). *See* notes 111-30 *infra* and accompanying text.

35. Knighton v. Watkins, 616 F.2d at 798.

36. 10 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: *Civil* §2679 (1973); 6 MOORE'S FEDERAL PRACTICE ¶ 54.77(9) (1976). The prevailing party simply files a bill of costs and a supporting affidavit with the clerk. On the basis of the affidavit and any other information within his knowledge, such as opposing party's objections, the clerk assesses costs. After the clerk fixes the costs any dissatisfied party may move for judicial review of the clerk's assessment. *See generally* Peck, *Taxation of Costs in United States District Court*, 42 NEB. L. REV. 788 (1963).

37. Knighton v. Watkins, 616 F.2d at 728. *See* note 8 *supra*. While rule 54(d) does not specify a time limit for motions for costs, several districts have adopted local rules that set time limits on such requests. *See* 10 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: *Civil* §2679, 240 n.76 (1973).

38. FED. R. CIV. P. 54(d). This is the provision upon which the court relied in *Gary v. Spires*, 634 F.2d 772, 773 (4th Cir. 1980). In *Gary*, the district court allowed the prevailing defendants counsel fees under the Fees Act upon a motion made more than two months after the action had been dismissed and the expiration of the appeal period. In a rather terse opinion the circuit court stated simply that to wait so long to

enlarged,[39] but the time requirement is not jurisdictional, so a court can allow even a tardy motion at its discretion.[40] Because of these rules and the congressional designation of fees as costs, the Fifth Circuit concluded that in Fees Act cases there will be no time limit on the filing of a motion seeking attorney's fees.[41]

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ask for fees was unjustified. *Id.* A decision not to appeal may rest not only on the merits of the appellant's case, but also upon consideration of the expense of the appellate review. Because the delay by the defendant deprived the unsuccessful plaintiff of making this economic balance, the court rejected the demand for fees as inequitable, relying on the provision in the Fees Act that a "court in its discretion may allow" attorney's fees. *See* note 3 *supra.* The Fourth Circuit did, however, note that fees are costs under the Fees Act. *Id.* Nonetheless, the court found the motion untimely for failure to appeal the assessment of costs made by the clerk within five days as required by rule 54(d). Under this analysis, when a judgement is silent on fees awardable under the Fees Act, but assesses costs due as of course, the deserving party must file for review by the court within five days of entry. In holding that the rule 54(d) time limit applied, the court in *Gary* failed to recognize that this time period may be enlarged. *See* note 39 *infra.* This decision also avoided the question of whether, in the context of the Fees Act, rule 59(e) should apply to fee motions.

39. FED. R. CIV. P. 6(b) (1967) provides:

> (b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.

40. 6 MOORE'S FEDERAL PRACTICE ¶ 54.77(9) (1976).

41. Knighton v. Watkins, 616 F.2d at 798. The court in *Knighton* did note that there is a distinction between the practices governing the award of fees and that of awarding ordinary costs. *Id.* at 798 n.2. *Accord*, Terket v. Lund, 623 F.2d 29, 33 (7th Cir. 1980) ("the decision to award attorneys' fees under §1988 is different from the routine assessment of costs normally made by the court clerk.") While the Fees Act allows fees to be part of costs only in the discretion of the district judge, costs are ordinarily assessed initially by the clerk of the court. The Fifth Circuit determined that this difference in practice was not significant enough to warrant that fee motions be governed by rule 59(e). *See generally* 6 MOORE'S FEDERAL PRACTICE ¶ 54.77(9) (1976).

The Fifth Circuit recently reaffirmed its decision in *Knighton.* Robinson v. Kimbrough, 652 F.2d 458, 464 (5th Cir. 1981) (Fees Act); Van Ootegham v. Gray, 628 F.2d 488, 497 (5th Cir. 1980) (§1983 action in which plaintiff prevailed and was awarded fees under the Fees Act with the court holding that "[a] motion for fees is not a motion to alter or amend the judgement, [*Knighton*], and therefore, does not require a reconsideration of the judgment."); *see also* Jones v. Dealers Tractor & Equipment Co., 634 F.2d 180, 181 (5th Cir. 1981) (Title VII: held, court had jurisdiction under *Knighton* to award fees as part of costs).

The Sixth and Seventh Circuits also have adopted the view that a motion for attorney's fees represents a request for costs under the Fees Act.[42] The Seventh Circuit held that, since rule 54(d) does not impose a time limit within which a motion for costs must be made, fees may be awarded for time spent securing compliance with a summary judgment.[43] The Seventh Circuit contrasted its case under the Fees Act with the usual case where attorney's fees are not provided for by statute but are sought as part of the litigation itself.[44] Since the Fees Act provided for the award of fees as part of costs, the Seventh Circuit agreed with the Fifth Circuit and held that rule 59(e) does not apply to motions made pursuant to the Fees Act.[45] Thus, three courts of appeal have held that, because the Fees Act specifically deems attorney's fees to be part of the costs of litigation, a request for fees is a request for costs for purposes of the timeliness issue and, as such, is not limited under rule 59(e).

While some courts have determined that a fee application is more akin to a request for costs than to a motion to alter or amend a judgment governed by rule 59(e), attorney's fees do differ from routine costs in several significant ways. First, whereas routine costs made available by federal statute ordinarily are assessed initially by the clerk of the court, attorney's fees are awarded at the discretion of the trial judge.[46] Second, not all fee-shifting statutes authorize fees as part of the costs,[47] nor do all statutory provisions

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42. Johnson v. Snyder, 639 F.2d 316, 317 (6th Cir. 1981) (*per curiam*) (suit for damages and injunctive relief under Fair Housing Act and Fees Act; held, that *Knighton* controlled and was a better reasoned opinion that *White*); Bond v. Stanton, 630 F.2d 1231, 1234 (7th Cir. 1980) (Fees Act). *See also* Hairline Creations v. Kefalas, 664 F.2d 652, 659 (7th Cir. 1981) (dicta: rule 59(e) does not apply to Fees Act cases).

43. Bond v. Stanton, 630 F.2d 1231, 1234 (7th Cir. 1980).

44. *Id. See* Stacy v. Williams, 446 F.2d 1366 (5th Cir. 1971); notes 133-38 *infra* and accompanying text.

45. Bond v. Stanton, 630 F.2d at 1234; *cf.* Hairline Creations, Inc. v. Kefalas, 664 F.2d 652 (7th Cir. 1981) (rule 59(e) applies to motions for fees under the Trademark Act but not under the Fees Act).

46. *See* note 41 *supra.*

47. Federal fee-shifting statutes vary widely. One group, of which the Fees Act is a part, award "a reasonable attorney's fee as part of costs." *See, e.g.*, Title II, Civil Rights Act, 42 U.S.C. §2000a-3(b) (1967); Title VII, Civil Rights Act, 42 U.S.C. §2000e-5(k) (1972). Another group closely resembles this wording by providing that a prevailing party is entitled to "the cost of suit, including a reasonable attorney's fees." *See, e.g.*, The Clayton Act, 15 U.S.C. §15 (1914). Still other acts separate attorney's fees from other taxable costs. *E.g.*, Fair Labor Standards Act, 29 U.S.C. §216(b) 1961) ("The court shall . . . allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.")

Despite the mandatory wording of the Clayton Act, cases differ as to whether

for costs include fees.[48] Finally, while rule 54(d) allows costs as of course to the prevailing party unless the district court directs otherwise,[49] a single standard, attorney's fees traditionally have been awarded on a dual standard; to prevailing plaintiffs unless special circumstances make an award inequitable, but to prevailing defendants only in cases where the plaintiff's suit was frivolous or unreasonable.[50] Costs and fees differ not only in their statutory definitions and provisions but also in the manner in which they are awarded and to whom they are awarded.

Although these differences between costs and fees suggest that they be treated differently, that suggestion loses force where Congress expressly provides that attorney's fees be assessed as costs. This express language becomes even more compelling upon consideration of the underlying policies behind fee-shifting. For instance, in the public interest context, fee-shifting encourages private litigation to vindicate civil rights.[51] In the context of claims on behalf of group interest (the common fund cases), fee-shifting facilitates pursuit of remedies where no one person has sufficient stake in the outcome and a class action is not feasible.[52] To achieve these ends, the expense barrier, including routine costs, attorney's fees and other expenses must be minimized. Congress accomplished this by including the single most expensive litigation item in its definition of costs in §1988. While several courts have relied on this congressional definition that fees are costs under the Fees Act to hold that

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fees are costs under that act. *Compare* Baughman v. Cooper-Jarrett, Inc., 530 F.2d 529, 531 n.2 (3d Cir. 1976) (award of attorney's fee as part of the cost of suit is mandatory); *with* Clapper v. Original Tractor Cab Co., 270 F.2d 616, 627-8 (7th Cir. 1959) (attorney's fees are not meant to be included as an item of the usual costs taxed against the unsuccessful litigant.) These cases highlight the present conflict where under the Fees Act, which is similar to the Clayton Act, the results are also diametrically oppossed.

48. *See, e.g.*, Roadway Express, Inc. v. Piper, 447 U.S. 752, 757-62 (1980). In *Piper*, the Court determined that, since 28 U.S.C. §1927 must be read in conjunction with 28 U.S.C. §1920, which does not enumerate attorney's fees among the "costs" that ordinarily may be taxed against a losing party under rule 54(d), the term "costs" in §1927 does not authorize the assessment of attorney's fees against counsel who unreasonably extend the proceedings in any case.

49. A district court is not without discretion in determining whether and to what extent it should award costs. The particular circumstances of a case may permit a district court to refuse to award costs altogether or to apportion them between the parties. Croker v. Boeing Co., 662 F.2d 975, 998 (3d Cir. 1981); but *see* Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 235 (1964) (court's discretion to impose extraordinary costs should be used sparingly so as not to discourage litigation). *See generally* 10 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: *Civil* §2668 (1973).

50. *See* note 4 *supra*.

51. Sands, *Attorneys' Fees as Recoverable Costs*, 63 A.B.A.J. 510, 512 (1977).

52. *Id.*

no time limit applies to requests for attorney's fees, this analysis seems rather simplistic. Insofar as fees and costs are but incidental expenses incurred in vindication of personal or property rights, requests for fees and costs present matters collateral to the primary objective of the suit.

Fee Motions as Collateral and Independent Claims Subject to No Time Limit

If a fee request is considered as a separate claim, collateral to the merits of the case, a court will not place a time limit on the request. A fee motion has long been considered as presenting a collateral claim where the request is a claim on a common fund.[53] Courts have recognized the collateral nature of a fee request under fee-shifting provisions because of the numerous factors considered in awarding fees[54] and the separate appealability of the fees issue.[55] If considered as a separate, collateral claim, a fee request does not represent a motion to alter or amend the judgment or original decree on the merits and, therefore, rule 59(e) is inapplicable.

In the context of the common fund cases, no time limit is placed on claims for fees from that fund. In *Sprague v. Ticonic National Bank*,[56] the Supreme Court rejected a timeliness claim analogous to a present-day rule 59(e) argument. Under the equity rules then in existence, a final decree in a suit in equity could be revised only during the term of its entry.[57] Although the petition

53. *See, e.g.*, Boeing Co. v. Van Gemert, 444 U.S. 472 (1980); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); Sprague v. Titconic Nat'l Bank, 307 U.S. 161 (1939); Trustees v. Greenough, 105 U.S. 527 (1881). *See* notes 56-65 *infra* and accompanying text.

54. *See* notes 71-74 *infra* and accompanying text.

55. *See* notes 75-81 *infra* and accompanying text.

56. 307 U.S. 161 (1939). In *Sprague* the plaintiff sued to establish a priority claim on certain bonds in the hands of a receiver to cover the amount deposited in a trust fund held by a then bankrupt bank. The district court sustained the claim for the lien plus interest and "taxable costs." Several years later, and after several appellate hearings on the question of interest and while that issue was pending before the Supreme Court, the plaintiff made a claim in district court for attorney's fees on the theory that she had established a common fund for some fourteen other parties similarly situated. The district court held that it lacked authority over the case because, after appeal, it had no remaining function but to carry out whatever mandate was forthcoming from the Supreme Court. The court of appeals affirmed for this and for the additional reason that, since the term of court at which the decree had been entered had long since passed when the petition for fees had been filed, the district court lacked jurisdiction.

57. *Id.* at 169 n.9. Nor, under the same limitation, could a district court grant a rehearing of an appealable decree. *Id.* The Court noted that rules 59 and 60 of the

seeking attorney's fees was filed nearly two years after the final decree on the merits was entered, the Court refused to apply the term of court requirement, because it viewed a request for attorney's fees as an independent claim and not a request to alter the original decree.[58] To reach its conclusion, the Court first cited the historic authority of a court of equity to allow, in appropriate situations, counsel fees and other litigation expenses not included in the ordinary taxable costs authorized by statute.[59] Then the Court distinguished fees from ordinary costs because fees, unlike ordinary taxable costs, are not of a routine character; rather, fees are contingent upon the equities of the entire lawsuit—an assessment of which could best be made after exhaustion of all appeals.[60] The Court determined that, since a fee claim "was a collateral one, having a distinct and independent character,"[61] the fees issue was different from the ordinary taxing of costs and the merits of the case. Thus, the fee claim was barred neither by the original decree or the previous Supreme Court mandate, nor by the term of court rule.

The decision in *Sprague* remains intact because, as the Court in *Sprague* noted,[62] rules 59 and 60 of the new Federal Rules of Civil

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new Federal Rules of Civil Procedure dispensed with these time limitations based on terms of court, and set fourth the time limits in which actions to alter and amend a judgment or be relieved therefrom must be made. In addition, rule 6(c) provided that the expiration of a term of court would not affect or limit the doing of any act or the taking of any proceeding. *Id.* (Rule 6(c) was subsequently rescinded effective July 1, 1966).

58. The court stated:

> Since we view the petition for reimbursement as an independent proceeding supplemental to the original proceeding and not a request for a modification of the original decree, the suggestion of the Circuit Court of Appeals—that it came after the end of the term at which the main decree was entered and therefore too late—falls.

Id. at 170.

59. *Id.* at 164-65. The Court noted that eighteenth century English practice allowed the court in equity to allow for costs "between party and party" (*i.e.*, a fixed allowance for steps in a suit) as well as costs "as between solicitor and client" (*i.e.*, counsel fees and litigation expenses to the extent that fair justice to the other party would permit). *Id.* at 165.

60. The court stated that fees "are contingent upon the exigencies of equitable litigation, the final disposition of which in its entire process including appeal place such a claim in much better perspective than it would have at an earlier stage." *Id.* at 168. *See also* Perkins v. Standard Oil Co. of Cal., 399 U.S. 222, 223 (1970) (district court should in the first instance award fees for services performed at the appellate stages of successful litigation); notes 191-94 *infra* and accompanying text.

