The Federal Courts' Authority to Assess Attorneys' Fees Directly against Counsel - Roadway Express, Inc. v. Piper

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Federal courts have long endured unnecessary delays caused by the dilatory tactics of attorneys. With the intent of reducing these delays, section 1927 of title 28 authorizes a federal court to penalize attorneys who unreasonably multiply court proceedings. Specifically, the statute provides that the court may hold an attorney personally liable for excess costs created by his unreasonable and vexatious conduct. This section, however, does not provide an explanation of the costs a court may assess against an attorney.

In the recent case of Roadway Express, Inc. v. Piper, the United States Supreme Court provided some guidance on this question. Specifically, the Court held that "costs" under section 1927 do not include opposing attorneys' fees. In addition, the Court determined that the meaning of the term "costs" may not be supplemented through the incorporation of the attorneys' fees provisions of the civil rights statutes, which allow counsel fees to be awarded "as part of the costs" of civil rights litigation.


2. 28 U.S.C. § 1927 (1976). The attorney liability statute provides: "Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs." Id.

3. Id.


6. Id. at 761.

7. The attorneys' fees provisions of the civil rights statutes are codified in the Civil Rights Attorney's Fees Awards Act of 1976, § 2, 42 U.S.C. § 1988 (1976), section 204(b) of Title II, 42 U.S.C. § 2000a-3(b)(1976), and section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k) (1976). Section 1988 provides in part: "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title ... or title VI of the Civil Rights Act of 1964, ... the court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (1976) (emphasis added). Section 706(k) of Title VII provides: "In any action or proceeding under this subchapter, the court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee as part of the costs." 42 U.S.C. § 2000e-5(k) (1976) (emphasis added). Section 204(b) of Title II is similarly worded. 42 U.S.C. § 2000a-3(b) (1976).

Although the Court's reasoning was persuasive, its restrictive reading of section 1927 will inhibit the goal of the statute. The holding is therefore criticized and a suggested alternative is offered that will better serve the statute's purpose. Similarly, the alternative approaches proffered in the Court's opinion are examined with reference to the same legislative objectives.

FACTS AND PROCEDURE

The respondents in Roadway Express were attorneys who represented the plaintiffs in a civil rights class action suit against Roadway Express, Inc. In that suit, the respondents failed to comply with discovery and other pre-trial procedures. The defendant, Roadway Express, was unsuccessful in its attempt to compel discovery pursuant to Federal Rule of Civil Procedure 37(a). Finally, Roadway moved for a dismissal of the action under Rule

Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) (denied award of prevailing defendant's attorneys' fees under § 706(k) of Title VII); Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968) (per curiam) (authorized award of prevailing plaintiff's attorneys' fees under § 204(b) of Title II).

9. See notes 88 & 90 and accompanying text infra.

10. See notes 70-81 and accompanying text infra.


The complaint alleged that Roadway Express' employment policies discriminated on the basis of race. Monk v. Roadway Express, Inc., 599 F.2d 1378, 1380 (5th Cir. 1979). The suit was based on § 703(a)(1) of Title VII, which provides: "It shall be an unlawful employment practice for an employer—" (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race. . . ." 42 U.S.C. § 2000e-2(a)(1) (1976).

12. Monk v. Roadway Express, Inc., 73 F.R.D. 411 (W.D. La. 1977). Roadway Express propounded interrogatories to the plaintiffs on January 5, 1976. The plaintiffs failed to respond. In addition, the plaintiffs' attorneys failed to file a brief on the effect of a class action certification involving the defendant in a district court in Texas. The attorneys also failed to advise their clients that they were named as class plaintiffs and of the consequences and responsibilities of this status. Id. at 413-15.

13. The initial complaint also named Local Union No. 194 of the International Brotherhood of Teamsters as defendant. 599 F.2d at 1380.

37(b).\textsuperscript{15} That motion was granted,\textsuperscript{16} but the district court retained jurisdiction to determine whether the defendant was entitled to an award of costs and attorneys' fees expended as a result of the respondents' dilatory conduct.\textsuperscript{17}

In its decision on this award, the district court severely criticized the respondents' deliberate and vexatious behavior in prosecuting the claim.\textsuperscript{18} The court then assessed Roadway's attorneys' fees and court costs \textsuperscript{19} directly against the respondents,\textsuperscript{20} justifying the award on the basis of a combined reading of three statutes. First, it considered section 1927,\textsuperscript{21} which permits a court to tax an attorney for the excess costs incurred by his unreasonable and vexatious multiplication of the proceedings.\textsuperscript{22} The court also relied upon the attorneys' fees provisions of the two civil rights statutes,\textsuperscript{23} which define attorneys' fees "as part of the costs" which may be awarded to the prevailing litigant in civil rights suits.\textsuperscript{24} By reading these statutes together, the court concluded that attorneys' fees were properly characterized as part of the excess costs incurred by Roadway Express due to the respondents' improper behavior in the civil rights litigation.\textsuperscript{25}

