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ATTORNEY'S FEES: THE MUSHROOMING CLOUD OF LITIGATION

Robert W. Fioretti* & James J. Convery**

Ultimately, § 1988's straightforward command is replaced by a vast body of artificial, judge-made doctrine, with its own arcane procedures, which like a Frankenstein's monster meanders its well-intentioned way through the legal landscape leaving waste and confusion (not to mention circuit splits) in its wake.¹

Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976 (the Fees Act)² specifically to give federal courts discretion to award attorney's fees to prevailing parties in certain civil rights suits.³ Congress passed the Fees Act in direct response to the Supreme Court's decision in Alyeska Pipeline Service Co. v. Wilderness Society,⁴ which reaffirmed the traditional

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American rule\(^5\) that federal courts do not have the power to award attorney's fees to successful civil rights litigants without express statutory authorization or a special exception.\(^6\) Prior to *Alyeska*, federal courts had awarded attorney's fees to prevailing civil rights litigants under an exception to the American rule; the courts considered the litigants to be serving as "private attorneys general" to vindicate constitutional rights not only for themselves, but also for other similarly situated parties.\(^7\) The Supreme Court, however, rejected the "private attorney general" theory as an invasion of the legislature's province.\(^8\)

Wilderness Soc'y v. Morton, 479 F.2d 842, 851 (D.C. Cir.) (en banc), cert. denied, 411 U.S. 917 (1973). On appeal, the court reversed the district court and ordered it to reinstate the injunction. 479 F.2d at 893.

Once the merits of the litigation were effectively terminated by new legislation, the appellate court addressed the plaintiffs' request for an award of attorney's fees. Wilderness Soc'y v. Morton, 495 F.2d 1026 (D.C. Cir. 1974) (en banc). The court granted the petition for attorney's fees based on the "private attorney general" theory. The appellate court stated that when plaintiffs act as private attorneys general, they ensure the proper functioning of our system of government and advance public interests. An award of fees would not have discouraged the *Alyeska* plaintiffs from defending their case in court. Denying fees, however, might have deterred the appellants from undertaking the heavy financial burden of the litigation. *Id.* at 1036.

5. The American rule was established in Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796). In *Arcambel*, the Supreme Court held that each party is expected to bear the costs of its own litigation. The decision has generally been held to mean that courts should not permit fee awards unless authorized by a statute or recognized equitable exception. See Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967); I J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 717-18 (1971). Compare The Apollon, 22 U.S. (9 Wheat.) 362 (1824) (attorney's fees allowed as damages or costs) with The Baltimore 75 U.S. (8 Wall) 377 (1869) (attorney's fees disallowed unless provided for by statute).

6. Prior to *Alyeska*, courts' fashioned three general exceptions to the American rule in order to allow an award of benefits to persons other than the successful litigant. In *Trustees v. Greenough*, 105 U.S. 527 (1881), the Supreme Court relied on its traditional equitable power to permit the trustees of a fund or property, or one who preserves or recovers a fund for the benefit of others, to recover attorney's fees either from the fund or property itself, or directly from those enjoying the benefit. The *Greenough* Court arrived at this result despite the existence of a statute which limited fee awards to specified circumstances. See also Boeing Co. v. Van Gemert, 444 U.S. 472, 481-82 (1982) (recovery allowed in class action by bondholders under the common fund doctrine).


The third exception is when fees are assessed as a fine against a defendant who has willfully disobeyed a court order. Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 426-28 (1923). For further analysis of the American Rule, see Fioretti & Convery, *Attorney's Fees Under the Civil Rights Act—A Time for Change*, 16 J. MAR. L. REV. 261 (1983).

7. See *Alyeska Pipeline Co. v. Wilderness Soc.*., 421 U.S. 240, 270 n.46 (1975) (citing cases that incorrectly utilized the private attorney general theory).

8. *Id.* at 271 (1975). The Court admitted that it was desirable to encourage the private enforcement of environmental legislation, but nonetheless held that the American rule outweighed this consideration.
Attorney's Fees

Congress accepted the Supreme Court's challenge to permit the award of attorney's fees and to rectify the "anomalous gaps in our civil rights laws" that the Alyeska Court had created. Because civil rights laws require private enforcement, Congress believed that fee awards were essential if private citizens were to have a meaningful opportunity to assert the important


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


Section 1983 was enacted pursuant to the fourteenth amendment, the fifth section of which vests Congress with the "power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5. Congress satisfied the fourteenth amendment in 1868 and the enforcement provision, known as § 1983, was first used to enact the Klux Klan Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (codified as amended at 10 U.S.C. § 333; 18 U.S.C. §§ 371-372, 2384; 28 U.S.C. §§ 1343, 1861; 42 U.S.C. §§ 1983, 1985-1986 (1982)). Litigants rarely invoked § 1983 until 1961, when the Supreme Court broadened the Act's scope to encompass official conduct which was previously considered exempt. See Monroe v. Pape, 365 U.S. 167 (1961).

Congress also wanted to allow court awarded attorney's fees in actions brought under §§ 1981, 1982, 1985, and 1986. These provisions were enacted subsequent to the Civil War, a critical time in United States history. Section 1981 is intended to confer equality in civil rights. Section 1982 seeks to guarantee equality in property rights to all persons within the jurisdiction of the United States. Section 1985 prohibits conspiracy to interfere with another's civil rights. Section 1985 also provides a remedy against conspiracies undertaken to obstruct justice. Section 1986 provides a remedy against persons who, having knowledge of a conspiracy which violates § 1985, fail or refuse to prevent the object of the conspiracy when they have the power to do so.

11. Congress explained the need for private enforcement as follows:

The effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens. Although some agencies of the United States have civil rights responsibilities, their authority and resources are limited. In many instances where these laws are violated, it is necessary for the citizen to initiate court action to correct the illegality. Unless the judicial remedy is full and complete, it will remain a meaningless right. Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees H.R. 15460 is designed to give such persons effective access to the judicial process where their grievances can be resolved according to law.

underlying congressional policies. Additionally, Congress intended to remove financial barriers that might prevent disadvantaged people from having access to the courts, and afford successful civil rights plaintiffs "the opportunity to recover what it costs them to vindicate these rights in court." During hearings on the Fees Act, proponents of section 1988 viewed the proposed bill as a narrowly drawn response to the Alyeska decision and emphasized that the bill was not intended to encourage meritless litigation or provide aid or windfalls to prevailing counsel. The purpose of section 1988 is to ensure "effective access to the judicial process" for persons with civil rights grievances; Congress therefore adopted the moderate approach of permitting courts, at their discretion, to award "reasonable" attorney's fees to prevailing parties. Congress' rationale for this approach is that a prevailing party "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."
ATTORNEY'S FEES

The traditional American rule, however, does not permit a successful litigant to recover attorney's fees from an opponent unless a statute, contract, or exception exists. New legislation attempts to vitiate the rule, and there are now more than 100 federal fee-shifting provisions. With the proliferation of fee-shifting statutes, litigation to determine the amount of the awards has also multiplied. The result has been an alarming growth in attorney's fees litigation. The judiciary has subjected this area to uncertain and inconsistent judicial interpretation; courts have obscured the basic Congressional purpose for enacting the Fees Act and other fee statutes. These developments are both undesirable and unnecessary.

22. The American rule differs from the approach of many other nations. In Great Britain fees are automatically awarded to the prevailing litigant in all lawsuits. See Comment, Court Awarded Attorney's Fees and Equal Access to the Courts, 122 U. PA. L. REV. 636, 639 (1974).

For additional support for the American rule, see Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967), Stewart v. Sonneborn, 98 U.S. 187, 197 (1878), and Olerichs v. Spain, 82 U.S. 211, 230-231 (1872). See generally McCormick, Counsel Fees and Other Expenses of Litigation as an Element of Damages, 15 MINN. L. REV. 619, 619-42 (1931) (suggesting that the American rule was needed in a frontier society to encourage use of courts but today's congested court calendars require methods of promoting out of court compromises and settlements); Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 CALIF. L. REV. 792 (1966) (American rule is a burden on the poor and should be modified); Kuenzel, The Attorney's Fee: Why Not a Cost of Litigation? 49 IOWA L. REV. 75 (1963) (American rule causes injustice).