61. Sprague v. Ticonic Nat'l Bank, 307 U.S. at 169, *quoting*, Trustees v. Greenough, 105 U.S. 527, 531 (1881).

62. Sprague v. Ticonic Nat'l Bank, 307 U.S. at 169 n.9; *see* note 57 *supra*.

Procedure replaced the term of court requirement under the rules of equity. Under *Sprague* an attorney's fees request should be considered in an independent proceeding supplemental to the substantive action at least where the fee claim is made pursuant to the common benefit theory.[63] It follows then that a post-judgment fee request under these circumstances is not a motion to alter or amend that judgment under rule 59(e), but a separate claim governed by rule 54(d). And, since attorney's fees under the Fees Act are in the nature of an equitable award in the public interest,[64] fee requests pursuant to that act are akin to claims on a common fund in that both are equitable exceptions to the American Rule.[65] Therefore, fee requests under §1988 ought to be governed by *Sprague*, and thus subject not to the strictures of rule 59(e), but controlled only by rule 54(d).

In a thorough and well-reasoned opinion based in part upon *Sprague*, the Eighth Circuit, in *Obin v. District No. 9 of the Int'l Ass'n of Machinists and Aerospace Workers*, held that a motion for attorney's fees under Title VII raised "a collateral and independent claim, not an application for costs under Rule 54(d) or a matter integral to the merits of the action."[66] The court in *Obin* rested its decision on both legal and policy grounds.

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63. Even in cases where the court placed a time restriction on fee requests, the courts have acknowledged that a time limit will not apply in common fund cases or in cases where an attorney seeks fees by asserting a right of his own rather than one of his client. *See, e.g.*, Hairline Creations, Inc. v. Kefalas, 664 F.2d 652, 659 (7th Cir. 1981); White v. New Hampshire Dep't of Emp. Sec., 629 F.2d 697, 703 (1st Cir. 1980); Fase v. Seafarers Welfare & Pension Plan, 5689 F.2d 112, 114 n.3 (2d Cir. 1978).

That a claim for fees is collateral to the substantive action is further illustrated by the fact that a party entitled to fees under a fee-shifting statute may bring an action in federal court solely to recover fees. New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980) (prevailing party in state administrative proceeding can initiate federal lawsuit for fees under Title VII).

64. Hairline Creations, Inc. v. Kefalas, 664 F.2d 652, 659 (7th Cir. 1981).

65. *Id.*

66. 651 F.2d 574, 582 (8th Cir. 1981). *Obin* involved a Title VII action in which the prevailing defendant filed a motion for fees about two (2) weeks after entry of judgment pursuant to the fee-shifting provision of Title VII, 42 U.S.C. §2000e-5(k) (1976), and the bad faith exception to the American Rule. At the outset, the court in *Obin* determined that similar procedural rules should govern the timeliness of fee requests, be they made pursuant to §1988, Title VII of the bad faith exception. *Id.* at 578 n.5; *cf.* Hairline Creations, Inc. v. Kefalas, 664 F.2d 652, 656 (7th Cir. 1981) (determination of what rule, 54(d) or 59(e), defines post-judgment motions for attorney's fees requires examination of the nature of the exception to the American Rule under which fees are claimed and conditions under which fees are awarded).

Section 706(k) of Title VII of the Civil Rights Act of 1964, as amended, 42

Initially, the court determined that it was unlikely that Congress intended that attorney's fees be treated as costs for purposes of rule 54(d) because of the differences between fees and routine costs assessed after entry of judgment on the merits.[67] However, the Eighth Circuit refused to characterize fees as integral to the merits and thus subject to rule 59(e), because the award of fees differs both in its nature[68] and effect[69] from a judgment on the merits. In addition to the discretionary nature of fee awards and the dual standard under which fees are generally awarded, the court in *Obin* emphasized that fees differ from the merits because courts must examine, usually after separate hearings, numerous factors in addition to the merits in determining the propriety of fee awards.[70]

The numerous factors which a court must consider in awarding attorney's fees does illustrate the collateral and independent nature of fee awards. Ordinarily, a court must consider the number of hours worked and the hourly rate of the attorney as well as a number of "contingency" and/or "quality" factors such as the novelty and difficulty of the issues, the experience and reputation of the attorney, and the skill required to perform the legal services properly.[71] The Supreme Court has implied that, due to the complexity of the fee issue, which in some cases requires "the taking of evidence and

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U.S.C. §2000e-5(k) (1976) (emphasis added), provides: "the court, in its discretion, may allow the prevailing party, . . . *a reasonable attorney's fee as part of the costs.* . . ."

67. Obin v. District No. 9 of Int'l Ass'n Etc., 651 F.2d at 580; *accord*, Croker v. Boeing Co., 662 F.2d 975, 983 (3d Cir. 1981); White v. New Hampshire Dep't of Emp. Sec., 629 F.2d 697 F.2d 697, 702-03 (1st Cir. 1980); *see* note 27 *supra*.

68. Obin v. District No. 9 Int'l Ass'n, Etc., 651 F.2d at 580; *accord*, Terket v. Lund, 623 F.2d 29, 33 (7th Cir. 1980); *see* note 73 *infra* and accompanying text.

69. Obin v. District No. 9 of Int'l Ass'n, Etc., 651 F.2d at 581; *accord*, Knighton v. Watkins, 616 F.2d 795, 797 (5th Cir. 1980); *see* text accompanying note 34 *supra*.

70. Obin v. District No. 9 of Int'l Ass'n, Etc., 651 F.2d at 581.

71. This is the so-called "lodestar" method. *See, e.g.*, Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973); Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974), *aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547 (1978). Congress approved this method when it passed the Fees Act. *See* S. Rep. No. 94-1011, 94th Cong., 2d Sess., 6 (1976).

The lodestar method of fee computation involves three steps: (1) The lodestar sum is determined by multiplying the time expended by the normal hourly rate of the attorney; (2) the court may then *increase* the lodestar sum to account for various contingency factors such as the risk of the litigation and the risk of nonpayment, preclusion of other work, the undesirability of the case and delay in payment; (3) the court may then *increase or decrease* the lodestar sum because of the exceptional quality of the representation as reflected by the performance of counsel, the complexity and

briefing," the fee issue is collateral.[72] In a case cited in *Obin*, the Seventh Circuit stated that a fee award under the Fees Act involved consideration of factors beyond those involved in the merits of the case and was thus "distinct from the decision on the merits."[73] That a district court must consider many factors, often after a full evidentiary hearing on separate briefs submitted by the parties, suggests that a fee request presents a collateral issue.[74]

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novelty of the issues and, in settled cases, the results obtained. *See* Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980).

Some courts employ a less objective approach than the lodestar by simply considering one or more of the twelve factors listed in *Johnson v. Georgia Hwy. Express*, 488 F.2d 714, 717-19 (5th Cir. 1974). The *Johnson* factors include: (1) The time and labor required; (2) The novelty and difficulty of the questions; (3) The skill requisite to perform the legal service properly; (4) The preclusion of other employment by the attorney due to acceptance of the case; (5) The customary fee; (6) Whether the fee is fixed or contingent; (7) Time limitations imposed by the client or the circumstances; (8) The amount involved and the results obtained; (9) The experience, reputation, and ability of the attorneys; (10) The "undesirability" of the case; (11) The nature and the length of the professional relationship with the client; and (12) Awards in similar cases. The Seventh Circuit employs the guidelines adopted by the American Bar Association as set out in the Model Code of Professional Responsibility, D-R 2-106(B). Muscare v. Quinn, 614 F.2d 577, 579 (7th Cir. 1980).

No matter which method of fee computation a court utilizes, it is clear that it must consider many factors, most of which are unrelated to its decision on the merits of the case. For an excellent discussion of fee computation and fee awards generally, *see* Larson, *Attorney's Fees Under the Civil Rights Attorney's Fees Awards Act of 1976*, 15 *Clearinghouse Review* 309 (1981).

72. Bradley v. School Bd. of the City of Richmond, 416 U.S. 696, 723 (1974); *Accord*, Perkins v. Standard Oil Co. of Cal., 399 U.S. 222, 223 (1970) (in §4 Clayton Act action; held, "The amount of the award for such services [including appellate work] should, as a general rule, be fixed in the first instance by the District Court, *after hearing evidence* as to the extent and nature of the services rendered.") (emphasis added).

73. Terket v. Lund, 623 F.2d 29, 33 (7th Cir. 1980). In determining that a notice of appeal specifying appeal from the order awarding fees is required the court stated:

> [T]he decision to award attorneys' fees under [the Fees Act] is different from the routine assessment of costs normally made by the court clerk . . . it involves an exercise of the district court's judgment requiring an examination of factors beyond the issues decided with the merits of the suit and also different from the largely ministerial task of taxing the traditional items of costs. (Citations omitted).

Id.

74. Obin v. District No. 9 of the Int'l Ass'n Etc. 651 F.2d at 581. The Eighth Circuit indicated that the characteristics it relied upon to distinguish fees from the merits of an action were the same as those that distinguished fees from costs relied

The separate appealability of the fees issue also demonstrates the collateral nature of requests for counsel fees. Of course, to be appealable, an order or judgment must be final.[75] An exception to this Final Judgment Rule exists for "collateral orders" which are offshoots from the principal litigation and are immediately appealable regardless of the posture of the principal litigation.[76] The Supreme Court has held that where fees are a claim on a common fund their award is appealable as collateral to the principal action.[77] Upon this authority some courts of appeal have held that an order granting or denying fees is collateral and appealable under §1291 even though the principal litigation itself is not final or appealable.[78] Other courts have held that, where liability for fees has been decided, reservation of the issue of the amount of fees does not affect the finality of the

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upon in *White v. New Hampshire Dep't of Emp. Sec.*, 629 F.2d 797, 702 (1st Cir. 1980), *rev'd and remanded*, 455 U.S.___, 102 S. Ct. 1162 (1982). In distinguishing fees from costs for timeliness purposes, the First Circuit argued that the number of factors that a court must consider suggested that fees should not be likened to costs thus rendering rule 59(e) applicable to fee requests. *Id. See* notes 111-26 *infra* and accompanying text.

75. This is the Final Judgment Rule. *See* Andrews v. United States, 373 U.S. 334, 340 (1963); Cobbledick v. United States, 309 U.S. 323, 324 (1940). *See generally* 15 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: *Jurisdiction* §3906 (1975).

"A 'final decision' generally is one; which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Catlin v. United States, 324 U.S. 229, 233 (1945). The final judgment rule is condified in 28 U.S.C. §1291; *see* note 13 *supra*.

76. Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546-47 (1949) (appeal lied from order denying defendant's right to require security for reasonable attorney's fees as provided by state law). *See generally C. Wright, Law of Federal Courts* §101 (3d ed. 1976).

To qualify as collateral, an order must meet a two-part test: (1) the order must conclusively determine the disputed question; and (2) the order must resolve an important issue completely separate from the merits of the action. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 375 (1981); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 169-72 (1974).

For a collateral order to be final and appealable, it must: (1) constitute a complete, formal and, in the trial court, a final rejection of a claimed right; (2) where denial of immediate review would render impossible any review whatsoever. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 376 (1981). *See* 10 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: *Civil* §2653 (1973).

77. Trustees v. Greenough, 105 U.S. 527, 531 (1881); *accord*, Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 169 (1939).

78. *See, e.g.*, United States Steel Corp. v. United Mine Workers of America, 456 F.2d 483, 486-87 (3d Cir.), *cert. denied*, 408 U.S. 923 (1972); Preston v. United States, 284 F.2d 514, 515 & n.1 (9th Cir. 1960); Angoff v. Goldfine, 270 F.2d 185, 186 (1st Cir. 1959).

underlying decision on the merits.[79] The court in *Obin* held that, because a post-judgment motion for fees raises a collateral and independent claim, district courts retained jurisdiction to rule upon such motions notwithstanding entry of judgment resolving the merits of the action,[80] and that the claim for fees is separably appealable as a final judgment.[81] In all these cases the result is the same; there is no time limit on requests for counsel fees.

The collateral nature of a fee request is further illustrated in cases in which the court awarded attorney's fees even though the substantive issue became moot. For example, in a case on appeal from an interlocutory order, the Ninth Circuit held that the district court retained jurisdiction to continue other phases of the lawsuit; namely, a request for attorney's fees.[82] Since only the interlocutory appeal, not the entire action, was dismissed as moot, the prevailing parties were free to request fees from the district court. The Ninth Circuit held that where a district court awards fees as part of its original order, with the amount to be set later, claims for fees are ancillary to the case and survive independently under the court's equitable jurisdiction, and may be heard even though the underlying case has become moot.[83] Since the court stated that fees were costs under the Fees Act, and decided that claims for fees were ancillary

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79. Obin v. District No. 9 of Int'l Ass'n, Etc., 651 F.2d 574, 584 (8th Cir. 1981); Bacon v. Toia, 648 F.2d 801, 810 (2d Cir. 1981); Memphis Sheraton Corp. v. Kirkley, 614 F.2d 131, 133 (6th Cir. 1980); Hidell v. International Diversified Investments, 520 F.2d 529, 532 n.4 (7th Cir. 1975) (common fund); Swanson v. American Consumer Indus., Inc. 517 F.2d 555, 561 (7th Cir. 1975) (common fund); Cinerama, Inc. v. Sweet Music, S.A., 482 F.2d 66, 69-70 & n.2 (2d Cir. 1973) (dictum: although failure to set attorney fees as a matter of contract damages prevents an order from being final, failure to set attorney's fees where fees are a matter of judicial discretion may not prevent order from being final); *but cf.*, Bradford Exch. v. Trein's Exch., 644 F.2d 682, 683 (7th Cir. 1981) (in a non-common fund case appellate court lacks jurisdiction to entertain an appeal from an order awarding attorney's fees prior to entry of a judgment on the merits of the substantive claims).

80. Obin v. District No. 9 of Int'l Ass'n, Etc., 651 F.2d at 583-84.

81. *Id.* at 584.

82. Williams v. Alioto, 625 F.2d 845, 848 (9th Cir. 1980). The court in *Williams* also indicated that attorney's fees under the Fees Act were to be awarded as costs and would be sought ordinarily after litigation. *Id. See* note 33 *supra* and accompanying text. *Williams* illustrates the close relationship between the claims that the fees are costs and that fees present a collateral issue.

83. *Id.* When a case becomes moot, judgment on the merits usually is entered in favor of the defendant and the case is dismissed. Under the Fees Act, however, the form of the judgment is unimportant. *See, e.g.*, Ross v. Horn, 598 F.2d 1312, 1322 (3d Cir. 1979). The plaintiff will be considered to have prevailed for purposes of the Fees Act so long as the plaintiff succeeds on any significant issue which achieves some

and independent from the merits, the implication is that there will be no time limit within which the claim must be raised.