The United States Court of Appeals for the Fifth Circuit found no clear error in the district court's decision that the respondents' conduct violated section 1927.\textsuperscript{26} The appellate court, however, did not agree that the attor-
ney's fees provisions of the civil rights statutes could be read into section 1927's assessment of excess costs. The fee provisions, the court reasoned, provide that attorneys' fees may be assessed against the unsuccessful party, not against the unsuccessful party's counsel. The district court's combination of these unrelated statutory provisions, the court of appeals concluded, produced "a hybrid result contemplated by none of the statutes." The Supreme Court also disapproved of the concurrent reading of the attorney liability statute and the fee provisions. It affirmed the appellate decision and remanded the case to the court of appeals with directions to return it to the district court for proceedings consistent with its opinion.

BACKGROUND LAW: DETERRENCE OF DILATORY CONDUCT IN THE FEDERAL COURTS

Traditionally, federal courts deterred the dilatory conduct of attorneys by utilizing their inherent contempt power to punish attorneys who disrupted or obstructed the administration of justice. Unfortunately, because of the general judicial reluctance to hold attorneys in contempt and because of a
strict mens rea requirement, the contempt power has been criticized as an inadequate deterrent to the dilatory tactics of attorneys.

To supplement a court's contempt power, various rules and statutes provide for assessing costs against an attorney who has delayed court proceedings. For example, rule 8(b) of the Calendar Rules for the Eastern District of New York provides that a judge may assess costs directly against an attorney whose conduct "obstructed the effective administration of the court's business." Similarly, in the Idaho district courts, Local Rule 23 states that failure to comply with court rules may result in the imposition of costs on an attorney. Regrettably, such rules are available in only a few jurisdictions, and although these rules do not possess the strict mens rea requirement for

33. Most courts require a specific showing that an attorney intended to obstruct court proceedings. See Hawk v. Cardoza, 575 F.2d 732 (9th Cir. 1978); In re Dellinger, 461 F.2d 399 (7th Cir. 1972); United States v. Sopher, 347 F.2d 415 (7th Cir. 1965). But see United States v. Delahanty, 488 F.2d 396 (6th Cir. 1973) (showing of recklessness sufficient). Cf. Sykes v. United States, 444 F.2d 928 (D.C. Cir. 1971) (intent inferred from reckless disregard of professional duty). See generally Dobbs, Contempt of Court: A Survey, 56 Cornell L. Rev. 183, 261-65 (1971). Professor Dobbs cites various interpretations of the intent requirement. He notes that the failure to distinguish between civil and criminal contempt punishments has contributed to the disagreement among courts as to what type of conduct fulfills the willfulness requirement. Id.

34. See Renfrew, Discovery Sanctions: A Judicial Perspective, 67 Calif. L. Rev. 264, 270 (1979) (strict intent requirements and procedural formalities reduce its effectiveness) [hereinafter cited as Renfrew]. Sanctions, supra note 4, at 623 (inadequate to deal with the problem); Comment, An Attorney Fine: A Sanction to Ensure Compliance with Court Calendar Orders, 30 U. Chi. L. Rev. 382, 394 (1963) (inadequate to deal with the problem); Financial Penalties, supra note 32, at 863 (inadequate to meet needs of courts faced with lesser species of attorney misconduct).

35. Federal courts have the authority to establish rules for the orderly conduct of business. Heckers v. Fowler, 69 U.S. (2 Wall.) 123, 128 (1864). This authority has been codified in § 2071 of the Judicial Code, which provides: "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court." 28 U.S.C. § 2071 (1976).

In addition, Fed. R. Civ. P. 83 provides:

Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. . . . In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

See 7 J. Moore Federal Practice ¶ 83.03, at 83-5 (2d ed. 1980). District court rules must pertain to procedure and must be consistent with the Federal Rules. Id.

36. E.D.N.Y. Ind. Ass. & Cat. R. 8(b). Although this rule was enacted in 1966, it was first utilized by the court in In re Sutter, 543 F.2d 1030 (2d Cir. 1976), where an attorney was fined $1,500 in costs for causing a three-day delay in the start of a criminal trial.


38. See Sanctions, supra note 4, at 635-36 (suggesting that jurisdictions may be reluctant to adopt such rules because of doubt as to their validity). See also United States v. Wendy, 575 F.2d 1025, 1029 n.15 (2d Cir. 1978) (noting that, for unknown reasons, a calendar rule for the Southern District of New York similar to the rule applied in In re Sutter, 543 F.2d 1030 (2d Cir. 1976), was repealed).
contempt, they have not been frequently employed to deter attorney misconduct.

