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NOTES

Surveying the Law of Fee Awards Under the Attorney’s Fees Awards Act of 1976

Federal courts have traditionally refrained from awarding attorney’s fees to prevailing litigants absent a specific statutory authorization or a case falling into one of three well recognized exceptions.¹ In 1975, the Supreme Court reaffirmed this so called “American Rule”² in *Alyeska Pipeline Co. v. Wilderness Society.*³ Specifically, the *Alyeska* Court reversed a trend in lower federal courts to create a fourth exception to the “American Rule,” namely, the “private attorney general” exception.⁴ Under this exception, courts reasoned that plaintiffs who had successfully prosecuted civil rights violations had advanced a public interest by vindicating congressional policy, and had thereby earned an award of attorney’s fees. In *Alyeska,* the Supreme Court rejected this judicially created exception to the “American Rule” as invading the legislature’s province.⁵

¹ 421 U.S. 240, 257 (1975). The first of these three exceptions to the American Rule is the “bad faith” exception wherein courts award attorney’s fees to a party whose opponent has proceeded in bad faith, vexatiously, or for oppressive reasons. See, e.g., Vaughan v. Atkinson, 369 U.S. 527 (1962); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 (1923); Bell v. School Bd., 321 F.2d 494 (4th Cir. 1965). The second exception, usually labelled the “common fund doctrine,” allows the payment of attorney’s fees out of a common fund created by the litigation for the benefit of others. See, e.g., Mills v. Electric Autolite Co., 396 U.S. 375 (1970); Sprague v. Ticonic Nat’l Bank, 307 U.S. 161 (1939). The third exception permits the plaintiff to recover attorney’s fees from a recalcitrant defendant who disobeys a court order in a civil contempt proceeding. In such a case, the amount is viewed as a penalty on the defendant for disobeying a court order. See, e.g., Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 (1923).

² Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796). The rationale behind the “American Rule” is that parties should not be penalized for merely defending or prosecuting a lawsuit. Routinely awarding attorney’s fees in litigation would unjustly discourage the poor from instituting actions to vindicate their rights, if the penalty for losing included the fees of their opponent’s counsel. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967).


⁴ See, e.g., Cornist v. Richland Parish School Bd., 495 F.2d 189 (5th Cir. 1974); Fowler v. Schawrzwalder, 498 F.2d 143 (6th Cir. 1974); Hoitt v. Vitek, 495 F.2d 219 (1st Cir. 1974); Morales v. Haines, 486 F.2d 860 (7th Cir. 1974); Wilderness Soc’y v. Morton, 495 F.2d 1026 (D.C. Cir. 1974). In Wilderness Soc’y v. Morton, the court explained that the private attorney general exception encouraged plaintiffs to pursue civil rights litigation despite the great expense and well-financed defendants involved, thereby enforcing such legislation. Id. at 1032.

⁵ 421 U.S. at 271.
Academic commentators almost unanimously condemned the *Alyeska* decision, warning that it effectively stifled the private enforcement of civil rights. In response to *Alyeska*, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976. This act amended section 1988 to allow district courts, in their discretion, to award reasonable attorney's fees to parties, other than the United States, who prevail in suits brought to enforce their civil rights under certain civil rights statutes. According to the legislative history, Congress intended the Act to "remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in *Alyeska* . . . and to achieve consistency in our civil rights laws." The Senate Judiciary Committee, which reported favorably on the bill, recognized that the congressional policies contained in civil rights laws depend heavily on enforcement by private citizens. The committee noted that since many private citizens are without sufficient funds to finance a lawsuit, especially where merely prospective relief is sought, to preclude the award of fees effectively frustrates


8 Section 1988 provides in pertinent part:

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.


the purpose of civil rights laws. The committee appropriately quoted Judge Clark from *Hall v. Cole*: "Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose." In sum, the Act's goal is to encourage private enforcement of civil rights legislation by citizens who could not otherwise afford it.

Statistics indicate that the goal of opening the federal judiciary's doors to all civil rights plaintiffs has been fulfilled. Within five years of its enactment, the number of civil rights cases brought against state and local governments under 42 U.S.C. § 1983 increased by two-thirds. Accompanying this increase was a concurrent rise in the number of cases involving proper application of the Act. This note surveys, through court decisions, the current state of the law relating to the Act and analyzes the decisions in light of the Act's legislative history and purpose. Parts I and II of this note discuss, respectively, who may recover, and who may be liable for, attorney's fees under the Act. Part III discusses whether attorney's fees are available when the litigation terminates without court ordered relief, and part IV discusses the calculation of a reasonable fee.