From the policy standpoint, characterizing requests for attorney's fees as collateral claims avoids the potential problems created by the application of the rule 59(e) time limit.[84] As indicated in *Obin*, separate treatment of the fees issue promotes judicial economy by minimizing appellate review of the same case[85] and encouraging out-of-court fee settlements.[86] Separate treatment of fees also avoids the potential ethical conflicts that might arise if, after entry of judgment, counsel negotiate simultaneously the substantive issues of the case and the amount of the fee award.[87] Thus, both legal and policy considerations dictate that "the timeliness of a claim for fees should be governed by procedural rules that reflect the collateral and independent nature of the claim rather than by rules, such as the ten-day provision of Rule 59(e), that relate to the merits of the action."[88]

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benefit for which claim was made, despite the fact that, in form, the judgment was for the defendant. In addition to moot cases, the same principle applies to cases which end in settlement, consent decree or even cases which end without formal relief. Extensive precedent exists for this proposition. *See, e.g.*, Maher v. Gagne, 448 U.S. 122, 129-30 (1980) (fees awarded to plaintiff who prevailed through settlement); Morrison v. Ayood, 627 F.2d 669, 671-72 (3d Cir. 1980) (fees awarded to prevailing plaintiffs when defendant stopped reprehensible conduct because of suit); Robinson v. Kimbrough, 620 F.2d 475-78 (5th Cir. 1980) (in jury discrimination case fees awarded to plaintiffs whose actions were significant catalytic factor in achieving result sought though no formal judicial relief obtained); Williams v. Miller, 620 F.2d 199, 202 (8th Cir. 1980) (fees awarded where *plaintiffs* dismissed suit after voluntary compliance by defendant mooted suit); Oldham v. Ehrlich, 617 F.2d 163, 168 (8th Cir. 1980) (fees awarded to prevailing plaintiffs whose suit caused department to abandon a regulation); Ross v. Horn, 598 F.2d 1312, 1322 (3d Cir. 1979) (looking to substance, not form, of outcome; fees awarded to plaintiffs whose suit caused implementation of new procedures thereby rendering claims moot); Cuneo v. Rumsfeld, 553 F.2d 1360 (D.C. Cir. 1977) (fees awarded to plaintiff after defendant released documents thereby mooting FOIA suit). That the plaintiffs in all these cases were deemed "prevailing parties" and entitled to fee awards notwithstanding the form of the outcome suggests that fee awards under these circumstances ought to be deemed as collateral to the litigation itself, rather that claims integral to the merits and sought as part of the final judgment. As such, the application of rule 59(e) to these fee requests would be inappropriate.

84. These problems are discussed at notes 176-214 *infra* and accompanying text.

85. Obin v. District No. 9 of Int'l Ass'n, Etc., 651 F.2d at 581 n.8; *but see* White v. New Hampshire Dep't of Emp. Sec., 629 F. 2d 697, 702-03 (1st Cir. 1980), *rev'd and remanded*, 455 U.S.____, 102 S. Ct. 1162 (1982) (notes 123-26 *infra* and accompanying text).

86. Obin v. District No. 9 of Int'l Ass'n, Etc., 651 F.2d at 583 & 581 n.8.

87. *Id.* at 582-83 & n.10.

88. *Id.* at 583.

Substantial authority under the common fund theory, Title VII and the Fees Act supports the view that fee requests should be considered as collateral to the principal litigation on the merits. However, a request for counsel fees need not be characterized as a collateral claim or even as a request for costs to reach the conclusion that a fee request is not limited by time. Even if a request for fees is considered to be integral to the merits of the case and within the scope of the remedies sought, a line of authority suggests that there is still no time limit on that request.

Fee Applications as Within the Scope of Remedies Sought Yet Subject to No Time Limit

Notwithstanding the line of authority that finds a judgment final and appealable although the amount of the fee award has yet to be determined,[89] a number of cases support the proposition that a judgment on the merits is not final and not appealable until the fees issue is resolved fully.[90] While the former cases characterize fee requests as collateral claims, the latter cases find that counsel fees are integral to the merits in the sense that they represent an important portion of the overall prayer for relief. Where fees are deemed to be collateral, there is no time limit on fee requests until final decision on the fee award is reached. Likewise, where fee requests are part of the remedies sought, no time limit exists because the underlying judgment on the merits is interlocutory and subject to rule 54(b)[91] which has no time limitation. Since rule 54(b) is sub-

89. *See, e.g.*, Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939) (common fund); Trustees v. Greenough, 105 U.S. 527 (1881) (common fund); Obin v. District No. 9 of Int'l Ass'n, Etc., 651 F.2d 574 (8th Cir. 1981); Williams v. Alioto, 625 F.2d 845 (9th Cir. 1980); Terket v. Lund, 623 F.2d 29 (7th Cir. 1980); *see* note 79 *supra*.

90. Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 737-44 (1976); Croker v. Boeing Co., 662 F.2d 975, 982-84 (3d Cir. 1981); Glass v. Pfeffer, 657 F.2d 252, 254-55 (10th Cir. 1981); Gurule v. Wilson, 635 F.2d 782, 787-88 (10th Cir. 1980); Johnson v. University of Bridgport, 629 F.2d 828, 830 (2d Cir. 1980); Paeco, Inc. v. Applied Moldings, Inc., 562 F.2d 870, 878 (3d Cir. 1977); Richerson v. Jones, 551 F.2d 918, 922 (3d Cir. 1977); Williams v. Ezelle, 531 F.2d 1261 (5th Cir. 1976); *cf.* Bradford Exch. v. Trein's Exch., 644 F.2d 682, 683 (7th Cir. 1981) (in a non-common fund case appellate court lacks jurisdiction to entertain appeal from an order awarding attorney's fees prior to the entry of judgment on the merits of the substantive claims).

In cases where attorney's fees are a contractually stipulated element of damages, the Second Circuit has a rule barring an appeal prior to a fee determination. Union Tank Car Co. v. Isbandtsen, 416 F.2d 96, 97 (2d Cir. 1969); Aetna Casualty & Surety Co. v. Giesow, 412 F.2d 468, 470 (2d Cir. 1969).

91. FED. R. CIV. P. 54(b) (1961) provides:

> (b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counter-claim, cross-claim, or third party claim, or when multiple parties are in-

ject to no time limit, presumably requests for counsel fees can be made without time constraints. The paradigm for this result is the Summary Judgment Rule in which an interloctory summary judgment on the liability issue of a case, as authorized by rule 56(c)[92] is not appealable until after resolution of the damages issue.[93]

The Supreme Court has determined that, in cases based on a single claim, failure to resolve the fees issue results in an interlocutory order. In *Liberty Mutual Insurance Co. v. Wetzel*,[94] the district court issued an order pursuant to a motion for partial summary judgment on the liability issue. The order left unresolved the requests made by the plaintiff for an injunction, damages and counsel fees. The district court, nonetheless, made the recital, required under rule 54(b), that final judgment be entered on the liability issue, that there was no just reason for delay,

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volved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

92. FED. R. CIV. P. 56(c) (1963) provides:

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *A summary judgment, interlocutory in character, may be rendered on the isue of liability alone although there is a genuine issue as to the amount of damages.*

(emphasis added).

93. 15 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: *Civil* §2715 (1973).

94. 424 U.S. 737 (1976). In this sex discrimination case brought under Title VII, the plaintiffs prayed for a judgment embodying the followng relief: (a) an order requiring the company to establish nondiscriminatory programs for hiring, salary, opportunity and promotion; (b) an injunction barring continuing discriminatory practices; (c) compensatory and exemplary damages with interest; and (d) costs and reasonable attorney's fees with interest.

Upon a motion for summary judgment, the district court entered an order finding that the company was guilty of discrimination. The company appealed and the court of appeals found it had jurisdiction under §1291 and affirmed. The Supreme Court heard oral argument on the issue of liability. The Court considered the appellate jurisdiction issue *sua sponte*. *Liberty Mutual*, 424 U.S. at 739-41.

and, therefore, the order was appealable.[95] The Supreme Court disagreed. Rule 54(b) applies only to orders finally disposing of some but not all claims or parties involved in a multiple claims action.[96] The Court determined that rule 54(b) did not apply because the complaint advanced but a single legal theory upon a single legal claim.[97] Although the district court duly certified the issue, the certification did not make the order on that single claim appealable,[98] nor could the court find the district court order appealable under any other possible theory.[99] Thus, in cases predicated upon a single legal theory [that is, those not within rule 54(b)] the district court must rule on liability and define the scope of the remedies, including attorney's fees, before the case is appealable. Under this rationale, underlying judgments will be interlocutory in cases brought under a discretionary fee-shifting statute, like the Fees Act, until liability for fees and their amount is conclusively determined.[100] Absent a final decision, a motion for attorney's fees cannot be untimely.

Four circuit courts have relied on *Liberty Mutual* to hold that failure to consider the fees issue prior to entering the original judgment resulted in an interlocutory order.[101] Most notably, in *Gurule v. Wilson*[102] the plaintiffs prayed in their original complaint for attorney's fees, but the trial court did not address the issue in its original order.[103] Later, the court awarded fees pursuant to the Fees Act in an amended judgment. The court of appeals held that the original order was interlocutory.[104] The

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95. *Id.* at 742.

96. *Id.* at 743. *See* Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 435 (1956).

97. Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. at 743.

98. *Id.* at 744.

99. Since this was an interlocutory judgment and not final under §1291, the only other possible authorization for appeal would have been under §1292. Since the district court did not grant an injunction, it could not fall within the purview of §1292(a)(1) which allows appeal from injunctions. Nor did the order fall within the §1292(b) exception for failure to apply therefore within ten days. *Id.* at 744-45.

100. Some additional support for this position can be found by implication in *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980). In this common fund case, while the court did not consider the appealability issue since Boeing did not raise it on appeal, the court, in dicta, distinguished *Liberty Mutual* and found that the award of fees from a fixed fund was final and appealable. *Id.* at 479 n.5. However, Justice Rehnquist, the author of *Liberty Mutual*, would have remanded the cause back to the court of appeals with instructions to dismiss the appeal for lack of appellate jurisdiction. *Id.* at 482-89 (Rehnquist, J., dissenting).

101. *See* note 90 *supra.*

102. 635 F.2d 782 (10th Cir. 1980).

103. *Id.* at 787.

104. *Id.*

court in *Gurule* was concerned with assuring that any final order inform the losing party as to the extent of the remedy afforded against it[105] and with the prevention of piecemeal appeals which the final judgment rule seeks to deter.[106] Because of the policy against piecemeal appeals, the Tenth Circuit held that the judgment on the merits would not be final until the fees issue was resolved fully.[107] This decision allowed what would have been a late cross apeal to be timely since it was the second amended judgment that was the final and appealable order.[108]

Where fees are requested in the pleadings or by motion made before entry of final judgment, and fees are viewed as within the scope of the remedies sought, a line of cases hold that the underlying decision on the merits is interlocutory and not final until the remedy of attorney's fees has been addressed and decided.[109] Under these circumstances

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105. *Id.* at 786.

106. *Id.* at 786-88.

107. *Id.* at 788; Glass v. Pfeffer, 657 F.2d 252, 255 (10th Cir. 1981); *accord*, Croker v. Boeing Co., 662 F.2d 975, 984 (3d Cir. 1981).

108. Gurule v. Wilson, 635 F.2d at 788. The court in *Gurule* implied in dicta that, had the trial court awarded fees based on the prayer in the complaint thus making the judgment final for purposes of §1291, the formal motion for fees under §1988 would not have been timely. *Id.* at 786, 787; *accord*, Glass v. Pfeffer, 657 F.2d at 255 (request for fees made in defendants' answer).

109. *See* note 90 *supra*. The Tenth Circuit indicated in *Gurule v. Wilson*, 635 F.2d at 788, and *Glass v. Pfeffer*, 657 F.2d at 255, that its position accorded *White v. New Hampshire Dep't of Emp. Sec.*, 629 F.2d 697 (1st Cir. 1980). But *Gurule* and *Glass* can be distinguished from *White*. In *Gurule* and *Glass*, the court affirmed the fee award because the initial application for fees was made before entry of final judgment, i.e., in the pleadings, not in a rule 59(e) motion to alter or amend the judgment. Since rule 59(e) applies only to final judgments, it did not govern the outcome in *Gurule* or *Glass*.

In *White*, on the other hand, the plaintiffs did not request attorney's fees in their complaint nor before final judgment on the consent decree, but they first requested fees in a post-judgment motion under the Fees Act four months after final judgment. As a result, the First Circuit denied the motion pursuant to rule 59(e). The key distinction then in these cases appears to be that, whereas in *Gurule* and *Glass* fees were sought initially in the pleadings, the fees issue in *White* was not raised until well after entry of final judgment.

This note suggests that the Tenth Circuit need not have totally embraced the decision in *White* and that its inclination to apply rule 59(e) to post-judgment fee motions was therefore dicta. Since the fees issue had been raised in the pleadings, the Tenth Circuit could have reached its decision—that lack of decision on the fees issue rendered the underlying judgment on the merits interlocutory—without reference as to whether a post-judgment fee claim would be governed by rule 59(e). *Compare also* Giorgi v. State Bank of Lancaster, 48 A.F.T.R.2d 81-5552, 81-5553 (D. Kan. 1981) (fee motion denied for failure to request fees in complaint or within 10 days of judgment) *with* Anderson v. Morris, 550 F. Supp. 1095, 1105 (D. Md. 1980) (fee motion allowed where fees sought in complaint).

there can be no time limit on formal fee motions because there is no final judgment until counsel fees have been decided and assessed. While the result under this reasoning is that there will be no time limit on the fee request, the underlying rationale—that is, concern about finality of judgment and piecemeal appeals—coincides with that behind the recent decisions which have placed time restrictions on post-judgment motions for attorney's fees.

Fees as Integral to the Merits and Subject to the Rule 59(e) Time Limit

Despite the three characterizations of counsel fees which lead to the conclusion that there is no time limit on the request for fees, courts in several circuits[110] have recently arrived at an opposite conclusion; namely, that under the Fees Act, a request for counsel fees must be made either before entry of judgment on the merits or, at the latest, within ten days of entry of judgment as prescribed by rule 59(e). In arriving at this result, the courts dismissed the arguments that fees are costs under the Fees Act or that fees present collateral claims.

White v. New Hampshire Department of Employment Security[111] represents the first appellate decision to place a rule 59(e) time limit on a request for attorney's fees under the Fees Act.[112] The court started

110. White v. New Hampshire Dept. of Emp. Sec., 629 F.2d 697 (1st Cir. 1980), *rev'd and remanded*, 455 U.S.____, 102 S. Ct. 1162 (1982); Hirschkop v. Snead, 475 F. Supp. 59 (E.D. Va. 1979), *aff'd on other grounds*, 646 F.2d 149, 150 (4th Cir. 1981).

111. 629 F.2d 697 (1st Cir. 1980), *rev'd and remanded*, 455 U.S.____, 102 S. Ct. 1162 (1982).

112. *Id.* at 699. *White* was a class action suit challenging the unemployment compensation procedures of the defendant agency, seeking declaratory and injunctive relief. After trial, judgment was entered from which the agency appealed. Negotiations resulted in a consent decree and judgment was entered thereon. Neither the decree nor the judgment mentioned counsel fees. Thereafter, the plaintiff class moved for fees under the Fees Act. After a hearing the court awarded the class $16,000 in fees, from which award the agency appealed. The agency raised the timeliness-jurisdictional issue for the first time on appeal.