An important statute that was designed to deter abuse of the judicial process and is available to all federal courts is section 1927. That section provides that an attorney who has unreasonably and vexatiously multiplied court proceedings may be held liable for the excess costs incurred by his opponent because of the attorney’s conduct. The use of section 1927, however, has been inconsistent. A major difficulty has been the issue of exactly what costs can be assessed against an attorney. The United States Court of Appeals for the Seventh Circuit, in 1507 Corp. v. Henderson, indicated that the assessment of excess costs should be limited to “taxable” costs, recognizing in its determination that attorneys’ fees could not be included.

39. In In re Sutter, 543 F.2d 1030 (2d Cir. 1976), the court specifically held that district courts had the power to promulgate local rules imposing sanctions for attorney misconduct that falls short of contempt. Id. at 1037-38. Contra, Gamble v. Pope & Talbot, Inc., 307 F.2d 729 (3d Cir.), cert. denied, 371 U.S. 888 (1962). In Gamble, the Court of Appeals for the Third Circuit reversed a fine imposed on an attorney who violated a local rule of the District Court for the Eastern District of Pennsylvania, stating that the lower court did not have the authority to fine an attorney who has not been held in contempt of court. Id. at 731. The decision of the Gamble majority has been criticized on the ground that the court’s disciplinary power should have justified the financial penalty. See, e.g., Comment, Dismissal for Failure to Attend a Pretrial Conference and the Use of Sanctions at Preparatory Stages of Litigation, 72 Yale L. J. 819 (1963); Note, Civil Procedure—Power of Federal Courts to Discipline Attorneys for Delay in Pre-Trial Procedure, 38 Notre Dame Law. 158 (1963).

40. Sanctions, supra note 4, at 635-36.


Another difficulty with this provision is the requirement that the attorney’s conduct must be unreasonable and vexatious. No single definition of this term has been adopted by all jurisdictions. See United States v. Ross, 535 F.2d 346, 349 (6th Cir. 1976) (intentional departure from proper conduct); West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1092 (2d Cir.) (bad faith), cert. denied, 404 U.S. 105 (1971); Kiefel v. Las Vegas Hacienda, Inc., 404 F.2d 1183, 1187 (7th Cir. 1968) (serious disregard for the orderly processes of justice), cert. denied, 395 U.S. 908 (1969); Toledo Metal Wheel Co. v. Foyer Bros. & Co., 223 F. 350, 358 (6th Cir. 1918) (decided under predecessor to § 1927) (obnoxious, unreasonable, and improper conduct).

43. 447 F.2d 540 (7th Cir. 1971) (per curiam).


45. 447 F.2d at 542 (quoting In re Realty Associates Securities Corp., 53 F. Supp. 1013, 1014 (E.D.N.Y. 1943)). Other decisions in which the attorney liability statute was discussed and in which attorneys’ fees were not considered “costs” under § 1927 include: United States v. Ross, 535 F.2d 346, 350 (6th Cir. 1976) (failure to appear on scheduled trial date); Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprenticeship & Training Comm., 83 F.R.D. 136, 139 n.5 (N.D. Cal. 1979) (failure to comply with court order directing joinder of indispensable
The Second Circuit, however, disagreed with the Henderson court's view of the allowable costs. In Browning Debenture Holders' Committee v. DASA Corp.,[46] the court noted that the "American Rule" ordinarily precludes assessing attorneys' fees against a party in a suit. The Browning court, however, held that those fees could be assessed against an attorney under the statutory authority of section 1927.[47] Due to the disagreement among the federal courts, it was necessary for the Supreme Court in Roadway Ex-

46. 560 F.2d 1078 (2d Cir. 1977).
47. The American Rule recognizes that litigants bear the burden of their attorneys' fees. First articulated in Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796), the rule has been adhered to in recent cases. See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975); F.D. Rich Co. v. United States ex rel. Industrial Lumber Co., 417 U.S. 116 (1974); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967).

Certain exceptions to the American Rule have been recognized. For example, if a litigant brings an action which preserves or recovers a fund in which others benefit, he may recover his attorneys' fees from the fund itself or from required contributions from those who share the benefit. See, e.g., Hall v. Cole, 412 U.S. 1 (1973) (union member whose vindication of right of free speech rendered substantial benefit to all union members); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) (individual shareholders whose suit to prevent illegal corporate merger rendered benefit to the corporation and its shareholders); Trustees v. Greenough, 105 U.S. 527 (1882) (individual bondholders whose suit to prevent fraudulent conveyances of funds benefitted other bondholders). See generally Dawson, Lawyers and Involuntary Clients: Attorney Fees from Funds, 87 Harv. L. Rev. 1597 (1974).