23. Alyeska, 421 U.S. at 260-61 n.33 (citing 29 federal statutes that permitted fee awards in certain actions).


25. The number of reported cases involving fee litigation increases every week. A LEXIS search conducted on March 11, 1986 revealed 2404 cases. The proliferation of litigation on attorney's fees has led courts to complain that "'[t]he fee proceedings have become the main event rather than the side show," and that the "'attorney's fees tail is wagging the civil rights dog."' Mills v. Eltra Corp., 663 F.2d 760, 761 (7th Cir. 1981).

26. This "'new field of law . . . has grown so fast and become so complex that it has baffled the effort of courts and lawyers to comprehend and apply it.'" Cutler, Foreward to 1 M. DeFner & A. Wolf, Court Awarded Attorney Fees (1983).

Federal courts have read the Fees Act expansively since its enactment, and have produced numerous and differing opinions over the proper application of section 1988. This article examines these problematic areas under the Fees Act in order to formulate guidelines that Congress should adopt to aid courts in uniformly evaluating claims for attorney's fees. Congress should establish these standards for the Civil Rights Act and the numerous other statutes which shift the entire expense of litigation to state, local, and federal governments. Although conflict and judicial confusion continue, the courts have developed very few guidelines. Only Congress can resolve the apparent dilemma over section 1988 and other fee shifting statutes.

I. THE PREVAILING PARTY REQUIREMENT

The plain language and legislative history of section 1988 indicate that either a plaintiff or defendant may be eligible for a fee award as a prevailing party. Courts, however, apply different standards when considering a fee award for a prevailing plaintiff as opposed to a prevailing defendant. Courts generally award fees to a prevailing plaintiff under the standard announced in *Newman v. Piggie Park Enterprises, Inc.* *Newman*, a 1968 decision, is a Title II case involving racial discrimination in a place of public accommodation. In *Newman*, the Supreme Court held that a victorious plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." In adopting this expansive interpretation of the Title II fee provision, the Court noted that the Congressional intent to encourage private enforcement of civil rights would be frustrated if fees were awarded only when the defendant acted in bad faith.

Five years later, in *Northcross v. Board of Education*, the Court applied the *Newman* standard in a suit brought to enjoin school segregation under

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29. The authors endorse the Fees Act and the concept of awarding reasonable fees to prevailing parties in civil rights' actions. They recommend changes, however, to eliminate the unintended and undesirable side effects that have resulted in mushrooming litigation.

30. For more thorough insight into the following background material, see Fioretti and Convery, supra note 6.

31. See supra note 2.


33. 390 U.S. 400 (1968).


35. 390 U.S. at 402.

36. The Title II fee provision at issue in *Newman* provides: "[i]n any action commenced pursuant to this subchapter, 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, and the United States shall be liable for costs the same as a private person." 42 U.S.C. § 2000a-3(b) (1982).

37. 412 U.S. 427 (1973) (per curiam).
the Emergency School Aid Act of 1972. This act provided for attorney’s fees much like the provision in Title II. Since the attorney’s fees provision of the school aid act was similar to that in Title II, the Court reasoned that the same construction was appropriate.

The drafters of the 1976 Attorney’s Fees Awards Act adopted the Newman-Northcross standard because it advanced the overall intent of Congress to give prevailing litigants some assurance that their costs would be refunded. As the Newman Court recognized, aggrieved parties should not be deterred from seeking judicial redress because of the costs associated with legal representation. Such a deterrence would frustrate the public interest in protecting civil rights.

In contrast to the prevailing plaintiff standard, it is currently more difficult for a prevailing defendant to recover attorney’s fees under section 1988. The general rationale for this distinction is that prevailing defendants do not “appear before the court cloaked in a mantle of public interest.” Permitting defendants to recover fees in the absence of special circumstances that render the award unjust would also thwart the legislative intent behind section 1988. Impecunious plaintiffs, who fear losing their suit, would hesitate to seek judicial redress unless their claims were highly likely to succeed. This would curtail the private enforcement of civil rights claims. Congress recognized these concerns and indicated that a prevailing defendant may recover fees “only if the action is vexatious or frivolous, or if the plaintiff has instituted it solely to ‘harass or embarrass’ the defendant.” This prevailing defendant standard was subsequently adopted by the Supreme Court in Christiansburg Garment Co. v. EEOC.

There is no question that Congress intended that a “prevailing party” be a completely successful litigant who receives a final judgment on a civil...

39. The fees provision of the Emergency School Aid Act provided that in cases involving racial discrimination in education, the court could allow the prevailing party a reasonable attorney’s fee if it finds the proceedings were necessary to bring about compliance; the United States, however, cannot be a prevailing party.
40. 412 U.S. at 428.
41. See Newman, 390 U.S. at 402.
42. United States Steel Corp. v. United States, 519 F.2d 359, 364 (3d Cir. 1975).
43. H.R. REP. No. 1558, supra note 11, at 7.
44. 434 U.S. 412, 421 (1978). See also Davidson v. Keenan, 740 F.2d 129 (2d Cir. 1984) (test not whether plaintiffs acted in good faith or on advice of counsel, but whether claim is clearly meritless); Gerena-Valentin v. Koch, 739 F.2d 755 (2d Cir. 1984) (lawsuit duplicative of action already litigated and resolved in trial and appellate courts); Shaw v. Neece, 727 F.2d 947 (10th Cir.) (fee award proper if plaintiff’s action is frivolous, unreasonable, or without foundation), cert. denied, 104 S. Ct. 2358 (1984); Lewis v. Brown & Root, Inc., 722 F.2d 209 (5th Cir.) (action was unreasonable and vexatious), cert. denied, 104 S. Ct. 975 (1984); see also Jensen v. Stangel, 762 F.2d 815 (9th Cir. 1985) (district court may award attorney’s fees to a prevailing defendant only in limited circumstances).
rights claim. Courts and attorneys, however, still struggle with two major questions: (1) what constitutes a prevailing party for the purposes of an award of attorney's fees, and (2) how large an award should the prevailing party receive. Both section 1988 and subsequent Supreme Court decisions have granted broad authority and discretion to lower federal courts in their attempts to make these determinations.

The Supreme Court, in *Hensley v. Eckerhart* addressed both the prevailing party and the award amount problems. The Court held that plaintiffs are prevailing parties for attorney's fees purposes if they succeed on any significant litigated issue that achieves some of the benefit sought in bringing the suit. In determining the amount of the award, a court must then measure the extent of plaintiffs' success.

In *Hensley*, the plaintiffs represented a class of involuntarily confined persons. The class plaintiffs challenged the constitutionality of treatment and conditions at the forensic unit of a state hospital. The district court found that the plaintiffs prevailed on five of the six alleged constitutional violations. The petitioner appealed only the fee award. The plaintiffs' four attorneys claimed that they worked 2985 hours and sought payment at rates varying from forty to sixty-five dollars per hour. The fees totaled approximately $150,000. The state officials objected on numerous grounds, including counsels' attempt to collect fees for hours spent on unsuccessful claims. The district court, however, refused to eliminate the award for hours spent on unsuccessful claims for two reasons. First, the plaintiffs had obtained significant relief. Second, the defendants' suggested method of apportioning fees failed to consider "the relative importance of various issues, the interrelation of the issues, the difficulty in identifying issues, or the extent to which a party may prevail on various issues."
On appeal, the Supreme Court believed that the district court adequately justified its threshold determination that the class plaintiffs were prevailing parties. The Court noted, however, that the district court failed to clearly address two issues: whether the failed claims related to the successful claims, and whether the level of success achieved made the total hours expended a satisfactory basis for the fee award.

In discussing the first issue, the Court reasoned that claims unrelated to the successful claims should be treated as if they had been raised in separate lawsuits and therefore be omitted in determining the fee award. The Court acknowledged, however, that an attorney may be unable to divide the hours expended in the litigation on a claim-by-claim basis.