At the outset of this opinion, the First Circuit held that the jurisdictional rule 59(e) argument could be raised for the first time on appeal. *Id.* at 700. The court stated that the rule 6(b) proscription against enlargement of the rule 59(e) time limit was "mandatory and jurisdictional." *Id.; accord*, Lapiczak v. Zaist, 451 F.2d 79, 80 (2d Cir. 1971). *See* United States v. Robinson, 361 U.S. 220, 229 (1960). Thus, the matter of jurisdiction properly may be raised at any stage in the proceedings. *Id.; contra*, Fox v. Parker, 626 F.2d 351, 353 (4th Cir. 1980). In *Fox*, the unsuccessful defendant contended that under rule 59(e) the district court lacked jurisdiction to consider a motion for attorney's fees filed roughly nine months after final order. The Fourth Circuit, without citation to any authority, held that it could not consider the timeliness issue since the defendant failed to raise it during argument on the motion before the district court. *Id.* In effect, the result is that a rule 59(e) timeliness argument, which is ordinarily

"from the premise that a final judgment ordinarily signifies the final resolution, subject to appeal, of all claims raised in a lawsuit."[113] Thereafter, other claims, both new and old, may be raised only according to the rules providing for the reopening of the judgment.[114] Thus a claim for attorney's fees under the Fees Act must be resolved before or in the final judgment unless the claim falls within an exception.[115]

In an attempt to avoid the rule 59(e) ten-day limit on reopening the judgment, the plaintiff in *White* urged two exceptions. The plaintiff claimed that fees are costs under the Fees Act, or, alternatively, that a fee request presents a collateral claim. The First Circuit rejected both claims. While the court agreed that the language of the Fees Act itself lends some support to the position that fees are costs, and thus an exception to rules requiring resolution before judgment, the First Circuit found three factual differences between fees and other costs which it considered persuasive reasons why fees are not costs.[116] The court compared costs assessed as of course, as detailed in §1920,[117] with attorney's fees and found that, while costs are capable of routine computation, the discretionary award of fees requires a court to "evaluate possibly a dozen diverse factors."[118] Furthermore, the parties ordinarily assist the trial court in deciding and assessing fee, frequently in a separate hearing. Finally, since fees often involve sizeable sums, appeals often ensue. Fees thus represent a major controverted issue in the litigation. On the other hand, costs are easy to figure and rarely engender dispute or appeal. As a result, the court held that fees are not to be considered costs under the Fees Act.[119]

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jurisdictional, cannot be raised for the first time on appeal. While the practical result of this holding is that there is no jurisdictional time limit on the filing of a motion seeking attorney's fees, the holding conflicts with the general rule that subject matter jurisdiction may be raised at any time. *See generally* C. WRIGHT, LAW OF FEDERAL COURTS, §7 (3d ed. 1976).

113. White v. New Hampshire Dep't of Emp. Sec., 629 F.2d at 701.

114. *Id.*

115. *Id.; accord,* Suzuki v. Yuen, 507 F. Supp. 819, 821 n.2 (D. Hawaii 1981) (court noted that plaintiffs' motion for fees was made within ten-day period required by rule 59(e) citing *White*); Bryant v. International Schools Services, Inc., 502 F. Supp. 472, 491-92 (D.N.J. 1980) (court in dicta advises plaintiffs in Title VII action to comply with rule 59(e) to avoid possible timeliness objection citing *White*).

116. The First Circuit in *White* expressly rejected the view that fees are costs expressed *Knighton v. Watkins*, 616 F.2d 795 (5th Cir. 1980); *see* notes 29-41 *supra* and accompanying text.

117. *See* note 8 *supra.*

118. White v. New Hampshire Dep't of Emp. Sec., 629 F.2d at 702; *see* note 71 *supra.*

119. *Id.* at 703. The court added that the fact that the Supreme Court, in

The First Circuit also rejected the argument that a fee request presents a collateral and independent claim and is thus not governed by rule 59(e). The court held this position inapposite for several reasons. This was not a common fund case nor one in which an attorney was seeking fees by asserting a right of his own rather than one of his client.[120] Moreover, the language of the Fees Act itself required that the fee issue belonged within the main body of the action.[121] The First Circuit determined that a fee request under the Fees Act was not collateral, but rather, intimately tied to the case of the prevailing party and part of the overall relief sought in the suit.[122]

In holding as it did, the First Circuit expressed several concerns. The court indicated that resolution of the fees issue before entry of judgment would be more economical than later resolution and would ensure certainty as to the scope and finality of the judgment.[123] The court viewed its rule as one which would discourage protraction of disputes while not imposing great hardship on the parties or the courts.[124] The court determined that its rule, when coupled with the certification procedure under rule 54(b), would lend ample flexibility to civil rights suits in which time is of the essence, while at the same time ensuring final unified judgments.[125] Finally, the court foresaw no ethical ramifications in its decision which requires parties to consider the fees issue in their settlement negotiations. The court suggested that, if agreement on fees cannot be easily accomplished during negotiations, the parties could always submit the issue to the court in the event fees were not waived altogether.[126] As a result of this decision, in the First Circuit at least, a

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another context, characterized fees under the Fees Act as part of costs was not dispositive of the issue of fees as costs under rules 54(d) and 58. *Id.* The Court suggested a comparison of *Hutto v. Finney*, 437 U.S. 678 (1978) *with Roadway Express, Inc. v. Piper*, 447 U.S. 752, 757-62 (1980) (costs that federal courts may impose on lawyers for dilatory tactics do not include attorney's fees under the Fees Act). *See* note 48 *supra* and accompanying text. *Cf.* Greenwood v. Stevenson, 88 F.R.D. 225, 229-32 (D.R.I. 1980) (the inclusion of "accrued costs" in a rule 68 offer of judgment does not encompass attorney's fees; analogy to *White* to determine that fees are not costs for rule 68 purposes).

120. White v. New Hampshire Dep't of Emp. Sec., 629 F.2d at 703.

121. *Id.* at 704. The court quoted the following language to support its conclusion: " '*In any action or proceeding* to enforce [appropriate civil rights statutes]' the court may, in its discretion, allow reasonable attorney's fees to the prevailing party." *Id.* (Emphasis added by the court.)

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 704-05.

126. *Id.* at 705.

motion under the Fees Act must be made no later than ten days after entry of judgment.

The First Circuit expressly adopted the views and reasoning of *Hirschkop v. Snead.*[127] Initially, the court in *Hirschkop* found that, since the failure to resolve the fees issue did not deprive the original order of finality,[128] it could apply the rule 59(e) time limit. Turning to the merits of the timeliness issue, the court first considered whether attorney's fees presented a collateral and independent claim which could be considered after entry of judgment and which does not affect the finality of the order on the merits. A collateral claim must be separable fom the rights asserted in the main action and neither affect nor be affected by the decision on the merits.[129] The court held that a discretionary fee award pursuant to the Fees Act was not collateral under this standard because the award "necessarily and explicitly" depended on the merits in that district courts must consider the outcome of the case on the merits in setting the amount of a fee award.[130]

While the court in *Hirschkop* indicated that the timeliness question under the Fees Act was one of first impression, the court determined that the weight of authority from other contexts supported its position that rule 59(e) governed motions made under the Fees Act. In a strict

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127. 475 F. Supp. 59 (E.D. Va. 1979), *aff'd on other grounds*, 646 F.2d 149, 150 (4th Cir. 1981). In *Hirschkop* the plaintiff moved for fees under the Fees Act about a month after entry of judgment which was made pursuant to a mandate of the court of appeals. The fees question had not been raised at trial nor on appeal. The court determined that, since rule 59(e) bars motions to alter or amend judgments not made within ten days of entry, which time limit cannot be extended because of rule 6(b), the court lacked jurisdiction over the motion if it was one brought under rule 59(e).

128. *Id.* at 61. The plaintiff had argued that the order had not been final for rule 59(e) purposes. *See* notes 89-109 *supra* and accompanying text. The court dismissed this claim for three reasons: The court determined that, even though its order did not allow for counsel fees, it nonetheless fulfilled the mandate of the court of appeals in every respect and had been intended as a final order terminating the litigation. Nor was the court willing to raise the fees issue *sua sponte* based on the discretionary language of the Fees Act. Finally, the court determined that a district court lacks jurisdiction to award discretionary costs such as counsel fees after an appeal is taken where the discretion of the court as to such costs depends on the merits of the case. Hirschkop v. Snead, 475 F. Supp. at 60-61. *See* Wright v. Jackson, 522 F.2d 955, 957-58 (4th Cir. 1975).

129. WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: *Jurisdiction* §3911 (1976). *See* note 74 *supra.*

130. Hirschkop v. Snead, 475 F. Supp. at 62. *See* Barber v. Kimbrell's, 577 F.2d 216, 226 n.28 (4th Cir. 1978); Wright v. Jackson, 522 F.2d 955 (4th Cir. 1975).

liability tort action,[131] the plaintiff sought to amend its judgment to include attorney's fees twenty-eight days after entry of judgment. The court indicated that the motion would be timely only if the plaintiff was entitled to the fee award as a matter of right and not a matter of discretion.[132] The implication is that, since a fee award is discretionary under the Fees Act, the motion must be made within ten days of entry of judgment.

The discretionary nature of a fee award under the bad faith exception to the American Rule allowed the Fifth Circuit, in *Stacy v. Williams*,[133] to apply the rule 59(e) time limit to a fee request. Upon plaintiff's motion to amend the bill of costs to include attorney's fees made some two months after entry of judgment, the district court held that, since it was not concerned with correcting a mere clerical error in the judgment, but with granting new substantive relief, the motion for fees must comply with rule 59(e).[134] The Fifth Circuit affirmed this because the rule 59(e) time limit could not be enlarged.[135]

The decision in *Stacy* is particularly noteworthy in light of the recent holding by the Fifth Circuit in *Knighton v. Watkins*[136] in which the court did not apply rule 59(e). The court reached its decision in *Knighton* because the Fees Act authorized fee awards as part of costs. On the other hand, in *Stacy* the court unequivocally

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131. Glick v. White Motor Co., 317 F. Supp. 42 (E.D. Pa. 1970), *aff'd*, 458 F.2d 1287 (3d Cir. 1972). Plaintiff asserted, in contradiction to the general rule in tort actions, that at common law attorney's fees were allowed as damages in some cases to completely restore plaintiffs to the status quo. Plaintiff also sought prejudgment interest.

132. *Id.* at 45. The court denied the motion for fees, because, even if it had accepted plaintiff's novel proposition and treated his motion as timely, it would have denied fees anyway since the common law was contrary to tort cases generally and there was no other basis upon which to award fees. The court granted the motion for prejudgment interest because such interest was available as a matter of right under the applicable law and failure to include such interest was therefore a clerical error correctable under rule 60(a). The Third Circuit affirmed this ruling on the motion for interest. Glick v. White Motor Co., 577 F.2d at 1294.

133. 446 F.2d 1366, 1367 (5th Cir. 1971); *accord*, Snyder v. Leake, 87 F.R.D. 362 (N.D. Miss. 1980).

134. Stacy v. Williams, 50 F.R.D. 52, 54 (N.D. Miss. 1970). The court added that rule 59(e) "is particularly applicable to a motion to alter a judgment to allow attorney's fees which were neither asked for before judgment nor mentioned in the judgment." *Id.*

135. Stacy v. Williams, 446 F.2d 1366, 1367 (5th Cir. 1971). For the text of FED. R. CIV. P. 6(b) which precludes enlargement of the ten-day time limit of Rule 59(e) *see* note 39 *supra*. *See* also note 112 *supra*.

136. *See* notes 29-41 *supra* and accompanying text.

stated that "[t]here is, and can be, no contention that the word 'costs,' so used, [in the final order] included plaintiffs' attorneys' fees."[137] The court in *Knighton* distinguished *Stacy* because the plaintiff in the latter case brought the fee request under the bad faith exception, not the Fees Act.[138] These conflicting decisions are reconcilable only because the fee requests were made under different exceptions to the American Rule. These cases highlight the present confusion among the courts as to the applicability of the rule 59(e) time limit to claims for attorney's fees.

Two other cases cited in *Hirschkop* further exemplify this confusion and lend support to the position that rule 59(e) should apply in cases in which fee applications are brought under fee-shifting provisions. In a patent case, a district court in the Fourth Circuit awarded attorney's fees pursuant to a fee-shifting provision in the Patent Infringement Act nearly a year after entry of final judgment.[139] The Fourth Circuit reversed by holding that the district court lacked jurisdiction over the motion for attorney's fees.[140] Not only had the final order of the district court disposed of all the issues before it and had not been appealed from, but the original appeal had divested the trial court of jurisdiction except to carry out the terms of the appellate mandate which was silent on the fees issue. Under these circumstances, the Fourth Circuit held that the case could be reopened or the order revised to include attorney's fees only according to rules 59 or 60.[141] The court added that "the issue of attorney fees should have been considered and disposed of either prior to or at the time of the entry of final judgment in this case and not left open pending the outcome of the appeal."[142] The court in *Hirschkop* cited this holding to support its posi-

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137. Stacy v. Williams, 446 F.2d 1366, 1367 (5th Cir. 1971).

138. Knighton v. Watkins, 616 F.2d 795, 797 (5th Cir. 1980). *See* notes 29-34 *supra* and accompanying text.

139. DeBuit v. Harwell Enterprises, Inc., 540 F.2d 690, 692 (4th Cir. 1976). The Patent Infringement Act provides in pertinent part: "The court in exceptional cases may award reasonable attorney fees to the prevailing party." 35 U.S.C. §285 (1952).

140. DeBuit v. Harwell Enterprises, Inc., 540 F.2d 690, 692-93 (4th Cir. 1976); *accord*, Gonzales v. Fairfax Brewster School, Inc., 569 F.2d 1294, 1297 (4th Cir. 1978).

141. DeBuit v. Harwell Enterprises, Inc., 540 F.2d at 692-93. *See generally* 9 MOORE'S FEDERAL PRACTICE ¶ 203.11 (1980).

142. DeBuit v. Harwell Enterprises, Inc., 540 F.2d at 693. The court quoted with approval, *Id.* at 693 n.3, the language used by a district judge under similar circumstances:

> I think it would be very bad practice if it is established in patent suits that the parties may litigate the question of infringement and validity through all the

tion that the fees issue should be decided concurrently with the merits of the case, especially where the fee award is discretionary.[143]

The Second Circuit also has implied that a time limit on motions for attorney's fees might be appropriate in the context of discretionary fee-shifting provisions. In *Fase v. Seafarers Welfare and Pension Plan*,[144] the plaintiff, who received summary judgment for pension benefits, moved for an award of counsel fees more than a month after entry of judgment on the theory that the efforts of his attorney had created a common fund or, alternatively, under the fee-shifting provision of E.R.I.S.A.[145] The district court held that the plaintiff could not recover under either theory on the merits;[146] and even if he could, the motion was not timely under rule 59(e).[147] The court based its decision on the absence of active pursuit of the fee claim[148] and the potential for substantially increased liability

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courts, and then after that is all over, start in and litigate again on the question of whether the one or the other of the parties are entitled to attorney's fees, and if so, how much. I think that would be a very bad practice. I am not willing to start it.

Laufenberg, Inc. v. Goldblatt Bros., Inc., 187 F.2d 823, 824 (7th Cir. 1951). *Laufenberg* was litigated under the old patent act, 35 U.S.C. §70, whose language is similar to the present Patent Infringement Act. The court in *Laufenberg* refused to award fees because it would, in effect, require two lawsuits. While the defendant argued that the fees issue should be decided only after all appeals had been exhausted, the court read the statute as requiring determination of the fees issue with the decision on the merits and that provision for any appropriate award should be made in the judgment. The court then could reserve jurisdiction to award any additional fees if any are incurred thereafter. If appeal is taken the appellate court can decide the propriety of a fee award for services rendered on appeal, and upon entry of its judgment the court of appeals could tax these fees accordingly. *Id.* at 825. *But see* Darlington v. Studebaker-Packard Corp., 191 F. Supp. 438, 440-41 (N.D. Ind. 1961) (in patent action, under amended fee-shifting provision, dismissed for failure to prosecute where there was no reservation of jurisdiction to award costs and fees nor were any such costs or fees awarded in original dismissal order; held, court need not make award at time of entry of judgment but may award fees at the time it deems most appropriate and, under *Sprague v. Ticonic Nat'l Bank*, court has the power to entertain petition for fees after the cause has been disposed of on appeal). *See* note 189 *infra* and accompanying text.