Another equitable exception to the rule applies when a party has litigated in "bad faith." When a litigant has engaged in vexatious, oppressive, or wanton conduct which either induced or occurred during the litigation, that party may be held liable for his opponent's legal expenses. See, e.g., Vaughan v. Atkinson, 369 U.S. 527 (1962) (willful and persistent denial of libellant's claim); Bell v. School Bd., 321 F.2d 494 (4th Cir. 1963) (evasive and obstructive tactics); Rolax v. Atlantic Coast Line R.R., 186 F.2d 473 (4th Cir. 1951) (discriminatory and oppressive conduct which induced the litigation). See generally Note, Attorney Fees: Exceptions to the American Rule, 25 Drake L. Rev. 717 (1976); Note, Attorney's Fees and the Federal Bad Faith Exception, 29 Hastings L.J. 319 (1977).


48. 560 F.2d at 1089. Other decisions in which the attorney liability statute was discussed and in which attorneys' fees were considered "costs" under § 1927 include: Asai v. Castillo, 593 F.2d 1222, 1224 (D.C. Cir. 1979) (delayed filing of petition for review); Meitzner v. Mindick, 549 F.2d 775, 784 n.12 (C.C.P.A.) (patent suit filed after claim was collaterally estopped), cert. denied, 434 U.S. 854 (1977); North Am. Foreign Trading Corp. v. Zale Corp., 83 F.R.D. 293, 297 (S.D.N.Y. 1979) (motion to disqualify opposing counsel filed for purposes of delay); In re Complaint of Cosmopolitan Shipping Co., 77 Civ. No. 1425, slip op. at 1 (S.D.N.Y. 1978) (settlement delayed by instituting separate proceeding in another court).
press to determine if “costs” under section 1927 could be construed to include attorneys’ fees.

The Roadway Express Decision

The Supreme Court in Roadway Express \(^{49}\) determined that several factors precluded the construction of section 1927 to include attorneys’ fees as "costs." \(^{50}\) The Court referred to the legislative history of the attorney liability statute \(^{51}\) and emphasized that at the time the statute was enacted, the "American Rule" specifically excluded attorneys’ fees from the costs awarded to a prevailing party. \(^{52}\) The majority therefore assumed that Congress intended to follow the "American Rule" when it inserted the term "costs" into the attorney liability statute. \(^{53}\) In addition, the Court cited a congressional act of 1853 in which the attorney liability provision was reenacted \(^{54}\) and the costs allowable in federal courts were specified. \(^{55}\) Reasonable statutory construction, the Court concluded, provides that the costs specified were also the costs that could be assessed under the attorney liability statute. \(^{56}\) Thus, the Court reasoned that the present provisions derived from the 1853 Act must be similarly construed. \(^{57}\)


50. 447 U.S. at 757-64.

51. The statute was enacted “to prevent multiplicity of suits or processes, where a single suit or process might suffice for the administration of justice. . . .” 26 Annals of Cong. 29 (1813). The majority in Roadway Express noted that the provision was a response to the practices of certain United States Attorneys. Because they were paid on a piecework basis, a number of those attorneys filed unnecessary lawsuits to increase their compensation. 447 U.S. at 759 n.6 (citing H.R. Doc. No. 25, 27th Cong., 3d Sess. 21-22 (1842)). That purpose was evident in the wording of the original statute:

That whenever causes of like nature, or relative to the same question shall be pending before a court of the United States . . . causes may be consolidated as to the court shall appear reasonable. And if any attorney, proctor, or other person admitted to manage and conduct causes in a court of the United States or of the territories thereof, shall appear to have multiplied the proceedings in any cause before the court so as to increase costs unreasonably and vexatiously, such person may be required by order of court to satisfy any excess of costs so incurred.

Act of July 22, 1813, ch. 14, § 3, 3 Stat. 21 (1813). For the Code history of the attorney liability statute, see note 83 infra.

52. See note 47 supra.

53. 447 U.S. at 759. See Morissette v. United States, 342 U.S. 246, 263 (1952) (Court reasoned that if a term of art is used in the language of a statute, Congress is presumed to know and adopt the meaning its use will convey to the judicial mind).

54. Act of Feb. 26, 1853, ch. 80, 10 Stat. 162 (1853). The wording of the 1853 provision was similar to the statute enacted in 1813. See note 51 supra.


56. 447 U.S. at 760.