The Court also observed that defendants could in good faith raise alternative legal grounds to reduce fee awards. A reduced fee award is appropriate only when the success obtained is "limited in comparison to the scope of the litigation as a whole." The Court then reversed the decision below because the district court never made a specific finding that the relationship of the successful claims to the overall litigation warranted a specific fee award.


The Eleventh Circuit follows the Fifth Circuit's more restrictive definition of "prevailing party". See Miami Herald Publishing Co. v. City of Hallandale, 742 F.2d 590, 591 (11th Cir. 1984) (plaintiff must succeed on the principal issue); Commonwealth Oil Ref. Co. v. EEOC, 720 F.2d 1383, 1385 (5th Cir. 1983) (plaintiff must succeed on central issue); Doe v. Busbee, 684 F.2d 1375, 1381 (11th Cir. 1982) (plaintiffs not prevailing parties when successful claims vacated on appeal).

50. 461 U.S. at 433.
51. Id. at 434.
52. Id. at 435. "Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee." Id. at 440.
53. Id. at 440. The Hensley Court specifically held that the success achieved by a plaintiff is a "crucial" factor in determining the amount of an award of fees. Id. In a footnote, the Court rejected a prior Eighth Circuit ruling in Brown v. Bathke, 588 F.2d 634 (8th Cir. 1978), which allowed a fee award to a partially successful plaintiff. The plaintiff in Brown was a fired school teacher who sought reinstatement, lost wages, $25,000 in damages, expungement of derogatory material from her employment records, and costs and attorney's fees. The plaintiff eventually recovered lost wages and her employment records were expunged. Noting that the plaintiff lost on the major issue of reinstatement and only obtained minor relief in comparison to the amount sought, the district court awarded attorney's fees only for hours spent on the successful issues. The Eighth Circuit reversed and remanded the lower decision, indicating that the plaintiff was entitled to fees on her unsuccessful claims if they were not frivolous. The Hensley Court rejected the court of appeal's analysis, stating that it was certainly well within the district court's discretion to make a limited fee award in light of the minor relief obtained. 461 U.S. at 438-39, n.14.
54. 461 U.S. at 438. The Hensley Court remanded the case to the district court to determine
Instead of clarifying the proper standard to be used in determining awards of attorney's fees, the *Hensley* decision merely spawned further litigation; the decision also increased the focus of the federal judicial system on fee litigation rather than on the vindication of individual civil rights.\(^{55}\) This is especially true when civil rights litigation is resolved by settlement or consent decree or is dismissed as moot. Equally problematic are cases in which plaintiffs receive only nominal damages or prevail on only some of their claims.

### A. Settlement or Consent Decree

The entry of a settlement or a consent decree is deemed to be success on the merits under both Supreme Court precedent and the legislative history of the Fees Act; in such circumstances, attorney's fees may be awarded to a civil rights plaintiff.\(^{56}\) It becomes difficult, however, to determine the extent of the success achieved when plaintiffs receive either less relief or a different form of relief than that originally sought. In such situations, district courts have emphasized divergent factors in determining attorney's fee awards.

In *Gillespie v. Brewer*,\(^{57}\) for example, a prisoner sought $100,000 in compensatory and punitive damages from state officials for injuries suffered when state police officers beat him and allowed an attack dog to bite him. The state had prevailed in eleven similar cases that had gone to trial. The plaintiff accepted $200 in settlement of his claim.\(^{58}\) The district court rejected the proper amount of the fee award in light of the Court's new standards. It also held that the fee applicant bears the burden of establishing entitlement to an award and documenting the hours expended and the hourly rates. *Id.* at 437.

55. As of July 1, 1985, **L**ex**is** showed 384 federal cases and 78 state cases citing *Hensley*.

56. *Maher v. Gagne*, 448 U.S. 122 (1980). In *Maher*, the plaintiff brought an action challenging state social welfare regulations. The parties entered into a consent decree which provided for increased benefits to the plaintiff and other welfare recipients. The district court granted the plaintiff's petition for fees and both the Second Circuit and the Supreme Court affirmed. *See also* S. Rep. No. 1011, supra note 3, at 5, **reprinted in 1976 U.S. Code Cong. & Ad. News** at 5912 (parties prevail when they vindicate rights by a consent judgment or without formal relief).


58. *Id.* at 220-21. The parties also agreed to bear their own costs and attorney's fees. *Id.* at 221. The district court held that this "waiver" was against public policy due to an inherent conflict of interest between plaintiff and his counsel. Therefore, the agreement was found to be without full force and effect. *Id.* at 226-28. Cf. *Jeff D. v. Evans*, 743 F.2d 648 (9th Cir. 1984) (bifurcated settlement process imposed), *cert. granted*, No. 84-1288 (U.S. May 13, 1985); *Prandini v. National Tea Co.* 557 F.2d 1015 (3d Cir. 1977) (required bifurcation of settlement as to the merits and attorney's fees).

Recently, one appellate court has held that simultaneous negotiations of merits and fees and waiver of fees and costs should not be prohibited per se. *Moore v. National Ass'n of Sec. Dealers*, Inc., No. 83-2213, slip op. (D.C. Cir. June 4, 1985). In *Moore*, the plaintiff, a black female employee, alleged sexual and racial discrimination, in violation of Title VII of the Civil Rights Act, by the National Association of Securities Dealers. Concluding that a settlement was
the defendant's contention that the $200 payment was merely a nuisance settlement and held that the plaintiff was a prevailing party for fees purposes. The court reasoned that the minimal amount of the settlement was only relevant in determining the amount of the fee, not the plaintiff's initial entitlement. Despite the minor relief obtained by the plaintiff, the district court ultimately awarded the plaintiff the full amount of the fee request.

In Storch v. Payne, however, another district court found that the plaintiff was not a prevailing party in a particular settlement. In Storch, the plaintiff sued the state for sexual discrimination in her employment. The parties reached a settlement whereby the plaintiff received five weeks of

possible only if attorney's fees were waived, the plaintiff finally negotiated a settlement agreement that excluded a fee award. That waiver made Moore liable for attorney's fees already paid to previous counsel (about $3,100) plus costs (about $34,000). The district court approved the settlement agreement on the basis that Moore had voluntarily waived her right to costs and fees.

The D.C. Circuit observed a confrontation between two important policies: the civil rights fee shifting policy designed to encourage plaintiffs to protect their civil rights, and the general judicial policy favoring settlement of disputes. Slip op. at 10. The court found that when plaintiffs have a weak case and lack bargaining power, they may wish to use the potential right to statutory fees as a bargaining chip towards achieving a more favorable settlement. Slip op. at 11. Thus, neither simultaneous negotiations nor voluntary waiver of attorney's fees should be foreclosed. Slip op. at 11.

In support of the district court's ruling, the appellate court noted that neither the fee statute nor the legislative history of the Fees Act contained any prohibition of attorney's fees waivers. Slip op. at 14-15. After reviewing the case law in other circuits, as well as ethics opinions of bar associations, the court concluded that the propriety of simultaneous settlement depends entirely on the circumstances of each case. Slip op. at 21.

The danger of a per se prohibition on simultaneous negotiations lies in possible unintended consequences. The court found that the principal consequence was the discouragement of settlements. Slip op. at 16, n.13. Further, the court noted that a ban on simultaneous negotiations implies a lack of trust in both the practicing bar's ability to engage ethically in settlement negotiations and in the court's ability to check unreasonable conduct through the exercise of Federal Rule of Civil Procedure Rules 16 and 23. Slip op. at 23, n.15.

59. The district court was uncomfortable with the term "nuisance settlement," calling it an "ambiguous label" that should not describe a final compromise. 602 F. Supp. at 222. But see Chicago Police Officers' Ass'n v. Stover, 624 F.2d 127 (10th Cir. 1980) (nuisance settlements should not give rise to a prevailing plaintiff); cf. Parker v. Mathews, 411 F. Supp. 1059 (D.D.C. 1976) (totality of circumstances determines prevailing party in out-of-court settlements).

60. The court acknowledged it had taken a broad view on the issue of what constitutes a prevailing party and noted that other courts have taken an extremely liberal view on nearly every interpretation of § 1988. 602 F. Supp. at 221.