143. Hirschkop v. Snead, 475 F. Supp. 59, 63 (E.D. Va. 1979), *aff'd on other grounds*, 646 F.2d 149, 150 (6th Cir. 1981).

144. 79 F.R.D. 363 (E.D.N.Y. 1978), *aff'd*, 589 F.2d 112 (2d Cir. 1978).

145. Employment Retirement Income Security Act of 1974, 29 U.S.C. §1132(g) (1976) ("The court in its discretion may allow a reasonable attorney's fee and costs of action to either party").

146. Fase v. Seafarers Welfare and Pension Plan, 79 F.R.D. 363, 365-66 (E.D.N.Y. 1978).

147. *Id.* at 366.

148. *Id.*

presented by the claim,[149] both of which would deny the defendant the certainty and protection afforded by the federal rules on the scope and finality of judgments.[150] Since the motion was not filed within ten days of entry of judgment, the court lacked jurisdiction to act upon the motion.[151]

The Second Circuit affirmed this decision on the merits without expressing a view on the rule 59(e) issue.[152] The opinion by Judge Friendly is important in that it identified two situations in which a motion for counsel fees may be collateral to the merits and thus permissible outside the ten-day period prescribed in rule 59(e). These situations are those in which the attorney seeks remuneration from a fund created by the litigation and those cases in which the attorney asserts a right of his own, not a right of his client.[153] Because the fees are taken out of the fund created by the litigation, both of these situations present a lesser problem than situations in which allowance of a fee consists of an addition to the amount awarded by the judgment.[154] The court in *Hirschkop* found that, since neither situation existed in that case, the court lacked jurisdiction to consider the motion for an award of counsel fees made under the Fees

149. Additional liability does not ensue in common fund cases because the fees are taxed from the fund already created by the litigation. *See* National Council of Community Mental Health Centers, Inc. v. Weinberger, 387 F. Supp. 991 (D.D.C. 1974), *rev'd on other grounds sub nom.*, Nat'l Council of Community Mental Health Centers, Inc. v. Mathews, 546 F.2d 1003 (D.C. Cir. 1976), *cert. denied*, Wagshal v. Califano, 431 U.S. 954 (1977). In *Weinberger*, the court rejected defandant H.E.W.'s contention that rule 59(e) barred reopening of the judgment for consideration of the fees issue after ten days. Not only had the class, by its representatives, petitioned for attorney's fees from the outset, but the court held that "rule [59(e)] does not apply where costs in the form of attorney's fees are sought by the eventually successful party from a common fund created by the litigation." *Weinberger*, 387 F. Supp. at 994 n.3. The court added that costs usually are not taxed until after appeal and that, in a common fund case, the viability of the fund must be finally established before expenses to be taxed against it are considered. Finally, the court pointed out that while *Stacy v. Williams* (notes 133-138 *supra* and accompanying text) reached a different result, the court in *Stacy* recognized this common fund exception.

150. Fase v. Seafarers Welfare and Pension Plan, 79 F.R.D. 363, 367 (E.D.N.Y. 1978).

151. *Id.* & n.9; *accord*, Ford v. New York Central Teamsters Pension Fund, 506 F. Supp. 180, 181 n.1 (W.D.N.Y. 1980), *aff'd*, 642 F.2d 664, 665 (2d Cir. 1981) (E.R.I.S.A., 42 U.S.C. §1132(g); dicta that fee motion field about two months after entry of judgment would be untimely, but court considered merits when defense counsel waived objection to untimeliness).

152. 589 F.2d 112, 114 (2d Cir. 1978).

153. *Id.* at 114 n.3.

154. *Id. See* note 202 *infra* and accompanying text.

Act.[155] The cases and procedural rules applicable to a fee request under the Fees Act were essentially set out in *Hirschkop* which was the precursor of the recent decision by the First Circuit in *White*.[156]

Finally, the Seventh Circuit recently confronted the issue of whether a post-judgment motion for attorney's fees in a trademark case filed twenty days after entry of judgment was a motion to alter or amend the judgment governed by rule 59(e) or was a motion for costs governed by rule 54(d).[157] In noting that such motions had not been uniformly governed by one rule, the court indicated that, because of the diversity of the exceptions to the American Rule, to decide what rule defines post-judgment motions for fees required examination of the nature of the exception under which the fees are claimed and the conditions under which fees are awarded.[158] Under

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155. Hirschkop v. Snead, 475 F. Supp. 59, 64 (E.D. Va. 1979). *aff'd on other grounds*, 646 F.2d 149, 150 (4th Cir. 1981); *accord* White v. New Hampshire Dep't of Emp. Sec., 629 F.2d 697, 703 (1st Cir. 1980).

The court also distinguished what it termed the slight authority contrary to its position. In *Lichtenstein v. Lichtenstein*, 55 F.R.D. 535, 537 (E.D. Pa. 1972), the court held that, while the plaintiff could not move (3 months after final ruling) to amend, citing *Stacy v. Williams*, the plaintiff could seek to amend his bill of costs to include counsel fees without violating rule 59(e). *Id.* the court in *Hirschkop* considered the *Lichtenstein* decision to be wrongly decided because the discretionary award of fees was, in its view, substantially different than the allowance of costs under rule 54(d). *See* Wright v. Jackson, 522 F.2d 955, 957 (4th Cir. 1975); Stacy v. Williams 446 F.2d 1366, 1367 (5th Cir. 1971).

The *Hirschkop* court also distinguished the common fund cases because no common fund was involved. *See* note 150 *supra*.

Finally, Gonzales v. Gonzales, 385 F. Supp. 1226 (D.P.R. 1974), *vac. and rem on other grounds*, 536 F.2d 453 (1st Cir. 1976), was not persuasive. In *Gonzalez*, while the fees motion was made eleven days after final decision, the court decided the issue on the merits thus avoiding the tougher jurisdictional issue. However, as pointed out in *Hirschkop*, the motion for the fee award in *Gonzalez* was timely since the ten day period expired on a Sunday, and thus was timely under the provision of rule 6(a). Hirschkop v. Snead, 475 F. Supp. at 64.

156. It is critical to note that the decision in *Hirschkop* was affirmed on appeal, but on entirely different grounds. Hirschkop v. Snead, 475 F. Supp. 59 (E.D. Va. 1979), *aff'd on other grounds*, 646 F.2d 149, 150 (4th Cir. 1981). The Fourth Circuit held that no attorney's fees could be recovered against the Supreme Court of Virginia when it acts in its legislative capacity in the promulgation of disciplinary rules because of the doctrine of absolute immunity. Thus, the Court of Appeals for the Fourth Circuit has not applied the rule 59(e) ten-day time limit to motions for attorney's fees.

157. Hairline Creations, Inc. v. Kefalas, 664 F.2d 652 (7th Cir. 1981).

The Trademark Act, 15 U.S.C. §1117 (1980) (as amended 1975), provides in pertinent part; "the court in exceptional cases may award reasonable attorney fees to the prevailing party."

158. Hairline Creations, Inc. v. Kefalas, 664 F.2d at 656.

this test, the court determined that, because of the "exceptional" requirement of the fee-shifting provision of the Trademark Act, the exercise of discretionary authority to award fees was "inextricably intertwined with the factual and legal issues that the trial court resolves at judgment."[159] Since the fee award was one of several potential remedies for trademark violations, fees would be awarded, as would other statutory remedies, at final judgment upon determining whether the exceptional requirement had been met.[160] This analysis led the court "inescapably to the conclusion that a postjudgment motion for attorneys' fees [under the Trademark Act was] a motion to alter or amend the judgment."[161]

The court distinguished its previous decisions under the Fees Act,[162] because of the unique character of that act.[163] Not only does the Fees Act designate fees as costs but, because of the strong public policy behind the Fees Act, fee awards under §1988 are equitable in nature.[164] The court determined that "[a]s collateral proceedings focusing on the conduct of the litigation rather than on the issues resolved by the litigation, proceedings awarding attorneys' fees under the equitable exceptions do not threaten the finality of the substantive judgment."[165] On the other hand, application of rule 59(e) in the trademark context, where fee awards depend on the substantive issues resolved by the litigation, would insure that reconsideration of the factual findings and legal conclusions would occur close in time to the judgment in order to prevent unnecessary relitigation and secure the finality of the judgment.[166] By focusing on "the *function* of attorneys' fees in the litigation process, not the form of the exception,"[167] the Seventh Circuit applied rule 59(e) in a limited context, but, more importantly, reiterated that a motion for fees under the Fees Act was a collateral matter not subject to any time limit.

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159. *Id.* at 658.

160. *Id.*

161. *Id.* The court also cited cases under the patent statutes which have considered fees as a quesion to be determined at final judgment. *Id. See* notes 139-42 *supra* and accompanying text.

162. *See* Bond v. Stanton, 630 F.2d 1231 (7th Cir. 1980); Terket v. Lund, 623 F.2d 29 (7th Cir. 1980) (notes 43-45 & 73 *supra* and accompanying text).

163. Hairline Creations, Inc. v. Kefalas, 664 F.2d at 660. The court stated: "The equitable character of an award of attorney's fees under §1988 is not altered simply because the exception is in statutory form." *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 659.

167. *Id.* at 660 (emphasis in original).

Courts in the First and Fourth Circuits have applied time limits on motions for counsel fees made under the Fees Act. While authority from other contexts supports this position, considerable doubt remains as to the persuasiveness of this view in light of the conflicting positions taken recently by the Fifth, Sixth, Seventh and Eighth Circuits that fee requests are either requests for costs or, alternatively, that they are collateral claims, but in either event not subject to any time limit.

As this survey indicates, the courts appear confused about the timeliness of motions for counsel fees. Not only do courts characterize fee requests differently, but some courts apply different rules depending on the exception to the American Rule under which the motion was made.[168] Despite the confusion it is clear that under the common fund exception no time limit will be placed on fee requests.[169] Under the Fees Act and other similar fee-shifting provisions, however, courts take conflicting views as to the appropriateness of a time limit. One reason for this conflict stems from the fact that courts differ as to the effect the procedural rules have on such judicial concerns as delay, finality, piecemeal appeals and ethical considerations.[170] While a time limit theoretically encourages speedy conclusion of litigation, the conflicting opinions suggest that a time limit may produce more problems than it solves.

POTENTIAL PROBLEMS ENGENDERED BY CHARACTERIZING FEES AS INTEGRAL TO THE MERITS AND APPLYING RULE 59(e)

The treatment of fee requests as motions to alter or amend a judgment under rule 59(e) may create a number of problems. Application of the ten-day limitation of rule 59(e) may raise the issue of appellate jurisdiction, and it might create serious practical problems

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168. *Compare* Bond v. Stanton, 630 F.2d 1231, 1234 (7th Cir. 1980) (Fees Act: no time limit) *and* Knighton v. Watkins, 616 F.2d 795, 797-98 (5th Cir. 1980) (Fees Act: no time limit) *with* Hairline Creations, Inc. v. Kefalas, 664 F.2d 652 (7th Cir. 1981) (Trademark Act: rule 59(e) applied) *and* Stacy v. Williams, 446 F.2d 1366, 1367 (5th Cir. 1971) (bad faith: rule 59(e) applied). *See also* White v. New Hampshire Dep't of Emp. Sec., 629 F.2d 697 (1st Cir. 1980) (Fees Act: rule 59(e) applied, but dictum to the effect that it would not apply rule 59(e) to common fund cases).

169. Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939); Trustees v. Greenough, 105 U.S. 527 (1881). *See* notes 56-65 *supra* and accompanying text.

170. *Compare* White v. New Hampshire Dep't of Emp. Sec., 629 F.2d 697, 704-05 (1st Cir. 1980) *with* Obin v. District No. 9 of Int'l Ass'n, Etc., 651 F.2d 574, 581-84 (8th Cir. 1981) *and* Terket v. Lund, 623 F.2d 29, 34 (7th Cir. 1980). *See* notes 171-209 *infra* and accompanying text.

for both the court and counsel. To require compliance with rule 59(e) may cause court congestion, delay and may discourage out-of-court settlement of post-judgment fee awards. Application of the ten-day rule may also require simultaneous post-judgment negotiation of the substantive issues and the fee award thereby causing potential ethical concerns.

The Appellate Jurisdiction Issue

The rule requiring simultaneous disposition of the merits of a case and attorney fee awards ("simultaneity") might raise the issue of finality for purposes of appeal. The court in *White* suggested that, while resolution of all issues including fees is desirable in the judgment, entry of a judgment on the merits which reserves the fee issue for later determination might be a possible option when time is of the essence.[171] Such a partial judgment raises the question of finality should an appeal be taken immediately.[172] As indicated above,[173] the courts differ as to the result under these circumstances. While the First Circuit recognized this potential finality problem, the court suggested that the certification procedures of rule 54(b) would allow courts ample flexibility.[174] Whether this is the preferred approach in the counsel fees context is uncertain as demonstrated by the decision in *Liberty Mutual Insurance Co. v. Wetzel.*[175] In that case, the court indicated that the situations to which rule 54(b) will

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171. White v. New Hampshire Dep't of Emp. Sec., 629 F.2d at 704; *see* Bacon v. Toia, 648 F.2d 801, 810 (2d Cir. 1981).

172. It would not create a finality problem where the judgment concerns injunctive relief, because such an order is appealable even if interlocutory under 28 U.S.C. § 1292(a)(1). Bacon v. Toia, 648 F.2d at 810.

28 U.S.C. §1292(a)(1) provides:

> (a) The courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court[.] . . ."

173. *See* notes 89-109 *supra* and accompanying text. Some courts deem the underlying judgment on the merits as final and appealable. *See* note 89 *supra*. Other courts take the position that such a judgment is interlocutory and therefore not appealable until resolution of the fees issue. *See* note 90 supra.

174. White v. New Hampshire Dep't of Emp. Sec., 629 F.2d at 704-05; *see also* Bacon v. Toia, 648 F.2d at 810.

175. 424 U.S. 737, 743 & n.4 (1976); *see* notes 94-100 *supra* and accompanying text.

apply will be limited strictly to cases involving multiple claims or multiple parties.[176]

Since rule 54(b) has such limited application, the suggestion by the First Circuit of certifying the merits while reserving the fees issue necessarily has limited application. For example, rule 54(b) would apply to that small class of cases, to which school desegregation cases belong, which "involve relief of an injunctive nature that must prove its efficacy only over a period of time and often with frequent modifications" through many interim final orders.[177] The rule will not apply, however, to complaints asserting only one legal right, even if such complaints seek multiple remedies for the alleged violation of that right.[178] Requiring simultaneity not only might engender a potential appealability problem in the form of lack of finality, but the certification procedure will not provide the panacea in every case.[179]

Uneconomical Use of Judicial Resources

Under the *White* rule, the fees issue must be raised prior to entry of a final judgment, or within ten days thereafter.[180] While the rationale underlying this rule is the prevention of piecemeal appeals,[181] the rule may in fact lead to less, rather than more,

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176. *Id.*

177. Bradley v. School Bd. of Richmond, 416 U.S. 696, 723 (1974).

178. Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 743 & n.4 (1976).