57. Id. See 2A C. Sands, Statutes and Statutory Construction § 51.03, at 298-99 (4th ed. 1979). The Court applied the rule that statutes are to be construed together when they are in pari materia. This rule is invoked when the statutes relate to the same subject matter, have the same purpose, or were enacted by the legislature at the same time. See Northcross v. Board of Educ., 412 U.S. 427 (1973) (Civil Rights Act of 1964 held in pari materia with Emergency School Aid Act of 1974); United States v. Stewart, 311 U.S. 60 (1940) (act concern-
The Court also addressed the argument that the attorneys' fees provisions of the civil rights statutes could supplement the term "costs" to include attorneys' fees. The Court examined the background of the civil rights fee provisions, noting first the absence in the legislative history of an intent to allow recovery of attorneys' fees from opposing counsel. This absence indicated to the majority that Congress intended these provisions to apply only to the opposing party, not the opposing attorney. The Court also observed that Congress imposed certain standards for courts to follow in awarding attorneys' fees in civil rights suits, depending on which party prevails and the equities of the action. The majority reasoned that a concurrent reading


58. For the text of the attorneys' fees provisions, see note 7 supra.

59. 447 U.S. at 761. See also Brief for Petitioner at 8-11, Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980).

60. 447 U.S. at 761. The Court cited the Senate report that accompanied 42 U.S.C. § 1988 which stated that the provision allows attorneys' fees to be awarded against a party. S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5908, 5912-13. However, the congressional debates, 122 CONG. REC. 31,832 (1976), indicate that during the Senate's consideration of 42 U.S.C. § 1988, there was concern among some members that the bill would encourage lawyers to file frivolous lawsuits:

Mr. ABOUREZK. There has been a great deal made here on the floor by opponents of this legislation that it would encourage frivolous lawsuits. It has been [called] the "lawyers' relief bill," as every bill has been called when it has come up and there has been opposition to it. But, according to the provisions of the bill itself, is it not true that . . . if the defendant in a civil rights suit were to prevail the court could prevent a frivolous lawsuit by having that provision available?

Mr. HATHAWAY. The Senator is absolutely correct. There is adequate safeguard in the bill to protect against frivolous lawsuits.

Mr. ABOUREZK. So if somebody thought, some lawyer thought, he was going to make a lot of money by bringing civil rights suits he would be subject to being penalized himself; is that not correct?

Mr. HATHAWAY. The Senator is correct.

Id. (Emphasis added).

61. 447 U.S. at 761-63.


Prevailing defendants, however, are not granted their attorneys' fees unless it can be shown that the suit was clearly frivolous, vexatious, or brought for purpose of harassment. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978). See, e.g., Kutska v. California State
of these provisions and the attorney liability statute would then incorporate those standards into section 1927.\(^63\) Incorporating those standards, the Court concluded, would fundamentally alter the nature of section 1927.\(^64\)

Finally, the Court considered the number of federal statutes which allow the award of attorneys' fees as part of the costs in certain types of litigation.\(^65\) The Court expressed its concern that an ad hoc construction under which only the cost elements of those statutes are used to define costs under section 1927 would result in a "two-tier system" of attorney sanctions.\(^66\) The majority contended that in a case involving one of those statutes, an attorney who violated section 1927 would be subject to an additional penalty of personal liability for opposing counsel's fees.\(^67\) After rejecting this construction as "standardless judicial lawmaking," the Court concluded that only Congress could supplement the framework of the attorney liability statute.\(^68\)

Although the Court determined that the legislative history of section 1927 could not authorize a court to assess attorneys' fees directly against counsel, the Court indicated that attorneys' fees could have been assessed against the respondents under certain alternative theories.

College, 564 F.2d 108 (3d Cir. 1977) (prevailing defendants awarded attorneys' fees when plaintiff's civil rights claim was meritless and brought merely to embarrass defendants); Carrion v. Yeshiva Univ., 535 F.2d 722 (2d Cir. 1976) (defendant employer awarded attorneys' fees when former employee's civil rights claim was frivolous and vindictive); McCampbell v. Chrysler Corp., 425 F. Supp. 1326 (E.D. Mich. 1977) (defendants not awarded attorneys' fees when factors indicating plaintiff's good faith outweighed factors indicating bad faith). See generally Berkovitz, A Summary of Issues Involving Attorneys' Fees in Civil Rights Cases, 13 Clearinghouse Rev. 282 (1979); Lipson, Beyond Alyeska—Judicial Response to the Civil Rights Attorneys' Fees Act, 22 St. Louis U. L.J. 243 (1978).

\(^63\) 447 U.S. at 762.
\(^64\) Id.
\(^65\) "[Section] 1927 does not distinguish between winners and losers, or between plaintiffs and defendants. The statute is indifferent to the equities of a dispute and to the values advanced by the substantive law. It is concerned only with limiting the abuse of court processes." Id.