61. Id. at 225.

62. Id. at 230. The plaintiff originally sought $2760 in attorney's fees. The court reduced this award by 35% because of the plaintiff's limited degree of success. The court then increased the amount by 15% because the plaintiff's attorney had a contingent fee agreement. The court also increased plaintiff's fee award by another 20% because the case was undesirable. Consequently, the plaintiff received the full $2760 in attorney's fees even though he received less than one-half of one percent of the original relief sought. Id. at 228-30.

severance pay and a higher paying job in another department. Even though the plaintiff obtained these benefits, the court held that she was not a prevailing party. The court stated that, had the plaintiff gone to trial, she probably would not have prevailed on the merits. Further, the job she received through the settlement would not have been available to her had she eventually obtained a favorable judgment.64

In *Harris v. Jones County*,65 the plaintiff settled a false arrest suit with the defendants for $7500.66 Although the plaintiff acquired some of the benefits he sought, he failed to show that his suit was a substantial factor in motivating the defendants to end the alleged unconstitutional behavior. Therefore, the district court held that the plaintiff had alleged only a prima facie case as a prevailing party and was not entitled to attorney's fees as a matter of law.67

**B. Mootness**

It is equally difficult to determine whether there is a prevailing party when remedial actions taken by a defendant prior to a judicial decision render the litigation moot. Generally, attorney's fees are justified if the plaintiff shows a causal connection between the filing of the suit and the defendant's action, and establishes that the defendant's remedial action was required by the court.68 The plaintiff's lawsuit should be a substantial factor or a significant catalyst in motivating a defendant to curtail unconstitutional behavior.69

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64. The court noted that the litigation did not cause any defendants to remedy any of their alleged mistakes and that if sex discrimination did exist, the settlement did not alter its existence. The plaintiff failed to establish any right or the proscription of any wrong, and she was therefore not entitled to relief or attorney's fees. *Id.* at 1080.


66. The plaintiff sought a declaratory judgment that certain acts of the defendants, the supervisors, sheriff, and jailer of Jones County, violated his state rights under Mississippi state law and his Constitutional rights to due process and freedom from cruel and unusual punishment. Plaintiff sought compensatory and punitive damages as well as injunctive relief. *Id.* at 1542.

67. *Id.* at 1544-46. For additional rulings on prevailing parties in settlement cases, see Toth v. United Auto., Aerospace and Agricultural Implement Workers of Am., 743 F.2d 398 (6th Cir. 1984) (fees granted to employee based upon benefits he received in a labor settlement agreement), El Club Del Barrio v. United Community Corps., 735 F.2d 98 (3d Cir. 1984) (failure of parties to provide for attorney's fees in a written settlement agreement insufficient to deprive plaintiff of fees because a clear waiver is required), Jones v. MacMillan Bloedel Containers, Inc., 685 F.2d 236 (8th Cir. 1982) (fees award is still possible despite a provision in the consent decree expressly prohibiting such recovery), and Poston v. Fox, 577 F. Supp. 915 (D.N.J. 1984) (plaintiff prisoners were prevailing parties and were awarded fees because they obtained changes in conditions and practices at the jail).

68. Williams v. Leatherbury, 672 F.2d 549 (5th Cir. 1982). See also DiFilippo v. Morizio, 759 F.2d 231 (2d Cir. 1985) (ambiguous victory with low damage award does not warrant imposition of a negative multiplier); Ganey v. Edwards, 759 F.2d 337 (4th Cir. 1985) (award of nominal damages does not prevent award of costs and fees).

In *B & J Music, Inc. v. McAuliffe*,\(^70\) the producers of an allegedly obscene play sought a temporary restraining order (TRO) to prevent Georgia state officials from making arrests or taking any actions to enforce local criminal laws that prohibited their production. At the TRO hearing, the defendants voluntarily agreed to refrain from making arrests, thereby rendering the plaintiff's request moot. This situation lasted for six months, when the plaintiffs moved for attorney's fees, claiming that they were a prevailing party because their plays had not been disturbed or interrupted by the defendants.\(^71\) In affirming the district court's denial of a fee award, the Eleventh Circuit held that fees cannot be awarded to plaintiffs merely because they ultimately achieved their desired result, especially when the defendants never intended to take the actions that the plaintiffs sought to prevent.\(^72\)

In contrast to the Eleventh Circuit, the Court of Appeals for the Eighth Circuit held, in *Premachandra v. Mitts*,\(^73\) that a plaintiff was entitled to attorney's fees when the defendants voluntarily agreed not to undertake certain conduct, even after the district court, the Eighth Circuit, and the Supreme Court had denied the plaintiff's request for injunctive relief. In addition to finding that the plaintiff's suit was a catalyst in achieving the relief desired, the Eighth Circuit also found that the suit was not frivolous, unreasonable, or groundless, and that the defendant's compliance was not merely gratuitous.\(^74\) The court's ruling turned on the fact that the plaintiff actually obtained relief, and not merely that he was legally entitled to relief.\(^75\)

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70. 719 F.2d 1536 (11th Cir. 1983).
71. Id. at 1538.
72. Id. at 1539. The court of appeals refused to award fees when only potential civil rights issues existed. The plaintiffs never achieved the relief that they sought and did not vindicate any substantial right.
73. 727 F.2d 717 (8th Cir. 1984).
74. Id. at 722-23. Judge Gibson dissented, stating:
Dr. Premachandra's request for a preliminary injunction was denied, and repeated requests for an injunction pending appeal were unsuccessful . . . There has been a sufficient determination, for attorney's fees purposes, that the VA's action was not required by law, and therefore gratuitous. In light of the above standard, Dr. Premachandra was not a prevailing party.
Id. at 733-34. (Gibson, J., dissenting).
75. See, e.g., Paragould Music Co. v. City of Paragould, 738 F.2d 973 (8th Cir. 1984) (case dismissed as moot and plaintiff was not prevailing party since there was no likelihood of success on the merits because the arcade, which obtained the TRO, went out of business); Knights of the Ku Klux Klan v. East Baton Rouge Parish, 735 F.2d 895 (5th Cir. 1984) (Klan prevailed only by virtue of a change in the law); see also Pomerantz v. County of Los Angeles, 674 F.2d 1288, 1292 (9th Cir. 1982) (when suit is moot as to all but one issue because of an action unrelated to the suit, the prevailing plaintiff may still be entitled to fees on the remaining issue); Stewart v. Hannon, 675 F.2d 846, 850 (7th Cir. 1982) (no fees awarded to plaintiffs as school systems abandoned use of allegedly discriminatory promotion standards for reasons independent of suit); Sullivan v. Pennsylvania Dep't of Labor & Indus., 663 F.2d 443, 452 (3d
C. Plaintiff Success on Some Issues

Section 1988 grants broad authority to courts in awarding attorney's fees to prevailing plaintiffs who vindicate federal constitutional or statutory rights. When a plaintiff prevails on only some of the issues, or on an interlocutory motion, the intent of Congress to award attorney's fees is less clear and therefore subject to much litigation.

In Gingras v. Lloyd, the Court of Appeals for the Second Circuit vacated a district court's award of $15,000 in fees to the plaintiffs, even though the lower court had denied the plaintiffs request for relief in its entirety. The Second Circuit stated that when a court does not rule in favor of a plaintiff and the defendant does not take any remedial action, it is difficult to conclude that the plaintiff prevailed. The mere fact that the lawsuit reassured the plaintiff does not make the plaintiff a prevailing party.