179. A possible solution to this potential finality problem might be to require, by local rule for instance, a district court to make its final decision on the merits and then, upon prompt motion by the prevailing party, to rule upon the fee motion as expeditiously as possible. *See* notes 226-33 *infra* and accompanying text.

180. White v. New Hampshire Dep't of Emp. Sec., 629 F.2d at 699.

181. This concern pervades the entire opinion in *White*. *See e.g., id.* at 701 ("appellate tribunals would be constantly vexed by multiple appeals growing out of fragments of the same litigation" if attorney's fees were not resolved before or in the final judgment); *id.* at 702 (since the district court often holds separate hearings on the fees issue, "[a]ppeals often ensue—leading to the prospect of separate appeals if final judgment rules are disregarded"); *id.* at 704 ("more economical of a court's time to resolve fees requests prior to entry of judgement . . . ensures certainty as to the scope and finality of the judgment").

It is doubtful whether the *White* rule would prevent piecemeal appeals in cases in which there will be inevitably a number of appealable interlocutory orders throughout the litigation process. Desegregation cases, for example, involve many orders granting or denying injunctive relief—orders which are appealable in any event under §1292(a)(1). *See* note 172 *supra*. The Eighth Circuit has construed *White* to mean that parties would have to file fee applications for *each* of these orders within ten days under rule 59(e), thereby leading to the fragmentation of the litigation over the single

economical use of judicial resources. Such a rule might delay both injunctive relief and appellate review of the merits. It might also cause congestion of court dockets by discouraging out-of-court settlement of the fees issue.

With regard to the propriety of delaying injunctive relief,[182] the Supreme Court, in a different context, but under a fee-shifting provision nearly identical to the Fees Act, has stated that it would "be undesirable to delay the implementation of [injunctive relief] in order to resolve the question of fees simultaneously."[183] The Court also stated that the statutory language was not to be read as requiring that a fee award be made simultaneously with entry of injunctive relief.[184] While the Court in that case was concerned with allowing fee awards incident to the final disposition of interim matters, the implication is that, under any circumstance governed by a fee-shifting statute, simultaneity should not be required at the expense of instituting injunctive relief.[185]

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issue of the fee award. Obin v. District No. 9 of Int'l Ass'n, Etc., 651 F.2d 574, 581 n.8 (8th Cir. 1981). This note suggests that such a reading of *White* is too literal. *White* stands for the proposition that a fee award under the Fees Act "is a matter to be raised and determined prior to *entry of final judgment*" or within ten days thereafter. White v. New Hampshire Dep't of Emp. Sec., 629 F.2d at 699. Since the focus of *White* was on preventing separate appeals on the merits and the fee award after entry of final judgment, the view expressed in *Obin*—that the *White* rule would require a motion for fees after each interim appealable order—is inapposite. Thus, while this note agrees with the charaterization made in *Obin* that fee requests should be considered as collateral claims to be decided in proceedings supplimental to the main action, this note suggests that *White* would not necessarily require fee applications to be made after each appealable order.

182. It cannot be overemphasized that there is no reason why injunctive relief need be delayed pending resolution of a fee award, because orders concerning injunctive relief are always final and appealable under §1292(a)(1). *See* note 172 *supra*. This note suggests that, in cases where the court grants injunctive relief and is also inclined to award fees pendente lite, it should not delay the implementation of the injunction simply because it has yet to make the fee award.

183. Bradley v. School Bd. of Richmond, 416 U.S. 696, 723 (1974). *Bradley* was a protracted litigation involving the desegregation of the public schools of Richmond, Virginia. *See* Education Amendments of 1972, 20 U.S.C. §1617 (1970 ed., Supp. II), which authorizes a federal court to award "a reasonable attorney's fee as a part of the costs" when appropriate in a school desgregation case.

184. *Id.* at 722. In *Bradley*, of course, the injunctive relief was entry of a desegregation order.

185. Recently, a district court implied that injunctive relief should not be delayed pending resolution of the fees issue, especially when time was critical. In *Anderson v. Morris*, 500 F. Supp. 1095 (D. Md. 1980), *aff'd per curiam*, 636 F.2d 55 (4th Cir. 1980), John B. Anderson, Independent candidate for President of the United States, sued Maryland election officials challenging the constitutionality of the state

When a court requires the fee issue to be litigated and included in the final judgment, an appeal on the merits might be delayed. This is especially true since the resolution of the fee issue may often be complex and require the taking of evidence and briefing.[186] In other words, after the merits of the case have been decided, and even assuming that a fee request is immediately made which would toll the thirty-day time limit for making an appeal,[187] the unsuccessful party would have to wait until the court decides the fees issue before appellate review of the merits. Furthermore, in many cases, the court might have to reconsider the fees issue after appeal and implementation of the court order.[188] The better view, and that suggested by the Supreme Court,[189] is to allow appeals on the merits to run their course before requiring fee applications to be filed. In

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laws which prevented him from being on the general election ballot. Time was of the essence in that case because any delay on the decision on the merits either at trial or on appeal would preclude effective injuctive relief, *i.e.*, Anderson would not meet the deadline to get on the ballot for the November elections. As a result, the courts decided the case on an expedited basis. The successful plaintiffs, who had sought attorney's fees in their complaint, filed a motion pursuant to §1988 for fees together with supporting memoranda shortly after the decision on appeal and the defendants' decision to forego further appeals. At the hearing on the fees motion, the unsuccessful defendants argued that the court no longer had jurisdiction to award fees because the plaintiffs filed their motion beyond the ten day limit to alter or amend the judgment prescribed by rule 59(e). Not only did the court hold that fees were costs under §1988, but, since it had been necessary to resolve the merits of the case on an expedited basis, the court determined that "[t]o hold that the plaintiffs [were then] barred from obtaining attorney's fees under §1988 because the issue was set aside pending resolution of the merits would be both illogical and unfair." *Id.* at 1106. *Anderson* is but one example that demonstrates why courts should be wary of delaying the final decision on the merits, and hence the relief sought, in order to decide the fees issue. To require simultaneous resolution of both the merits and the fees issues would in many cases cause delays that would prejudice a plaintiff's chances to obtain quick, meaningful and effective relief.

186. Bradley v. School Bd. of Richmond, 416 U.S. 696, 723 (1974). The Supreme Court has implicitly required an evidentiary hearing on the fees issue. Perkins v. Standard Oil Co. of Cal., 399 U.S. 222, 223 (1970). Several courts of appeal do require fee hearings. *See e.g.*, Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974); Lindy Bros. Bldrs., Inc. v. American Radiator & Std. Sanitary Corp., 487 F.2d 161 (3d Cir. 1973); *but see* Konczak v. Tyrell, 603 F.2d 13 (7th Cir. 1979) (no fee hearing required).

187. FED. R. APP. P. 4(a)(3).

188. After appeal and implementation of the court order the district (or appellate) court can award fees for work done on appeal and in securing compliance with the court order. Were the court also required to make an initial award of fees for work done at the hearing or trial stage, it would thus have had at least two hearings on the fees issue, when only one was really needed.

189. *See* Perkins v. Standard Oil Co. of Cal., 399 U.S. 222, 223 (1970); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 168-69 (1939).

this way, the district court has a full and clear view of the extent and impact of the litigation before making the fee determination. Whether the decision on the merits is affirmed, reversed or modified, the district could award the fees for the entire litigation and thereby avoid a superfluous hearing on the fees issue before appellate review on the merits. Placing a time limit on the filing of a motion for attorneys' fees thus could delay the litigation and not, as the court in *White* suggested,[190] make more economical use of the court's time.[191]

Application of rule 59(e), which necessitates filing for fees within ten days of judgment, might prolong litigation in still another respect. Such a requirement could discourage out-of-court settlement of post-judgment fee awards because of the difficulty in negotiating a settlement on fees within the ten-day period.[192] Fee requests require copious documentation so that courts can fairly weigh the myriad of factors required to make a fee award.[193] Lawyers must take the fee application procedure seriously because they bear the burden of proving entitlement to the fee award.[194] Preparation of convincing applications replete with supporting time records and affidavits addressing each of the lodestar factors requires time, thereby leaving less time to negotiate the fee award. Once a fee application has been made to the court, a party may be less likely to negotiate the fees issue, preferring instead that the court resolve the issue. As a result, a ten-day time limit, instituted in the interest of judicial economy, might actually congest court dockets. A time limitation on fee motions might thus serve to discourage out-of-court settlement of attorney's fees.

An Ethical Dilemma

Perhaps the most vexing problem engendered by requiring simultaneity exists in the potential ethical conflict caused by requiring opposing counsel to negotiate fee awards concurrently with

190. White v. New Hampshire Dep't of Emp. Sec., 629 F.2d at 704.

191. Moreover, application of rule 59(e) might lead to the fragmentation of the same litigation on the lone issue of fees. *See* Obin v. District No. 9 of Int'l Ass'n, Etc., 651 F.2d at 581 n.8. The court in *Obin* added that "the First Circuit's procedure may force an appeal of the entire case when the sole issue of concern to [the] appellant may be the propriety or size of the attorney's fees award." *Id.*

192. Obin v. District No. 9 of Int'l Ass'n, Etc., 651 F.2d at 581 n.8. & 583. The ten-day time limit of rule 59(e) cannot be enlarged. FED. R. CIV. P. 6(b).

193. *See, e.g.*, King v. Greenblatt, 560 F.2d 1024 (1st Cir. 1977), *cert. denied*, 438 U.S. 916 (1978). *See* note 71 *supra*.

194. Nadeau v. Hegemoe, 581 F.2d 275, 281 (1st Cir. 1978).

negotiations aimed at resolving the merits of the lawsuit.[195] While not statistically documented, it is a fact of class action life that the class action rarely goes to trial; it is ordinarily settled.[196] Since a fee award under *White* must be raised and determined before the entry of judgment [or be raised within ten days thereof under rule 59(e)], counsel might have to negotiate fees and the merits simultaneously[197]—a circumstance that often places counsel, especially class counsel,[198] in a compromising position.

While made in the name of the plaintiff, a motion for fees and costs in a civil rights case such as *White* is really a motion by the attorney.[199] "This interest in the fee makes it improper for the

195. The court in *White* acknowledged this possibility: "Nor in a consent decree context do we see anyting wrong with requiring the parties to face up to the issue of fees in their settlement negotiations." White v. New Hampshire Dep't of Emp. Sec., 629 F.2d at 705. *See generally* E.R. LARSON, FEDERAL COURT AWARDS OF ATTORNEY'S FEES 267 (1981); Levin, *Practical, Ethical, and Legal Considerations Involved in the Settlement of Cases in Which Statutory Attorney's Fees Are Authorized*, 14 CLEARINGHOUSE REV. 515 (1980).

196. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 59 (1975).

197. In theory, attorneys could do one of two other alternatives. The prevailing party could file a motion for fees within the ten-day limit of rule 59(e) and then negotiate. However, this procedure could discourage rather than encourage out-of-court settlement of post-judgment fee awards. Ten days is a rather short time within which to prepare a rigorous fee application. *See* Obin v. District No. 9 of Int'l Ass'n, Etc., 651 F.2d at 583; Terket v. Lund, 623 F.2d 29, 33 (7th Cir. 1980). More importantly, once the motion has been made, the party's position may have toughened making negotiations more difficult. *See* notes 192-94 *supra* and accompanying text.

Alternatively, the parties could conceivably carve the fees issue out of the consent decree for later resolution. That is, the parties should be encouraged to settle the merits, get court approval of the consent decree, and then go to work on a settlement of the fee award. While defense counsel often oppose this technique, because they wish to know the full extent of their liability, this notes suggests that this is the most logical way to avoid the potential ethical dilemma. *See* notes 237-43 *infra* and accompanying text.

198. Class counsel face a conflict of interest in two respects. Not only might his or her personal interest be different than that of either the representative plaintiff or the class as a whole; but, while a plaintiff's lawyer in any contingent fee arrangement depends on a favorable judgment or settlement for his fee, in many class action cases, the lawyer will be more prone to settle than would the class, whereas in other contigent fee contexts the divergence in views between attorney and client will likely be less. At the root of this bias toward settlement is that, while the financial interest of the plaintiff is in his total recovery less expenses (predominately attorney's fees), the financial interest of the attorney is in his fee less his time and effort required to produce it. Dam, *supra* note 196, at 59; Saylor v. Lindsley, 456 F.2d 896, 900 (2d Cir. 1972) (Friendly, J.).

199. Regaldo v. Johnson, 79 F.R.d. 447, 451 (N.D. Ill. 1978). *See* Dam, *supra* note 196, at 58-59; Handler, *The Shift From Substantive to Procedureal Innovations in Antitrust Suits*, 71 COLUM, L. REV. 1, 10 (1971).

lawyer in a civil rights suit to inject the question of attorney's fees into the balance of settlement discussions."[200] Injecting the fees issue in the substantive negotiations not only produces an ethical conflict, but adversely affects the negotiations themselves.[201] In simultaneous negotiations, class counsel might be tempted to accept less for the class in return for more in attorney's fees, which is unethical;[202] or class counsel might be asked to take less in fees, or even to waive fees altogether, in return for more for the class—a choice repugnant to the congressional purpose of fee-shifting generally and the Fees Act in particular.[203] The ethical conflict exists not only in actions for

200. Regaldo v. Johnson, 79 F.R.D. 447, 451 (N.D. Ill. 1978); *accord*, Mendoza v. United States, 623 F.2d 1338, 1352-53 (9th Cir. 1980) (20 U.S.C. §1617); Prandini v. Nat'l Tea Co., 557 F.2d 1015, 1021 (3d Cir. 1977) (Title VII).

201. "We cannot indiscriminately assume, without more, that the amount of fees have [sic] no influence on the ultimate settlement obtained for the class when, along with the substantive remedy issues, it is an active element of negotiation." Mendoza v. United States, 623 F.2d 1388, 1352 (9th Cir. 1980).

202. A.B.A. Model Code of Professional Responsibility, Canon 9 provides: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." *See also* Model Code of Professional Responsibility, EC 9-5.

The danger of impropriety is especially great in cases which result in one fund from which both the class and the attorney seek their awards; and the conflict is exacerbated when the defendant is indifferent as to the allocation. Mendoza v. United States, 623 F.2d 1338, 1352 n.19 (9th Cir. 1980). *Compare* Prandini v. Nat'l Tea Co., 557 F.2d 1015 (1977) (simultaneous negotiation strongly discouraged in class action) *with* Shlensky v. Dorsey, 574 F.2d 131 (3rd Cir. 1978) (*Prandini* distinguished; simultaneous negotiation permitted in class action shareholder's derivative suit because defendant corporation had interest in maximizing class award and minimizing fee award). *See* MANUAL FOR COMPLEX LITIGATION §1.46 (1977): "When counsel for the class negotiates simultaneously for the settlement fund and for individual counsel fees there is an inherent conflict of interest." *See* Levin, *supra* note 195, at 516.