\(^67\) 447 U.S. at 762.
\(^68\) Id. at 763. The Court reasoned that the judicial process may be obstructed as much in a commercial case as in a civil rights action; thus, there was no justification for subjecting civil rights attorneys to a different sanction for dilatory conduct. Id.

\(^69\) Id. The Court noted that a bill was pending in Congress to amend § 1927 to include attorneys' fees as part of the statute's financial penalty. 447 U.S. at 760 n.8. See S. 390, 96th Cong., 1st Sess. § 4(a) (1979); H.R. 4047, 96th Cong., 1st Sess. (1979); S. Rep. No. 96-238, 96th Cong., 1st Sess. 2-3, (1979); 125 Cong. Rec. S1343-68 (daily ed. Feb. 8, 1979).

A similar conclusion was reached by the Court in Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967). In Fleischmann, the district court had allowed a recovery of attorneys' fees as part of the costs of a trademark infringement suit brought under § 35 of the Lanham Act, 15 U.S.C. § 1117 (1964). The appellate court's reversal was upheld by the Supreme Court, stating that such a construction would vary the meaning of the term "costs" without support in the statutory language or legislative history. 386 U.S. at 720.
The Supreme Court’s Alternatives—
Roadway 37 and the Federal Courts’ Inherent Power

The Roadway Express Court presented two alternative rationales that would have authorized the assessment of fees against the respondents. The first alternative is Federal Rule of Civil Procedure 37(b), which provides specific sanctions that a court may impose for failure to comply with discovery orders. The Court emphasized that one of these sanctions is to hold a party or his attorney personally liable for attorneys’ fees incurred by the opposing party.

In addition, the Court noted that a federal court’s inherent power could be used to assess attorneys’ fees directly against counsel. In support of this proposition, the Court cited Link v. Wabash Railroad, which acknowledged the inherent power to dismiss a case for failure to pursue the litigation, and Alyeska Pipeline Service Co. v. Wilderness Society, which acknowledged the inherent power to assess attorneys’ fees against a party who has litigated in bad faith. The Court reasoned that the combination of these two components of a court’s inherent power provide the authority to

69. 447 U.S. at 763-64.
70. The sanctions under rule 37 range from the imposition of motion costs to the dismissal of the action. Fed. R. Civ. P. 37.
71. 447 U.S. at 763. The rule states:
   In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorneys’ fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Fed. R. Civ. P. 37(b) (emphasis added).
72. Justice Stewart and Justice Rehnquist did not take part in the consideration of the inherent power question, viewing it as an issue that should be addressed by the district court on remand. 447 U.S. at 764 n.11.
74. 447 U.S. at 765.
75. 370 U.S. 626 (1962). In Link, the Supreme Court upheld the lower court’s dismissal of the plaintiff’s case based on his attorney’s failure to appear at a pretrial conference. Justice Harlan, speaking for the Court, stated that the authority to dismiss the case was found in the court’s inherent power, “governed not by rule or by statute but by the control necessarily vested in courts to manage their own affairs.” Id. at 630.
76. Id.
77. 421 U.S. 240 (1975).
78. Id. at 258-59 (quoting F.D. Rich Co. v. United States ex rel. Industrial Lumber Co., 417 U.S. 116, 129 (1974)). The bad faith exception to the American Rule is discussed in note 47 supra.
assess counsel fees directly against an attorney who has willfully abused the judicial process.79 Expressing its concern for due process, the Court concluded that the fees sanction should not be applied without fair notice and an opportunity for a hearing.80 Thus, on remand, the district court could assess attorneys' fees against the respondents pursuant to Rule 37 or the district court's inherent power.81

CRITIQUE

While the Roadway Express Court presented a convincing analysis of the legislative history of section 1927, its strict adherence to that analysis may well have defeated the congressional purpose underlying the statute. Under these circumstances, the Court should have focused on the underlying purpose of the statute rather than on one word contained in the statute.82

Section 1927 dates to the early nineteenth century,83 and at the time it was enacted, the term "costs" did not include attorney's fees.4 As a statute increases in age, however, it is likely to be called upon to deal with circumstances unforeseen at the time of its enactment.85 In such cases, courts should attempt to carry out the will of the legislature by considering how the legislative purpose would best be effected in the new circumstances.86

The purpose of section 1927 is to deter dilatory conduct by penalizing an attorney who abuses the judicial process.87 Yet, by refusing to apply section