Situations in which the plaintiff only prevails against certain defendants, or only upon certain legal theories, also make fee determination more difficult. The Hensley decision requires fee reduction for hours that are spent on distinct unsuccessful claims and also when plaintiffs only achieve limited success. In Wojtkowski v. Cade, the Court of Appeals for the First Circuit affirmed a district court's fee award of $3,870 even though the jury awarded the plaintiff a total recovery of $6,000. In Wojtkowski, the plaintiff originally sought $200,000 in compensatory damages against a local

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77. As the Court stated in Hanrahan v. Hampton, 446 U.S. 754 (1980), "it seems clearly to have been the intent of Congress to permit such an interlocutory award only to a party who has established his entitlement to some relief on the merits of his claim, either in the trial court or on appeal." Id. at 757 (emphasis added). The Court strictly construed the legislative language to reach this decision. See S. Rep. No. 1011, supra note 3, at 7, reprinted in 1976 U.S. CODE CONG. & AD. News at 5908, 5912.
78. 740 F.2d 210 (2d Cir. 1984).
79. Id. at 211. The plaintiffs in Gingras challenged the closing of a state hospital. Plaintiffs' motions for class certification, declaratory judgment, and injunctive relief were all denied. In awarding fees, the district court noted that plaintiffs had moved the bureaucracy more quickly and efficiently to care for former hospital patients. Id. at 213.
80. Id. at 212.
81. Id. at 213.
82. 461 U.S. at 440.
83. 725 F.2d 127 (1st Cir. 1984).
84. Id. at 129. Plaintiff's attorney sought costs, attorney's fees, and prejudgment interest on fees for a total claim of $19,259.10. Id.
town, the police chief, and three individual officers for unlawful arrest and detainer. The plaintiff alleged that the town and its police chief provided inadequate training and supervision but were not directly involved in the underlying incident. The appellate court substantially reduced the plaintiff's request for attorney's fees because the subject liability theories were distinct from those of the guilty defendants, and because the damage award was limited. 85

Although the Wojtkowski court distinguished between successful and unsuccessful claims for fees purposes, the First Circuit's analysis is the exception rather than the rule. 86 In Phillips v. Weeks, 87 the plaintiffs sought to establish a pattern, practice, or policy of police brutality in certain isolated instances of misconduct by the defendants. 88 After a thirty day trial, the plaintiffs did not prevail on the issue of whether a policy or practice of brutality existed. The district court lamented that "if the plaintiffs only wanted to prove police misconduct involving arrests without probable cause and detention in segregated facilities and had not tried to prove police brutality, the trial would have taken three or four days rather than over 30 days."89 Thus, the court limited the results achieved by the plaintiffs in accordance with the scope of the litigation as a whole, 90 and reduced the fee request to reflect plaintiff's limited success. 91

Although the determination of the prevailing plaintiff has created additional litigation in the areas of settlement, mootness, and limited success, plaintiffs' attorneys should acknowledge that fee awards are limited. Various decisions hold that attorneys will not be compensated for time spent on litigating distinct speculative claims or on seeking extensive relief when only limited relief is available. As this awareness mounts, perhaps the courts can return the focus of civil rights litigation to the aggrieved party rather than to attorney's fees considerations.

II. Fee Computation

Computation of a prevailing party's fee entitlement is as vexing a problem as the determination of the prevailing party. The Supreme Court, however,

85. Id. at 130.
87. Id.
88. Id. at 242.
89. Id. at 249. The court noted that certain citizen complaint procedures were changed as a result of the litigation and that the suit was a factor in defendant's decision to integrate the jail. Id. at 250.
90. Id. at 248-49. The plaintiffs' prayer for relief was an exhaustive list of requests for declaratory and injunctive relief related to their claims arising out of the illegal policy that they failed to prove existed.
91. Id. at 250. The district court previously arrived at an amount of $54,643. After finding that the plaintiffs had only achieved 25% of the results they sought, the fee award was reduced to $13,660.75. Id. at 251.
gave some guidance in *Hensley v. Eckerhart.* In *Hensley*, Justice Powell observed that "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." This computation method, known as the lodestar, obviously vests the district court with much latitude in awarding reasonable attorney's fees. Such discretion, however, has led to undesirable results, especially in light of the Court's warning that "[a] request for attorney's fees should not result in a second major litigation." Courts need a more mechanical computation method that would eliminate secondary fee litigation and subsequent appellate review. Such a method

93. Id. at 433.

Following the *Hensley* directive, circuit courts have embraced two commonly employed fee computation methods: (A) the lodestar method, *see, e.g.,* Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 167-68 (3d Cir. 1973) (reasonable hourly rate times number of hours expended); and (B) the *Johnson* factors method, *see* *Johnson* v. Georgia Highway Express, Inc., 488 F.2d 714, 717-719 (5th Cir. 1974). The *Johnson* factors are twelve considerations which a judge may assess in awarding fees: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill required 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 of moving involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Compare* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (1979) *with* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 (1983) (listing eight factors from which *Johnson* is derived).

Application of these methods, however, has been inconsistent. Some circuits have utilized the lodestar approach, *see, e.g.,* Anderson v. Morris, 658 F.2d 246 (4th Cir. 1981); Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980); Furtado v. Bishop, 635 F.2d 915 (1st Cir. 1980); City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974); Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973). Other circuits have utilized the *Johnson* factor approach, *see, e.g.,* Muscare v. Quinn, 614 F.2d 577 (7th Cir. 1980); Francia v. White, 594 F.2d 778 (10th Cir. 1979). Some circuits have mixed the two; *see, e.g.,* Copper Liquor, Inc. v. Adolph Coors Co., 624 F.2d 575 (5th Cir. 1980); Kerr v. Screen Extras Guild Inc., 526 F.2d 67 (9th Cir.), cert. denied, 425 U.S. 951 (1975).

95. *Hensley*, 461 U.S. at 437. See Laffey v. Northwest Airlines, Inc., 746 F.2d 4, 19-20 (D.C. Cir. 1984) ("When the numbers fed into the lodestar are fundamentally arbitrary, no amount of calculation can restore objectivity. The fee setting approach becomes a complex and expensive overlay of delusive mathematical form over a process fundamentally grounded in an arbitrary assessment."). *See also* National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1325 (D.C. Cir. 1982) (per curiam) (market rate information should be as specific as possible).
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would provide sufficient compensation to attract competent counsel without providing counsel with outrageous windfalls.\textsuperscript{96}

\section*{A. Reasonable Hourly Rates}

A significant problem with the lodestar approach is the difficulty of determining a reasonable hourly rate of compensation.\textsuperscript{97} In recent years, the idea of imposing a fee ceiling in civil rights cases has gained momentum in both the legislature and the judiciary. Congress recently proposed the Legal Fee Equity Act,\textsuperscript{98} which is patterned after the Equal Access to Justice Act.\textsuperscript{99} The legal fee act establishes a fee ceiling of seventy-five dollars per hour for all fee awards mandated by federal statute or involving state action.\textsuperscript{100}

\textsuperscript{96} S. Rep. No. 1011, \textit{supra} note 3, at 6, \textit{reprinted in} 1976 U.S. Code Cong. & Ad. News at 5908. This article advocates supplanting the current lodestar formulation (reasonable hourly compensation rate times the number of hours reasonably expended) with a more rigid formulation composed of a Congressionally prescribed hourly compensation rate times the number of well-documented hours reasonably expended.

\textsuperscript{97} "Courts disagree on what factors should be applied, how they should be applied, and even what they mean . . . . As a result, in cases decided between 1974 and 1979, hourly rates awarded to civil rights attorneys varied by 685 percent." \textit{National Association of Attorneys General, Report to Congress, Civil Rights Attorney's Fees Award Act of 1976}, at 12 (Feb. 3, 1984), 130 Cong. Rec. S8842, 8843 (daily ed. June 29, 1984) [hereinafter cited as NAAG Report].

\textsuperscript{98} S. 2802, 98th Cong., 2d Sess. (June 27, 1984); H.R. 5757, 98th Cong., 2d Sess. (May 31, 1984). The general purpose of the bill is to establish procedures to ensure that fees awards to prevailing attorneys are reasonable. One commentator noted that "[a]lthough the 98th Congress expired before S. 2802 could progress beyond committee consideration, it is certain to be reintroduced and reviewed in the 99th Congress." Rader, \textit{The Fee Act of 1976: Examining the Foundation for Legislative Reform of Attorneys' Fees Shifting}, 18 J. Mar. L. Rev. 77, 114 (1984).