203. Asking counsel to accept less than the claim is worth directly contradicts the House report on the Fees Act. "A 'prevailing' party should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion." H.R. Rep. No. 94-1558, 94th Cong., 2d Sess., 7 (1976). Asking for, or suggesting, as the First Circuit did, a waiver of a fee request frustrates the purpose of the act which is to provide effective access to attorneys to the vast majority of victims of civil rights violations who cannot afford legal counsel. S. Rep. No. 94-1011, 94th Cong., 2d Sess., 1-2 (1976). To effectuate that purpose, Congress stated that the amount of a fee award should be reasonable enough to attract competent counsel and reimburse that counsel for all time reasonably expended on the case. *Id.* at 6. Suggesting a waiver of fees would frustrate the congressional intent that fee awards would act as a deterrent to illegal conduct by defendants. Levin, *supra* note 195, at 519. Thus, just as it would be unethical for counsel to accept less for his client than the claim is worth, counsel cannot be expected to accept too little or nothing at all for his or her work.

The New York City Bar Association has indicated that "it is unethical for defense counsel to propose settlements conditioned on the waiver of fees authorized by statutes designed to encourage the enforcement of civil rights and civil liberties . . . . we consider it unethical for defense counsel to attempt to negotiate the fee award under such statutes simultaneously with the negotiation of the settlement of the

money damages, but in cases where injunctive relief is negotiated as well.[204] Cognizant of this conflict, several circuit courts have adopted rules discouraging simultaneous negotiation of the substantive merits and the fees issue.[205]

Congress has discouraged simultaneous negotiations of the substantive merits of the case and the fees issue.[206] In both the Senate and House reports on the Fees Act, Congress suggested that an award of attorney's fees would be appropriate after the litigation terminated upon entry of final judgment, through consent decree, or even without formal relief.[207] While these statements were made in the context of defining when a party will have prevailed for purposes of the Fees Act, Congress implied that the issue of fees was to be addressed *after* negotiations and settlement on the merits. The Supreme Court recently relied on this legislative history in upholding a fee award made pursuant to the Fees Act after settlement of the case by consent decree.[208] In another case, the Court explicitly stated that "[t]he District Court properly chose not to address itself to the question of the [fee] award until after it had approved the [settlement plan]."[209] The requirement of simultaneous negotiation advocated by the First Circuit may impose severe ethical conflicts inconsistent with congressional intent and the procedure suggested by the Supreme Court.

While not purporting to be exhaustive, this discussion indicates that time limits on fee requests might create a number of problems. If a court attempts to reserve the fee issue, such reservation might deprive the substantive judgment of the finality required for appealability purposes. A time limit on fee motions does not assure economical use of scarce judicial resources and may in fact lead to fragmented litigation over the fee issue and superfluous fee

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merits." Opinion on Settlement Offers in Public Interest Litigation Conditional on Waiver of Statutory Fees, Inquiry Reference No. 80-94.

204. Mendoza v. United States, 623 F.2d 1338, 1352-53 (9th Cir. 1980). Congress specifically allowed that fees are to be available for actions seeking injunctive relief as well as damages. S. Rep. No. 94-1011, 94th Cong., 2d Sess., 9 (1976).

205. Mendoza v. United States, 623 F.2d 1338, 1353 (9th Cir. 1980) ("we strongly discourage the simultaneous negotiation of attorney's fees and substantive issues in class action settlement negotiations"); Prandini v. Nat'l Tea Co., 557 F.2d 1015, 1021 (3d Cir. 1977). *See* notes 219-224 *infra* and accompanying text.

206. S. Rep. No. 94-1011, 94th Cong., 2d Sess., 5 (1976); H.R. Rep. No. 94-1558, 94th Cong., 2d Sess., 7 (1976); *see* note 203 *supra*.

207. *Id.*

208. Maher v. Gagne, 448 U.S. 122, 130-33 (1980).

209. Bradley v. School Bd. of Richmond, 416 U.S. 696, 723 (1974).

hearings as well as discourage out-of-court settlement of fee awards. Of real concern is the potential for an ethical conflict by requiring the fees and the merits to be negotiated simultaneously. The potential for separate appeals on the fees issue is the evil sought to be cured by a time limit on fee requests. While a justifiable concern, the number and severity of the potential problems produced by application of rule 59(e) argue against its use. Concern for piecemeal appeals is better addressed through other means—means that conserve judicial energy and alleviate the potential ethical dilemma.

POTENTIAL REFORMS AND RECOMMENDATIONS

As discussed, the courts have taken inconsistent positions regarding the timeliness of motions for attorney's fees. Some clarification is therefore necessary.[210] Although several long-term reforms are proposed, a short-term approach is available under existing procedural rules that would assure the finality and immediate appealability of the substantive claim in the interest of achieving quick resolution of the primary issue in the lawsuit.[211] This recommended approach also would account for the potential ethical dilemma created by the application of a rigid time limit as well as prevent piecemeal appellate review of the merits and fees issues. Moreover, this approach stems from the view that the timeliness of motions for counsel fees should reflect the collateral and independent nature of fee awards, because such awards differ substantially from an assessment of routine costs and from a judgment on the merits. Finally, since many of the same considerations underlie a fee award under both the statutory and equitable exceptions to the American rule, similar procedural rules should govern all fee requests.[212] Only then will the interests of consistency and uniformity be served.

Possible Legislative Action

As noted, neither the Fees Act itself nor its legislative history sets any explicit guidelines on when a motion for fees must be

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210. For purposes of the following discussion assume that the plaintiff prevailed on the merits and would be entitled to a statutory fee award.

211. *See* notes 230-238 *infra* and accompanying text.

212. Obin v. District No. 9 of Int'l Ass'n, Etc., 651 F.2d 574, 578 n.5. (8th Cir. 1981).

made.[213] With but one exception,[214] Congress has not set any express time limitation for the filing of fee applications under the various federal fee-shifting statutes. In the interests of uniformity and consistency with the remedial purposes of fee shifting, one possible solution to the timeliness issue would be legislation[215] to provide that fee motions pursuant to all fee-shifting statutes need to be made only after entry of judgment or entry of a consent decree.[216] This note, however, suggests that this issue would be best treated by courts acting within their supervisory capacity.

Amendment of Rule 54(d)

A possible solution to the controversy over whether fees are costs for timeliness purposes is to amend rule 54(d) to expressly pro-

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213. If the language of the Fees act is read at face value that fees are to be awarded "as part of costs", and since a motion for award of costs is not governed by any strict time limit under the Federal Rules, a strong argument can be made that there ought to be no time limit, apart from an implicit requirement of reasonableness, on fee requests. *See* notes 19-41 *supra* and accompanying text.

Moreover, the cases cited in the Fees Act legislative history support a liberal reading of the Act and the availability of fees *after* entry of judgment on the merits or entry of a consent decree. E. LARSON, *supra* note 195, at 258-59. *See* notes 206-09 *supra* and accompanying text.

214. The Equal Access to Justice Act, Pub. L. No. 96-481 (Oct. 21, 1980), 94 Stat. 2325 (amending 5 U.S.C. §504 and 28 U.S.C. §2412 expressly provides:

§504. Costs and fees of parties

. . .

(2) A party seeking an award of fees and expenses shall, *within thirty days of a final disposition in the adversary adjudication*, submit to the agency an application . . .

. . .

§2412. Costs and fees

. . .

(B) A party seeking an award of fees and other expenses shall, *within thirty days of final judgment in the action*, submit to the court an application for fees and other expenses . . ."

(emphasis added).

215. The timing provisions of the Equal Access to Justice Act could provide a workable model. *See* note 214 *supra*.

216. Amending the federal fee-shifting statutes would not, however, resolve the timeliness issue in the context of the judicial exceptions to the American rule. But, under *Sprague*, as discussed at notes 53-65 *supra* and accompanying text, application of rule 59(e) is inappropriate in the common fund cases. With regard to the bad faith exception, since "similar considerations will underlie the court's determination of whether to allow fees under [either the bad faith or a statutory exception, or both] ... similar procedural rules should govern the timeliness of [all] fee applications." Obin v. District No. 9 of Int'l Ass'n Etc., 651 F.2d at 579 n.5.

vide that fees are costs under those statutory fee-shifting provisions like the Fees Act which equate fees and costs.[217] Alternatively, § 1920[218] might be amended to include attorney's fees as taxable costs. While each of these proposals would solve the definitional confusion under the Fees Act, they ignore that fees are inherently different than routine costs.[219] Also, the interests of consistency would be better served were all fee applications treated under a single rubric. Thus, amending the definition of costs is not feasible.

Amendment of Rule 54(b)

On the other hand, an amendment to rule 54(b) would clarify much of the confusion as to the finality and appealability of the substantive issues in cases where statutory fee awards are involved. Rule 54(b) could be amended in a way that makes a fee request a separate claim for relief.[220] Thus, even in cases which technically advance only a "single claim"[221] the fee request would constitute an additional claim thereby making the suit a multiclaim action for purposes of rule 54(b). If the court does not decide the fees issue but makes the appropriate certification, the certified issue would be final and appealable even if predicated on but a single claim. This proposal suggests a rule that modifies *Liberty Mutual Insurance Co. v. Wetzel*.[222] Under this proposed rule, reservation of the fees issue

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217. *See* note 8 *supra* for the text of rule 54(d). At the end of the rule might be added; "Costs" as used in this rule are to include attorney's fees when statutorily defined as such.

218. *See* note 8 *supra* for the text of 28 U.S.C. §1920.

219. *See* notes 46-50 *supra* and accompanying text.

220. *See* note 91 *supra* for the full text of the rule. At the end of the rule might be added: A claim for attorney's fees is considered a "claim for relief" for purposes of this rule.

221. *See* note 90 *supra*.

222. 424 U.S. 737 (1976). *See* notes 94-100 *supra* and accompanying text. Under the existing rule 54(b), *Liberty Mutual* was decided correctly. A question might arise, however, if the facts were changed slightly. Assume that the district court in *Liberty Mutual* had resolved not only the liability issue, but the requests for injunctive relief and damages as well; but left unresolved the fee request. (*Compare* cases cited in note 79 *supra* in which the amount of the fee award was unresolved but the opinion on the merits was nonetheless appealable.) Under a strict application of *Liberty Mutual* the order in this hypothetical case would be interlocutory becuase it left the fee issue unresolved and the complaint advanced but on a single theory upon a single claim.

Under an amended rule 54(b), as proposed, a fee request pursuant to a fee-shifting statute would represent a second claim to make the action, in effect, one of multiple claims. As a multiple claim action, it triggers rule 54(b) and all the issues decided in the order are appealable under §1291 upon certification by the district court pursuant to rule 54(b). This proposed rule would facilitate appeal on the merits and

would not affect the finality of the merits and therefore the fees issue would be collateral to the merits and not subject to a time limit.[223] Thus, the amended rule 54(b) would apply to most suits involving fee requests and would avoid any potential delay of the appellate review of the merits.[224] In essence, this proposal eliminates the third characterization of fee requests described above, and much of the confusion that goes with it.[225] While amendment of rule 54(b) represents a long-term approach to these problems, a short-term approach, advocated by the Seventh and Eighth Circuits, is presently available under the existing federal rules.

Expedited Fee Determination After Appeal on the Merits

The Seventh[226] and Eighth[227] Circuits have recently dealt with the concerns of judicial economy and piecemeal appeals in the context of post-judgment fee motions. Under existing federal rules, courts have two alternatives, either of which will avoid piecemeal consideration of the issues arising out of a single lawsuit. As the Eighth Circuit indicated, "the problem of possible piecemeal appeals need not arise where the trial court delays entry of judgment on the merits pending determination of attorney's fee claims and thereafter enters a single final judgment determining all issues."[228] While this approach avoids fragmentation of the lawsuit, such a practice might unnecessarily prolong the litigation because it might delay appellate review of the merits.[229]

This note recommends the alternative approach.[230] As suggested by the Seventh and Eighth Circuits,[231] after entry of final judgment on the merits, district courts should act on fee motions as

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avoid needless delay in the litigation. The unsuccessful defendant may still not know the extent of his liability, in terms of the amount of fees, for purposes of making a cost-benefit analysis of the feasibility of appeal. However, since the fee-shifting statute makes a fee award likely, the defendant is at least assured that he is liable for fees. The defendant and defense counsel can easily make a rough estimate as to the amount of fees in order to determine whether an appeal is practical.

223. *See* notes 75-81 *supra* and accompanying text.

224. *See* notes 186-91 *supra* and accompanying text.

225. *See* notes 89-109 *supra* and accompanying text.

226. Terket v. Lund, 623 F.2d 29, 34 (7th Cir. 1980).

227. Obin v. District No. 9 of Int'l Ass'n, Etc. 651 F.2d 574, 583 (8th Cir. 1981).

228. *Id.*

229. *See* notes 186-91 *supra* and accompanying text.

230. Another commentator has also recommended this approach. E. R. LARSON, *supra* note 195, at 268.

231. *See* notes 226-27 *supra.*

expeditiously as possible, even after notice of appeal.[232] Under this procedure, the district court may be able to decide the fees issue before a pending appeal on the merits has been fully briefed and argued. Any dissatisfied party can appeal the order on the fees issue; this appeal then may be consolidated with the appeal on the merits upon motion by either party or by the appellate court *sua sponte*. In the absence of a timely appeal on the merits, the circuit court need only consider the appeal, if any, from the order on fees.[233] This procedure avoids separate appeals on the substantive and fees issues. With piecemeal appeals thereby avoided, the trial court, by expeditious action, has promoted judicial economy. This approach also does not preclude the court from encouraging settlement negotiations.

Solving the Ethical Dilemma

In placing the rule 59(e) time limit on fee motions, the First Circuit in *White* not only expressed concern about judicial economy, finality of judgments and piecemeal appeals,[234] but the court also determined that forcing the parties to "face up" to the fees issue would present no ethical problems.[235] This view problematically minimizes the importance of negotiated settlements. It is axiomatic that out-of-court settlements relieve the overburdened court system. Settlement of disputes on both the substantive and fees issues would ameliorate docket congestion and therefore settlements must be encouraged. However, attorneys are less apt to negotiate when the potential for ethical conflict exists. If negotiations are to be encouraged, the judiciary ought to be concerned with maintaining an adversarial system in which attorneys can operate free from inherent conflicts of interest. Note has already been taken of the real

232. While the Seventh Circuit did not state any specific time limit within which counsel must apply for a fee award, the Eighth Circuit recommended a uniform local rule requiring the filing of a fee claim within twenty-one (21) days after entry of judgment. Obin v. District No. 9 of Int'l Ass'n, Etc., 651 F.2d at 583.

233. Obin v. District No. 9 of int'l Ass'n Etc., 651 F.2d at 583; Terket v. Lund, 623 F.2d at 34. *Cf.* Washington v. Board of Educ., 498 F.2d 11, 15 (7th Cir. 1974) (if appeal is taken before ruling on rule 60(b) motion for relief from judgment, court should consider the motion; if denied, denial can be appealed and consolidated with pending appeal on the merits; if court is inclined to grant the motion, the case can be remanded thereby avoiding unnecessary appeal). *But see* Wright v. Jackson, 522 F.2d 955, 957-58 (4th Cir. 1975) (award of fees required while merits are before district court, either before appeal, or on remand after merits settled).