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79. 447 U.S. at 766.
80. Id. at 767. For an excellent discussion of the due process implications of imposing penalties on attorneys, see Financial Penalties, supra note 32, at 862-87. The author contends that financial assessments are punitive measures that deprive attorneys of their personal property. Thus, he urges that some form of notice and hearing be required for the imposition of such measures. Id.
81. 447 U.S. at 767.
82. See Boys Mkts., Inc. v. Retail Clerks Local 770, 398 U.S. 235, 250 (1970) (the task of statutory construction cannot be performed by looking at a single word in isolation); United States v. Brown, 333 U.S. 18, 25-26 (1948) (emphasis on single word in statute should not override the statutory purpose).
84. 447 U.S. at 759. See text accompanying note 52 supra.
87. See Motion Picture Patents Co. v. Steiner, 201 F. 63 (2d Cir. 1912) (decided under predecessor of § 1927). The court stated: "[The statute] was designed to punish the
1927 in *Roadway Express*, the Court has insulated the conduct of a wrong-doing attorney from this statute. Moreover, the decision defeats section 1927's objective to protect innocent clients. In this case, the client who was not responsible for his attorney's dilatory conduct may nevertheless be assessed the prevailing opponent's attorneys' fees under the provisions of the civil rights acts. Not only did the client lose his case because his attorney erred, but he may have to pay the price of his attorney's transgressions. To avoid this inequity and to carry out the will of the legislature, the Court should have construed "costs" to mean costs of the specific litigation. Because civil rights statutes include attorneys' fees in their definitions of costs, such a construction would have authorized the Court to approve the award of attorneys' fees under section 1927. That construction clearly would have served the dual congressional purposes of deterring dilatory conduct and protecting the innocent client.

This suggested approach is preferable to the alternatives proposed by the Court. The assessment of attorneys' fees against counsel under Rule 37(b)
would both discourage attorney misconduct and protect the innocent client.96 Unfortunately, its scope is limited because Rule 37(b) sanctions are applicable only in cases of noncompliance with discovery orders.97 Moreover, opposing counsel may hesitate to move for the imposition of sanctions against an attorney because he or she may fear a future reprisal.98

The Court's second alternative, assessing attorneys' fees against counsel pursuant to the federal court's inherent power, also appears to serve the legislative purposes underlying section 1927.99 It does not, however, serve them as well as the statutory provision because the restrictive mental element will weaken its deterrent impact. The Court has limited the application of this sanction to willful abuses of the judicial process.100 A trial court, therefore, must find that an attorney intended to pursue dilatory tactics before it can assess the fees of opposing counsel against him. Dilatory conduct, unaccompanied by this intent, that nonetheless causes an unreasonable delay in the proceedings will not trigger the application of this sanction.101 Thus,


98. For example, opposing counsel may wish to abuse the discovery process as part of his litigation tactics in future cases. See Renfrew, supra note 34, at 272. Judge Renfrew compared discovery sanctions to a "double-edged sword." He stated that the reluctance to move for sanctions results in "a kind of gentlemen's agreement... extremely convenient for the attorneys... and extremely unfair to the litigants who pay more and wait longer for the vindication of their rights than they should." Id.

99. Now that the bad faith exception to the American Rule can be applied to an attorney as well as a party, a client cannot be punished if his attorney is responsible for the oppressive conduct that occurred during the litigation. Further, the assessment of attorneys' fees against counsel provides a court with a "powerful weapon" to discourage dilatory tactics. See Mcllvaine, supra note 1, at 413.

100. 447 U.S. at 766.

101. In comparison, most courts have strictly construed the "unreasonable and vexatious" requirement of § 1927. Generally, intentional misconduct by the attorney has been a prerequisite to its application. United States v. Ross, 535 F.2d 346, 349 (6th Cir. 1976). Cf. Kiefel v. Las Vegas Hacienda, Inc., 404 F.2d 1163, 1169 (7th Cir. 1968) (serious and studied disregard for court process), cert. denied, 395 U.S. 908 (1969). But see United Sheeplined Clothing Co. v. Arctic Fur Cap Corp., 165 F. Supp. 193 (S.D.N.Y. 1958) (costs imposed on attorney under § 1927 for negligent misconduct). Commentators, however, have urged that the words "unreasonable" and "vexatious" should embrace conduct beyond intentional abuses of the judicial process. See Renfrew, supra note 34, at 270 (strict intent requirement inappropriate for § 1927); Sanctions, supra note 4, at 627-28 (strict intent requirement curtails effectiveness of § 1927).