\textsuperscript{100} There was little precedential authority for the $75 an hour fee ceiling under the Equal Access to Justice Act. However, 42 U.S.C. \textsection 406(d)(1) (1982) provided for the award of attorney's fees in social security benefit claims cases up to 25\% of the past due benefits, and 38 U.S.C. \textsection 3404(c)(2) (1982) provided for the award of attorney's fees of up to $10 per claim in veterans' benefit claims cases. In these cases the fees are deducted from the benefits won by the claimant. \textit{See} Robertson & Fowler, \textit{supra} note 99. \textit{See also} New York Ass'n for Retarded Children, Inc. \textit{v.} Carey, 711 F.2d 1136 (2d Cir. 1983) (setting "break point" ceiling of $75 an hour under \textsection 1988 for public civil rights attorneys).

Much testimony was given before the Senate Subcommittee supporting a ceiling of $75 per
The judiciary has also become increasingly exasperated with the nebulous process of determining what constitutes a reasonable rate of compensation. In *Laffey v. Northwest Airlines, Inc.*, the Court of Appeals for the District of Columbia found that a private law firm’s established billing rate provides an easily ascertainable fixed market rate for calculating a section 1988 legal fee. The Court held that such rates were presumptively fair. The *Laffey* court nevertheless admitted that tedious, ad hoc reasonable hourly rate determinations are inevitable where a firm has no established billing rate.

In *Blum v. Stenson*, the Supreme Court stated that reasonable fees should be calculated according to the prevailing market rates in the local community, and that the calculation should include such factors as the attorney’s experience, skill, and reputation. This method also has its hour. For example:

- The Hon. Carol Dinkin, Deputy Attorney General, U.S. Department of Justice: “Even with the $75-an-hour limitation, there have been many lawsuits brought under the Equal Access to Justice Act. That number has not, I think, deterred litigation.”
- The Hon. Francis X. Bellotti, attorney general of Massachusetts: “We would have no difficulty at all in attracting competent counsel for $75 an hour. Ours is an urban northeast state where fees are high generally . . . . But the short answer is: I would have no problem with $75 an hour . . . .”
- The Hon. Steven Clark, attorney general of Arkansas: “In Arkansas, $75 an hour would attract competent counsel without question.”
- The Hon. David L. Wilkinson, attorney general of Utah: “That figure of $85 or $95 an hour is for the best firm in town I could find. I think that in our state $75 could attract competent counsel . . . .”


102. *Id.* at 24. *See also* Henry v. Webermeier, 738 F.2d 188 (7th Cir. 1984) (hourly rate submitted by plaintiff viewed as a “benchmark”).
103. 104 S. Ct. 1541, 1547 (1984). The Court noted that:

> We recognize, of course, that determining an appropriate “market rate” for the services of a lawyer is inherently difficult. Market prices of commodities and most services are determined by supply and demand. In this traditional sense there is no such thing as a prevailing market rate for the service of lawyers in a particular community. The type of services rendered by lawyers, as well as their experience, skill and reputation, varies extensively—even within a law firm . . . . But the fee usually is discussed with the client, may be negotiated, and it is the client who pays whether he wins or loses. The § 1988 fee determination is made by the court in an entirely different setting: there is no negotiation or even discussion with the prevailing client, as the fee—found to be reasonable by the court—is paid by the losing party.

*Id.* at 1547, n. 11.
104. *Id.* at 1547 n.11.
105. *Id.* at 1544-45 nn.4-5, 1546 n.9. *See also* Laffey v. Northwest Airlines Inc., 746 F.2d 4 (D.C. Cir. 1984); Furtado v. Bishop, 635 F.2d 915 (1st Cir. 1980). The existence of an independent pre-existing contingency fee agreement between the plaintiff and his attorney does not limit the potential fee award under § 1988. Such an agreement is relevant to the determination of the attorney’s value. Cooper v. Singer, 719 F.2d 1496 (10th Cir. 1983).
drawbacks. In *Grendel's Den, Inc. v. Goodwin*,\(^{106}\) Professor Laurence Tribe, the well-known Harvard constitutional law scholar, represented the prevailing party. After successfully proving that a Massachusetts zoning law was unconstitutional, Professor Tribe requested $331,441 in fees at an effective hourly rate of $412.50 per hour.\(^{107}\) Although the Court of Appeals for the First Circuit reduced Professor Tribe's request,\(^{108}\) the decision clearly demonstrates the potential for excessive fee requests based on experience and skill.\(^{109}\) Congress must now determine how much it should cost to ensure that a civil rights plaintiff has a sufficient opportunity to vindicate his or her rights.\(^{110}\)

Under the Fee Act's prevailing party requirement,\(^{111}\) fee awards are essentially merit-based and should be limited to successful civil rights litigators. The paramount consideration, as the Supreme Court has recognized,\(^{112}\) is


\(^{107}\) The $412.50 rate comprised a $275 an hour fee plus a 50% multiplier. See also *Rivera v. City of Riverside*, 679 F.2d 795 (9th Cir. 1982) (vacated and remanded in light of *Hensley v. Eckerhart*, 461 U.S. 952 (1983)).


\(^{109}\) Litigation in this area may increase substantially in light of *Institutionalized Juveniles v. Secretary of Public Welfare*, 758 F.2d 897 (3d Cir. 1985), in which the court suggested that a separate fee determination for the preparation of the actual fee petition may also be subject to a *Hensley* analysis. *Id.* at 924.

\(^{111}\) Unsuccessful defendants are faced with a "catch-22" situation in which they must choose between paying exorbitant fees or continuing litigation over the fees while watching them skyrocket even higher. See *Lund v. Affleck*, 587 F.2d 75, 77 (1st Cir. 1978).

\(^{112}\) *Hensley*, 461 U.S. at 436-37.
that an attorney should be compensated only for results. Every civil rights plaintiff must be afforded all opportunities to vindicate fundamental rights. Therefore, fee awards must be sufficient to attract competent attorneys.

Soaring fee awards are ultimately exacted from the public purse. Ambiguous fee standards also make the court system inefficient. Congress must consider basic economic principles, and remember that significant values inhere in the vindication of civil rights. Congress must therefore set an hourly compensation rate that is sufficient to attract attorneys who possess qualities that are essential to the effective enforcement of basic civil liberties. Given the current abundance of attorneys, this goal should not be difficult to achieve. Of course, the hourly compensation rate should also vary to accommodate geographic differences. Although a statutorily prescribed fee may limit the potential recovery available to highly priced attorneys, the purpose of the Fees Act is to "benefit meritorious claimants, not to subsidize the legal profession." Furthermore, a prescribed rate would reduce much of the time currently spent on litigating disparate fee awards.

B. Hours Reasonably Expended

A court must examine the total number of hours expended and then disallow unproductive time or time spent on unsuccessful claims to determine the number of hours reasonably expended by a prevailing party's counsel. Time actually expended is not necessarily time reasonably expended. This calculation is feasible because civil rights attorneys know that they are

113. Id.
114. "[I]n enacting § 1988, Congress determined that the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in § 1988, over and above the value of a civil rights remedy to a particular plaintiff." Hensley, 461 U.S. at 444-45 n.4 (Brennan, J., concurring in part and dissenting in part).
115. As the court of appeals in Laffey observed, "[c]reation of a prevailing community rate by fiat is a task for the Congress, and not for this Court . . . . All we can do is simplify and make more certain—and thus make more speedy, economical, and ultimately fairer . . . the fee setting process." 746 F.2d 4, 19 n.98 (D.C. Cir. 1984).
116. In every major metropolitan area there are a substantial number of lawyers who possess the skill to handle all but the most unusual civil rights cases. More than eight percent of all civil cases filed in federal court from June 30, 1983, to June 30, 1984, were civil rights suits. See Annual Report of the Director of the Administrative Office of the United States Courts 134 (1984). This number looms even larger since 17.7% of all cases were for recovery of overpayments and enforcement of judgments, and 11.5% were social security cases. Id. More than 27% of the cases heard in the United States Courts of Appeals were civil rights cases. Id. at 112.
118. "A district judge may not . . . authorize the payment of attorney's fees unless the attorney involved has established by clear and convincing evidence the time and effort claimed and shown that the time expended was necessary to achieve the results obtained." Hensley, 461 U.S. at 440-41 (Burger, C.J., concurring). See also Murray v. Weinberger, 741 F.2d 1423, 1427 (D.C. Cir. 1984) (unnecessary hours to be excluded from the calculation).
expected to exercise billing judgment\(^{120}\) and keep sufficiently detailed time records to substantiate the time expended and the services provided.\(^{121}\)

As a practical matter, courts have responded to the problem of excessive and duplicative hours by using percentage cuts.\(^{122}\) Attorneys should not feel overburdened by this scrutiny; courts have usually sustained reasonable additional expenditures such as those for necessary research\(^{123}\) or for an extra attorney's trial assistance.\(^{124}\) Disputes can easily be resolved by examining billing documents. Thorough documentation allows the court to examine a clear record from which it may determine not only which hours are reasonable, but which hours were spent on successful issues.