234. White v. New Hampshire Dep't of Emp. Sec. 629 F.2d at 704-05.

235. *Id.* at 705.

potential that a rule requiring simultaneity would produce ethical conflicts.[236] While the concerns expressed by the First Circuit must not be taken lightly, an approach that addresses the ethical dilemma, and thereby encourages negotiated settlements, would diminish the impact of these concerns.

The bifurcated approach to settlement negotiations suggested by the Third Circuit in *Prandini v. National Tea Co.*[237] minimizes the ethical dilemma. The Third Circuit urged "trial courts to insist upon settlement of the damage aspect of the case separately from the award of statutorily authorized attorneys' fees. Only after court approval of the damage settlement should discussion and negotiation of appropriate compensation for the attorneys begin."[238] Under this rule, since fee negotiations would begin only after court approval of the damage settlement, the fees issue is separated from the substantive merits thereby reducing the potential attorney-client conflict.

While not without limitations,[239] this approach has several advantages. Initially, separation of the negotiations on the merits and the fees eliminates the possibility of the attorney and client having to divide one fund which thereby reduces the conflict between attorney and client.[240] This approach encourages settlement which results in fewer cases going to trial. Finally, it preserves the benefits of the adversarial system because counsel maintain an economic interest in the lawsuit.[241] The fact that a number of courts have followed or approved the *Prandini* two-step approach attests to

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236. *See* notes 195-209 *supra* and accompanying text.

237. 557 F.2d 1015, 1021 (3d Cir. 1977).

238. *Id.* Earlier cases had also suggested that the fees issue "is more properly reserved for judicial consideration after settlement of the gross amount to be paid to the class." Jamison v. Butcher & Sherrerd, 68 F.R.D. 479, 484 (E.D. Pa. 1975); *accord*, Norman v. McKee, 290 F. Supp. 29, 36 (N.D. Cal. 1968), *aff'd*, 431 F.2d 769 (9th Cir. 1970). *See also* City of Philadelphia v. Charles Pfizer & Co., 345 F. Supp. 454, 470-71 (S.D.N.Y. 1972).

239. The *Prandini* approach has three basic limitations: (1) *Prandini* technically is limited to actions of plaintiff's counsel in that defendants' counsel may still make lump-sum offers. If the plaintiffs' counsel then demands the bifurcated approach and the offer is withdrawn negotiations might be temporarily stalemated; (2) since *Prandini* involved a class action in which judicial approval is required, the approach technically is unavailable for non-class actions; (3) the decision in *Prandini* was made pursuant to the supervisory powers of the court and not on the Code of Professional Responsibility. Levin, *supra* note 195, at 517. These limitations are but technical subtleties and the better view would be to interpret the *Prandini* approach as a guideline for all counsel. *Id.* at 518.

240. Prandini v. Nat'l Tea Co., 557 F.2d 1015, 1021 (3d Cir. 1977).

241. *Id.*

its viability as an effectual procedure in eliminating potential conflicts of interest.[242]

Eliminating the ethical problems theoretically encourages out-of-court settlements and thereby relieves backlogged courts. With fewer cases, the impact of protracted litigation and piecemeal appeals will be less severe. Even if piecemeal appeals and judicial economy remain serious problems, encouraging settlements need not interfere with judicial attempts to deal directly with these problems by expediting fee determinations.[243]

Since the *Prandini* court formulated its two-step rule in its supervisory capacity and not under any existing federal or local rule nor any particular provisions in the Code of Professional Responsibility, some attempt ought to be made to anchor this approach to a more permanent foundation. One commentator proposed that trial courts amend their local rules to incorporate the two-step approach.[244] To allay judicial concerns that this procedure might require additional court supervision over settlement discussions in which statutory fees are available, use of a magistrate has been suggested.[245] While amendments to local rules provide flexibility for individual trial courts, a more uniform standard is preferable.

Such uniformity might be attained through revision of the Code of Professional Responsibility. Indeed, a committee of the American Bar Association is currently reviewing the Code. In the notes to the Proposed Final Draft of the Model Rules of Professional Conduct the committee indicated that any fee arrangement is subject to the general conflict of interest provisions. The committee cited *Prandini* as a general reference and noted that conflicts of interest arise where the lawyer stands to benefit personally from the adoption of one course of action to the exclusion of another.[246] While the commit-

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242. *See, e.g.*, Bacon v. Toia, 493 F. Supp. 865 (S.D.N.Y. 1980), *aff'd*, 648 F.2d 801, 810 (2d Cir. 1981); Mendoza v. United States, 623 F. 2d 1338, 1353 (9th Cir. 1980); McDonald v. Chicago Milwaukee Corp., 565 F.2d 416, 426 (7th Cir. 1977); Munoz v. Arizona State Univ., 80 F.R.D. 670 (D. Ariz. 1978); Lyon v. Arizona, 80 F.R.D. 665 (D. Ariz. 1978); Regaldo v. Johnson, 79 F.R.D. 447 (E.D. Ill. 1978); Dunn v. H. K. Porter Co., 78 F.R.D. 41 (E.D. Pa. 1976). *But See* Officers for Justice v. Civil Service Comm'n, 473 F. Supp. 801 (N.D. Cal. 1979); Vega v. Bloomsburgh, 427 F. Supp. 593 (D. Mass. 1977); E.E.O.C. v. American Telephone & Telegraph Co., 419 F. Supp. 1022 (E.D. Pa. 1976), *aff'd*, 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).

243. *See* notes 226-33 *supra* and accompanying text.

244. Levin, *supra* note 195, at 521.

245. *Id.*

246. Proposed Final Draft of the Model Rules of Professional Conduct, Notes to Rule 1.5 at 37.

tee seems aware of the potential problem of simultaneous negotiation prompted by a rule 59(e) time limit, the Model Rules do not provide any specific provision that deals directly with this possibility.

Assuming adoption of the Model Rules in the format indicated by the Proposed Final Draft, the ethical issues involved in simultaneous negotiations of the fees and the merits can be incorporated easily. Under the proposed rule, "[a] lawyer shall not represent a client if the lawyer's ability to consider, recommend or carry out a course of action on behalf of the client will be adversely affected . . . by the lawyer's own interest," unless the lawyer reasonably believes that his interests will not adversely affect the best interest of the client and the client consents after disclosure.[247] Specific rules governing particular situations supplement this general rule. Under this format, the potential dilemma faced by attorneys in settlement negotiations, in which statutory fee awards are available, can be prevented simply by including this potentially adverse occurrence in the list of transactions that *per se* involve a conflict of interest.[248] Such a rule would codify the two-step approach and thereby eliminate any ambiguity as to whether counsel are engaged in unethical conduct. The threat of disciplinary action would prevent attorneys, especially unsuccessful defense counsel, from placing their adversary in an ethical bind vis-à-vis his or her client. Proper settlement negotiations would thereby be encouraged with the net effect being a reduction in the total number of cases that reach trial. The reduced caseload would relieve the backlogged court system and decrease the adverse impact of piecemeal appeals.

CONCLUSION

Whether a time limit applies to a post-judgment or post-settlement motion for attorney's fees has recently perplexed the circuit courts. Courts that have found that time limits unfairly restrict fee requests have characterized fee motions as requests for costs, as collateral claims or as requests decisions on which are required to achieve finality of judgments. The courts that require a time limit on fee requests have done so because those courts view fees not as costs nor collateral claims; rather, those courts consider fees as part of the judgment subject to rule 59(e). The theory behind the rule

247. *Id.*, Rule 1.7 at 48.

248. *Id.*, Rule 1.8 at 58-59. The proposed rule could read as follows: Lawyers shall not, in cases in which statutory fee awards are available, negotiate simultaneously the substantive and fees issues nor shall lawyers, after a judgment on the substantive issues has been entered, seek a waiver of a fee award in exchange for a waiver of appeal on the merits.

59(e) time limit on fee requests is to promote judicial economy be ensuring the scope and finality of judgments and avoiding piecemeal appeals. The courts disagree as to whether such results necessarily follow.

The rule 59(e) time restriction may require simultaneous disposition of the merits and fees issues. Notwithstanding its contrary intent, a time limit might delay appellate review on the merits and may raise a question about the finality of the underlying judgment should the fees issue not be resolved. Most importantly, a simultaneity requirement may create a potential ethical dilemma for counsel attempting to settle out-of-court. That an unsuccessful defense attorney might ask his adversary to take either less for himself or less for his client is unethical and repugnant to the theory underlying fee-shifting statutes.

This note recommends that courts treat fee applications as collateral and independent claims to be decided in separate proceedings only after entry of final judgment or entry of a consent decree. Courts should enter judgment on the merits of an action which would be final for purposes of appeal notwithstanding that a claim for attorneys fees may remain undecided. The time for appeal on the merits should run from the entry of this judgment and subsequent consideration by the trial court of the fee request should not toll the time for appealing the judgment on the merits. Because the fee application presents a collateral claim, it should not be treated as a motion to alter or amend the judgment governed by the ten-day time period of rule 59(e). However, district courts should proceed expeditiously on the fees issue upon motions made within a reasonable time as set forth in local rules. The order on fees, separably appealable as a final judgment, may be consolidated with any pending appeal on the merits. Where the parties are negotiating a settlement, courts should require the parties to carve out the fees issue for later negotiations which would begin only after entry of the consent decree. If courts and counsel were required to consider the attorney's fees issue only after final resolution of the merits, be it by entry of judgment or entry of a consent decree, piecemeal appeals would be avoided, potential ethical conflicts would no longer exist and out-of-court settlements would be encouraged.

ADDENDUM

On March 2, 1982, the Supreme Court announced its decision in *White v. New Hampshire Department of Employment Secuirty.*[249]

249. 455 U.S.____, 102 S. Ct. 1162 (1982).

The Court reversed and remanded the decision of the Court of Appeals for the First Circuit and held unanimously that rule 59(e) with its ten-day time limitation does not apply to post-judgment or post-settlement motions for attorney's fees pursuant to §1988.[250] The opinion, however, did not determine whether such post-judgment fee requests constitute motions for "costs" under rules 54(d) and 58.[251]

To reach its conclusion, the Court initially looked to the historical purpose of rule 59(e). The draftsmen of the rule intended it to provide federal courts with the authority to reconsider their judgments on the merits and to rectify any mistakes made therein.[252] Motions for attorney's fees under the Fees Act on the other hand raise collateral and separate issues to which rule 59(e) was never intended to apply.[253] Unlike other judicial relief, attorney's fees are not compensation for the injury giving rise to the lawsuit, and as such, are "uniquely seperable from the cause of action to be proved at trial."[254] Moreover, fee awards are available only to prevailing parties—a status determinable only after one party has "prevailed."[255]

Apart from the legal basis for its holding, the Court determined that the application of rule 59(e) would not necessarily promote finality, judicial economy or fairness, and may in fact "yield harsh and unintended consequences."[256] If rule 59(e) applied, counsel would forfeit their right to fees if they failed to request fees in conjunction with each final order.[257] It is sometimes unclear even to counsel

250. *Id.* at 1168.

251. The Court did not reach the question about the applicability of rules 54(d) and 58 because the question "was unnecessary to our disposition of the case." *Id.* at 1168 n.17. Justice Blackmun, while concurring in the Court's judgment, would have held that rules 54(d) and 58 did not apply to post-judgment §1988 fee requests, and he would have adopted the Eighth Circuit approach that fee requests are collateral claims to be addressed and determined after a decision on the merits upon motions made within time limits set by local rule. *Id.* at 1168 (Blackmun, J., concurring).

252. *Id.* at 1166.

253. *Id.*

254. *Id. See* Hutto v. Finney, 437 U.S. 678, 695 n.24 (1978) (discussed at notes 22-27 *supra* and accompanying text).

Although the Court held that requests for attorney's fees raise "legal issues collateral to the main cause of action," it distinguished *White* factually from *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939) (discussed at notes 56-65 *supra* and accompanying text). *White v. New Hampshire Dept. of Emp. Sec.*, 455 U.S. ____, 102 S. Ct. at 1166 n.13. But, while *Sprague* did not control the issue in *White*, the Court declared that "*Sprague* at least establishes that fee questions are not inherently or necessarily subsumed by a decision on the merits." *Id.*

255. *Id.* at 1166.

256. *Id.* at 1167.

257. *Id.*

which orders are and which are not final judgments especially in civil rights cases where "many final orders may issue in the course of the litigation."[258] Thus, the Court declared, "[c]autious to protect their own interests, lawyers predictably would respond by entering fee motions in conjunction with nearly every interim ruling. Yet encouragement of this practice would serve no useful purpose."[259] The Court further noted that the ten-day time limit of rule 59(e) could deprive parties of the time necessary to negotiate private settlements of fees issues thereby generating increased litigation over fees—"a result ironically at odds with the claim that it would promote judicial economy."[260]

Not unmindful of the need to prevent piecemeal appellate review and unfair post-judgment surprise to non-prevailing defendants, the Court offered several suggestions to ameliorate these concerns. The Court noted that the discretionary nature of fee awards under §1988 would support denial of fees in cases in which a post-judgment motion unfairly surprises or prejudices the affected party.[261] The Court pointed out that district courts were free to adopt local rules establishing time limits for filing fee motions and, in any event, district courts could avoid piecemeal appeals by promptly hearing and deciding claims for fees.[262] Such a practice, the Court declared, would permit consolidation of appeals from fee awards with appeals on the merits.[263]

While the decision in *White* clarified much of the confusion concerning the timeliness of post-judgment fee motions, a few questions remain. Rule 59(e) clearly does not apply to such motions. But the Court did not resolve the conflict between those courts that hold that fee motions represent requests for costs governed by rules 54(d) and 58 on the one hand,[264] and the position that fee requests

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258. *Id.*

259. *Id. See* notes 171-91 *supra* and accompanying text.

260. *Id. See* notes 192-94 *supra* and accompanying text.

A particularly noteworthy aspect of the opinion is that the Court declined to rely on the potential ethical dilemma caused by application of rule 59(e) as a basis for its decision. *Id.* at 1167 n.15. While it conceded that injecting the fees issue into settlement negotiations may raise difficult ethical issues, the Court determined that a defendant may have good reason to demand to know its total liability from both damages and fees, and therefore, the Court was "reluctant to hold that no resolution is ever available to ethical counsel." *Id. See* notes 195-209, 234-48 *supra* and accompanying text.

261. *Id.* at 1167-68.

262. *Id.* at 1168.

263. *Id. See* notes 226-33 *supra* and accompanying text.

264. *See* note 28 *supra.*

are collateral and independent claims not governed by any of the federal rules on the other.[265] Although the Court did not resolve this conflict directly, the Court approved the use of local rules to set appropriate time limits for post-judgment fee requests as suggested by the Fifth[266] and Eighth[267] Circuits. This note recommends that courts adopt the approach taken by the Eighth Circuit—that fee motions constitute collateral and independent claims to be addressed and determined after the decision on the merits upon motions made within time limits set by local rule. A logical time limit would be thirty days after judgment or entry of a consent decree.

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265. Obin v. District No. 9 of Int'l Ass'n, Etc., 651 F.2d 574 (8th Cir. 1981).
266. Knighton v. Watkins, 616 F.2d 795, 798 n.2 (5th Cir. 1980).
267. Obin v. District No. 9 of Int'l Ass'n, Etc., 651 F.2d at 583.