Interestingly, the Court in Roadway Express stated that the assessment of attorneys' fees against counsel under rule 37 is a less severe sanction than outright dismissal of the plaintiff's case. 447 U.S. at 767 n.14. Some federal courts have held that the less severe sanctions under rule 37 may be invoked where the failure to comply with discovery was not willful. See
this intent requirement restricts the inherent power alternative in the same manner as the contempt power and renders it a less effective approach than a simple construction of the section 1927 definition of “costs” to mean the costs of the specific litigation. In light of the ineffectiveness of the contempt sanction in deterring dilatory conduct, such a construction would clearly have been preferable.

**IMPACT**

The *Roadway Express* decision may serve as a reminder to the federal courts that dilatory tactics by attorneys need not be tolerated. Although the scope of allowable costs under the attorney liability statute is now limited to the taxable costs of sections 1920 and 1923 of the Judicial Code, the exclusion of attorneys’ fees probably will not render the statute meaningless. If the misconduct of an attorney does not warrant the assessment of attorneys’ fees under the authority of the court’s inherent power, the assessment of other litigation expenses under section 1927 may be an appropriate sanction. In addition, the *Roadway Express* decision may provide the impetus for Congress to approve a pending bill which would amend section 1927. If the section is amended specifically to include attorneys’ fees as part of its financial penalty, the federal courts will be provided with a stronger weapon for deterring dilatory conduct.

*Roadway Express* also may lead to a closer examination of an attorney’s responsibility for unreasonable delays in court proceedings. The Court’s discussion of the financial penalty available under Rule 37 suggests that a less lenient view should be taken toward attorneys who do not comply with the discovery rules. Accordingly, the Court’s expansion of the bad faith exception to the “American Rule” could prompt the courts to take a similar view toward tactical delays occurring outside the discovery stage. The financial

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Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062 (2d Cir. 1979) (counsel’s gross professional negligence sufficient basis to apply rule 37 sanctions); Hunter v. International Systems & Controls Corp., 56 F.R.D. 617 (W.D. Mo. 1972) (determination of willfulness not necessary in deciding whether rule 37 sanctions should be imposed); Bollard v. Volkswagen of Am., Inc., 56 F.R.D. 569 (W.D. Mo. 1971) (rule 37 sanctions justified without reference to whether failure to comply with discovery was willful). But see Flaks v. Koegel, 504 F.2d 702 (2d Cir. 1974) (willful refusal to obey discovery order is prerequisite to imposition of any rule 37 sanction).

102. See notes 29-34 and accompanying text *supra*.


104. See text accompanying notes 79, 100 & 101 *supra*.


106. The proposed amendment clearly indicates that only intentional misconduct by the attorney would violate § 1927. S. REP. No. 96-238, 96th Cong., 1st Sess. 35 (1979). Thus, the scope of the financial penalty under this section may be increased at the expense of its deterrent impact. See note 101 *supra*.

penalty of attorneys' fees based on Rule 37 or the court's inherent power would not give rise to the "awesome implications" of a contempt citation. As a result, fee assessments against an attorney may become a preferred method for punishing serious attorney misconduct.

It is foreseeable, however, that courts may be reluctant to utilize a fee sanction. The assessment of attorneys' fees against a lawyer may be viewed as a harsh penalty to be applied as sparingly as contempt citations. If this notion is adopted, it is likely that unreasonable delays in court proceedings caused by attorneys will continue. Just as the contempt sanction has been inadequate to control dilatory tactics by attorneys, a limited use of fee assessments would be similarly inadequate.

**CONCLUSION**

The *Roadway Express* decision insulated attorneys who violated section 1927 from personal liability for the fees of their opposing counsel. The Court's magnified emphasis on a single word and strict adherence to legislative history combined to uncompromisingly bar attorneys' fees as costs under section 1927. The statute's overall purpose of deterring abuse of the judicial process was also overshadowed. Further, the Court's discussion of alternative methods of assessing attorneys' fees against counsel does not guarantee that courts will overcome their reluctance to impose harsh sanctions on lawyers.

In answer to this reluctance, the necessity of an active role by the judiciary must be stressed. Although liability for attorney's fees may be a harsh penalty, the deterrence of dilatory tactics should be the primary rather than incidental goal of punishing errant attorneys. The methods proffered in *Roadway Express* are not ideal. Still, if the federal courts are willing to utilize the fee assessment sanctions authorized by Rule 37 or the federal court's inherent power, the efficiency and speed of trial proceedings could be somewhat increased. The better solution, however, would be for Congress ultimately to provide a more effective means of deterring dilatory tactics by amending section 1927 to include attorneys' fees as part of the statute's financial penalty.

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108. See United States v. Wendy, 575 F.2d 1025, 1030 (2d Cir. 1978). The *Wendy* court stated that a contempt citation afflicts a lawyer with "a stigma of antisocial conduct" and creates difficulties in seeking admission to practice in other jurisdictions. *Id.*