Multiplying a prescribed hourly rate by the number of well documented hours, while admittedly a somewhat mechanical lodestar, will significantly reduce the burden upon district courts. This lodestar method will allow courts to focus their resources on substantive claims while also establishing a reliable gauge to measure the extent of a potential fee award early in the litigation.\(^{125}\) Furthermore, appellate review of fee cases would be less frequent and more easily resolved. Unsuccessful defendants would then be dissuaded from engaging in:

> what must be one of the least socially productive types of litigation imaginable: appeals from the awards of attorney's fees, after the merits of the case have been concluded, when the appeals are not likely to affect the amount of the final fee. Such appeals, which greatly increase the costs to plaintiffs of vindicating their rights frustrate the purpose of § 1988.\(^{126}\)

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120. "It would be inconceivable that the prevailing party should not be required to establish at least as much to support a claim under 42 U.S.C. § 1988 as a lawyer would be required to show if his own client challenged the fees." *Hensley*, 461 U.S. at 440 (Burger, C.J., concurring). See also *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) (billing judgment is as important in public civil rights litigation as it is in the private sector).


124. See, e.g., *Planned Parenthood Assoc. of Kansas City v. Ashcroft*, 655 F.2d 848 (8th Cir. 1981); *Tasbey v. Estes*, 651 F.2d 287 (5th Cir. 1981). But see *Roe v. City of Chicago*, 586 F. Supp. 513 (N.D. Ill. 1984). In *Roe*, the court found the use of multiple attorneys in a relatively simple civil rights case unjustified. The court stated that "[t]here is no justification for saddling an opponent with the kind of double-timing by lawyers reflected in this case. What is at work here is an example of what has brought the cost of legal services out of the reach of most of our populace." *Id.* at 514.

125. Litigants should settle the fee amount but the parties probably will not do so when they have "no way of estimating how much a court would award in a particular case." *NAAG REPORT, supra* note 97, at 29. 130 CONG. REC. S8842, 8843 (daily ed. June 29, 1984).

126. *Hensley*, 461 U.S. at 442 (Brennan, J., concurring and dissenting).
C. Multipliers

Courts often used multipliers or bonuses to enhance fee awards prior to the Supreme Court’s decision in Blum v. Stenson. In Blum, the Supreme Court recognized the arbitrariness and excessiveness of fee awards that are enhanced by multipliers, and stated that the plain lodestar calculation usually yields a presumptively reasonable fee. The Court nevertheless refused to accept the argument that an upward adjustment is never permissible. The Court reasoned that there may be circumstances when the lodestar results in an unreasonably low fee. More specifically, an upward adjustment would be justified when the fee applicant offers specific evidence to show that counsel provided superior legal services or achieved exceptional success.

Some jurists argue that multipliers produce an inherent windfall to attorneys and should therefore be totally abolished. The National Association of Attorneys General claims that the use of multipliers, or bonuses, is inconsistent with, and not supported by, the legislative history of the Fees Act, is an arbitrary enhancement of a reasonable award, and encourages litigation of meritless claims. Although the Supreme Court has limited the number of situations in which multipliers may be used, a circuit split has already developed over whether or not multipliers are properly used to enhance a fee award when a high risk suit is ultimately successful.

Congress must review the use of multipliers and determine whether a need exists for such an award in light of the Hensley standard for reasonable fees. If Congress decides to retain the use of multipliers, it must develop clear and specific guidelines for their use.

D. Rule 68 — Offer of Judgment

As judicial interpretation of section 1988 grows more diverse, state and local government units have sought to avoid the pitfalls of unnecessarily
protracted civil rights litigation.\textsuperscript{134} One recently utilized tool is Rule 68 of the Federal Rules of Civil Procedure, which is designed to encourage the early settlement of litigation.\textsuperscript{135} Due to conflicting interpretations of the Rule,\textsuperscript{136} both the Supreme Court and the Federal Rules Advisory Committee are considering possible changes to Rule 68.

The Supreme Court recently decided the case of \textit{Marek v. Chesney}\textsuperscript{137} which will primarily affect attorneys seeking statutory fee awards. In \textit{Marek}, the Court determined whether attorney's fees, which \$1988 defines as part of costs, are among the costs encompassed by Rule 68 for the purpose of determining the plaintiffs' fee liability when they reject an offer of settlement and later obtain a final judgment less favorable than the original settlement offer.\textsuperscript{138} The Seventh Circuit had reversed the district court, stating that Rule 68 costs do not include the defendant's attorney's fees even though the plaintiff's costs do.\textsuperscript{139} The Seventh Circuit further stated that a plaintiff's rejection of a defendant's Rule 68 offer, including those situations when the offer was more favorable than the final judgment, did not bar the plaintiff

\begin{itemize}
\item \textsuperscript{135} \textit{Fed. R. Civ. P. 68} provides as follows:
\begin{quote}
Offer of Judgment. At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.
\end{quote}
\item \textsuperscript{136} Compare Fulps v. City of Springfield, 715 F.2d 1088 (6th Cir. 1983) (attorney's fees are included in "costs") with Pigeaud v. McLaren, 699 F.2d 401 (7th Cir. 1983) (fees not included). See also Delta Airlines, Inc. v. August, 450 U.S. 346 (1981) (fees not included).
\item \textsuperscript{137} 53 \textit{U.S.L.W.} 4903 (U.S. June 25, 1985). The Supreme Court reversed the Seventh Circuit and held that civil rights plaintiffs, like any other plaintiffs who reject offers more favorable than what is ultimately recovered at trial, will not recover attorney's fees for services performed after the offer is rejected. \textit{Id.} at 4906.
\item \textsuperscript{138} \textit{Id.} at 4904.
\item \textsuperscript{139} \textit{Id.}
\end{itemize}
from recovering even post-offer attorney’s fees. The Seventh Circuit recognized the proposed rule change to Rule 68, but commented that “the Committee did not discuss and may not have considered the possible impact of the proposed amendment on attorney’s fees statutes, such as 42 U.S.C. § 1988 that are intended to encourage particular types of litigation.”

On appeal, the Supreme Court reversed the Seventh Circuit. The Court held that when the underlying statute defines costs to include attorney’s fees, such fees must also be included as costs under Rule 68 offers of settlement. The Court noted with approval Rule 68’s policy of encouraging settlements, and held that when plaintiffs reject an offer more favorable than what they ultimately recover at trial, the courts will disallow attorney’s fees for any services performed after the Rule 68 offer is rejected. The Court further held that Rule 68 does not require the defendant to itemize the settlement offer into claim and costs amounts. “As long as the offer does not implicitly or explicitly provide that the judgment not include costs, a timely offer will be valid.”

Although the existing Rule 68 is a ‘‘one-way street,’ available only to those defending against claims,’ the Supreme Court and the Rules Advisory Committee have increased the opportunities and incentives to settle lawsuits, and these efforts are laudable. Perhaps their combined efforts will provide the necessary catalyst to encourage plaintiffs and defendants to seriously consider and accept legitimate settlement offers. Also, the Rules Advisory Committee has proposed a new Rule 68 that would apply in virtually all civil cases.

140. Id.
142. 53 U.S.L.W. at 4906.
143. Id.
144. Id. at 4905.
146. The Preliminary Draft of the Proposed Amendments provides as follows:

Rule 68. Offer of Settlement; Sanctions
At any time more than 60 days after the service of the summons and complaint on a party but not less than 90 days (or 75 days if it is a counter-offer) before trial, either party may serve upon the other party but shall not file with the court a written offer, denominated as an offer under this rule, to settle a claim for the money, property, or relief specified in the offer and to enter into a stipulation dismissing the claim or to allow judgment to be entered accordingly. The offer shall remain open for 60 days un-
III. RECOMMENDATIONS

In authorizing the grant of attorney's fees in civil rights cases, Congress did not advance specifically detailed standards to govern the propriety or amount of such awards. Congress left these matters to the discretion of the courts with the direction that such awards be reasonable and be granted to the prevailing party. Although a court is not required to award fees, in most cases it will allow a prevailing plaintiff to recover his costs of representation absent special circumstances. The lack of meaningful standards for determining what constitutes a reasonable fee in any given case has resulted in often inconsistent and excessive fee awards which create additional litigation to settle the claims for such fees. Clear guidelines must be developed to balance the Congressional intent to encourage the enforcement of civil rights against the American rule that requires parties to bear their own

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less sooner withdrawn by a writing served on the offeree prior to acceptance by the offeree. An offer that remains open may be accepted or rejected in writing by the offeree. An offer that is neither withdrawn nor accepted within 60 days shall be deemed rejected. The fact that an offer is made but not accepted does not preclude a subsequent offer. Evidence of an offer is not admissible except in proceedings to enforce a settlement or to determine sanctions under this rule.

If, upon a motion by the offeror within 10 days after the entry of judgment, the court determines that an offer was rejected unreasonably, resulting in unnecessary delay and needless increase in the cost of the litigation, it may impose an appropriate sanction upon the offeree. In making this determination the court shall consider all of the relevant circumstances at the time of the rejection, including (1) the then apparent merit or lack of merit in the claim that was the subject of the offer, (2) the closeness of the questions of fact and law at issue, (3) whether the offeror had unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer, (4) whether the suit was in the nature of a "test case," presenting questions of far-reaching importance affecting non-parties, (5) the relief that might reasonably have been expected if the claimant should prevail, and (6) the amount of the additional delay, cost, and expense that the offeror reasonably would be expected to incur if the litigation should be prolonged.

In determining the amount of any sanction to be imposed under this rule the court also shall take into account (1) the extent of the delay, (2) the amount of the parties' costs and expenses, including any reasonable attorney's fees incurred by the offeror as a result of the offeree's rejection, (3) the interest that could have been earned at prevailing rates on the amount that a claimant offered to accept to the extent that the interest is not otherwise included in the judgment, and (4) the burden of the sanction on the offeree.

This rule shall not apply or derive actions under Rules 23, 23.1 and 23.2.


Public hearings were held on this proposal on February 1, 1985 in Washington, D.C. and on February 21, 1985 in San Francisco, California. Marek, 53 U.S.L.W. at 4914, n.59.

147. See City of Riverside v. Rivera, 763 F.2d 1580 (9th Cir. 1985), cert. granted, 54 U.S.L.W. 3720 (U.S. Oct. 22, 1985) (No. 85-224). The district court in Rivera awarded $243,343.75 in attorney's fees after the jury awarded $33,350 on the merits. The question presented for review is "What are the proper standards for a district court's exercise of discretion in awarding attorney's fees to a prevailing party under 42 U.S.C. § 1988?"
litigation expenses. Since the courts have been unable to arrive at a consistent and workable standard for the calculation of reasonable fees under the Fees Act, Congress must weigh national economic considerations and amend the Fees Act to provide a uniform calculation standard. Only a uniform standard will eliminate the current confusion over fee awards.

The absence of a uniform standard for the calculation of reasonable fees also makes it difficult for plaintiffs and defendants to settle fee claims without litigation. Plaintiffs are encouraged to litigate their claims for fees because the cost of fee litigation is usually borne by the defendants. Fee shifting deters plaintiffs from settling meritorious claims and encourages defendants to settle cases when they have a strong, but potentially unsuccessful, defense. Congress should amend the Fees Act to require that fees be awarded only to parties who clearly and substantially prevail on the issue for which the fees are being sought. Such a standard would protect civil rights defendants when only minor relief or nominal damages are sought. Additionally, this proposed standard would discourage plaintiffs from bringing frivolous civil rights actions.

Congress should also enact a uniform hourly rate of compensation for civil rights attorneys. The enactment of a uniform rate would allow defendants to more fully assess their liability in civil rights cases without adversely limiting the availability of civil rights attorneys. A fair limitation on the rate

148. See M.F. DERFNER & A. WOLF, COURT AWARDED ATTORNEY'S FEES 16.01 (1983); Comment, Calculation of a Reasonable Award of Attorney's Fees under the Attorney's Fees Award Act of 1976, 13 J. MAR. L. REV. 331, 378 (1980) (in a five year period awards have varied by 685%).

149. Civil rights plaintiffs should not be penalized for helping to reduce court docket congestion by settling their cases out of court. See H.R. REP. No. 1558, 94th Cong., 2d Sess. 7 (1976).

150. In Linhart v. Glatfelter, 584 F. Supp. 1369, 1372 (N.D. Ill. 1984), the court stated: [P]ublic employees can haul their employers into federal court with comparative ease under § 1983 since even the most mundane personnel decision can satisfy the state action requirement of the statute. Faced with the intimidating prospect of costly federal litigation, including what one respected commentator has called "the swamp of discovery," and the specter of paying for the plaintiff's lawyer under § 1988 should they lose the case, public employers are often persuaded to capitulate. Id. at 1372.

151. This is also Recommendation Number 3 of the National Association of Attorneys General. NAAG REPORT, supra note 97, at 18.

152. As one federal judge has commented:

[M]any of these so-called civil rights actions have proven to have nothing whatever to do with civil rights as that term is normally understood. Instead, the Constitution has been debauched as lawyers, "not overly hindered by the courts," have endeavored to transform even the most petty complaints against the local government into federal cases of constitutional dimension. Rather than vindicating fundamental rights, such lawsuits over the trivial annoyances of everyday life actually diminish public esteem for the Constitution. When every misstep by government, no matter how slight, is seized upon as creating a cause of action entitling its holder to a
of compensation would encourage local governments to consider early settlement in cases when some liability exists, and thereby lessen the impact that civil rights judgments have on government budgets. Finally, Congress and the judiciary must use Rule 68 to encourage early settlement. When a defendant can show that the plaintiff brought a lawsuit principally to obtain fees, or that a plaintiff rejected an offer of settlement pursuant to Rule 68 and obtained a less favorable judgement, Congress should either limit the availability of attorney’s fees or deny them completely. The use of a lawsuit to obtain fees does not serve a rational purpose and drains public resources; such claims must therefore be stopped.

CONCLUSION

As the foregoing analysis indicates, the discretion and subjectivity vested in the federal courts under section 1988 has engendered considerable conflict. The straightforward command of section 1988 as an exception to the American rule has caused both an explosion of fee litigation and a proliferation of fee-shifting statutes that have now made the American rule the exception. Neither the courts nor Congress have devised clear guidelines for awarding attorney’s fees to the prevailing party. If any change is to occur in this area, Congress must seriously consider adopting limits on fee awards. Such limits, however, must not discourage victims of civil rights violations from litigating their grievances. Congress must return the focus of civil rights litigation to the aggrieved party and away from fee considerations. Both the courts and Congress must again look at the Attorney’s Fees Awards Act of 1976 and the other fee shifting statutes in order to protect more equitably those individuals whose rights have been violated. Legislative action is urgently needed to establish uniform standards for setting fees at levels that will attract competent counsel without granting windfalls to lawyers. Without clear standards, the mushrooming cloud of litigation will continue to drain the resources of state and local governments to the detriment of the courts, the public, and the parties whose civil rights have been violated.

chance at receiving a cash jackpot from a federal jury, plus an award of attorney’s fees as an automatic bonus, important values are lost and the Constitution comes to be looked upon as a sort of lottery ticket.