I. Who May Recover Under the Act

Section 1988 provides that a "prevailing party" may recover attorney's fees from his opponent. Despite the straightforward language, this term has prompted much litigation. This section of the note discusses the standards applied by courts in determining whether a party has "prevailed" within the meaning of the Act.

A. The Prevailing Plaintiff

Congress patterned the section 1988 language after that in Titles II and VII of the Civil Rights Act of 1964. The Act's legislative history indicates that Congress intended the standards for awarding

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11 Id. at 3, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 5910-11.
12 462 F.2d 777 (2d Cir. 1972).
13 S. REP. No. 94-1011, supra note 9, at 2, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 5910 (quoting Hall v. Cole, 462 F.2d at 780-81.)
15 See note 8 supra.
16 Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (1976), prohibits discrimination in places of public accommodation. Section 2000a-3(b) covers attorney's fees:
1. In any action 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
fees under the Act, including the meaning of "prevailing," to be generally the same as that under the Civil Rights Act of 1964. In fact, the Senate Report on the Act cited with approval the Supreme Court's interpretation, in \textit{Newman v. Piggie Park Enterprises, Inc.}\textsuperscript{20} of the term "prevailing" in the Civil Rights Act of 1964. In \textit{Newman}, the Court of Appeals for the Fourth Circuit had held that the plaintiffs, who had won injunctive relief under Title II of the 1964 Civil Rights Act, were not entitled to a fee award unless they could show that the defendants had proceeded in bad faith or for the purpose of delay.\textsuperscript{21} The Supreme Court disagreed and held that a "successful" plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render it unjust."\textsuperscript{22}

Although this interpretation of "prevailing" supports the policy of encouraging private litigation, the term "successful" is no less ambiguous than "prevailing." One court has subsequently defined "successful" to mean "succeed[ing] on any significant issue in litiga-

\textsuperscript{18} Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1976), prohibits discriminatory employment practices. Section 2000e-5(k) covers attorney's fees:

\begin{quote}
In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the [Equal Employment Opportunity] Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.
\end{quote}


\textsuperscript{19} Id. at 6, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 5911.

\textsuperscript{20} 390 U.S. 400 (1968).

\textsuperscript{21} Newman v. Piggie Park Enters., 377 F.2d 433, 437 (4th Cir. 1967).

\textsuperscript{22} 390 U.S. at 402. In \textit{Newman}, the Court noted that if plaintiffs were required to bear their own attorney's fees, "few aggrieved parties would be in a position to advance the public interest." \textit{Id.} Five years later, in \textit{Northcross v. Board of Educ.}, 412 U.S. 427 (1973) (per curiam), the Supreme Court applied the same reasoning and standard to a fee shifting provision under the Emergency School Aid Act of 1972, 20 U.S.C. §§ 1601-1619 (1976) (repealed in 1978). Section 1617 of that act contained a similar fees award clause. The Supreme Court standard has been commonly referred to as the \textit{Newman-Northercross} standard.
tion which achieves some of the benefit the parties sought.\textsuperscript{23} Other courts have emphasized that the successful plaintiff-applicant need not show the defendant proceeded in bad faith or frivolously,\textsuperscript{24} that the nature of his conduct was intentional or wanton,\textsuperscript{25} or that the plaintiff is himself unable to pay the fees.\textsuperscript{26} Were these determinations relevant, a plaintiff might prevail on the merits but still have to pay his attorney's fees. Faced with this possibility, many plaintiffs, even those with meritorious claims, might forego litigation.\textsuperscript{27} Likewise, an attorney might be hesitant to take civil rights cases if unable to assess his chances of a fee award. Therefore, by eliminating these conditions for awarding section 1988 attorney's fees to prevailing parties, courts have further encouraged private enforcement of civil rights laws.

In contrast to the liberal interpretation of section 1988 reflected above, some courts have denied prevailing parties fee awards where

\textsuperscript{23} Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978). In Nadeau, the plaintiffs, inmates at the New Hampshire State Prison, filed a § 1983 suit seeking access to library facilities and improved confinement conditions. Prior to completing the trial, the parties entered into, and the district court subsequently approved, a consent decree which considerably improved the conditions the plaintiff class had been subjected to prior to the institution of the suit. \textit{Id.} at 277. The district court, however, refused to award attorney's fees because the plaintiffs had not succeeded in obtaining formal relief. The First Circuit remanded the case stating that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit." \textit{Id.} at 278-79.

\textsuperscript{24} See, e.g., Christianburg Garment Co. v. EEOC, 434 U.S. 412, 418 (1978); Newman v. Piggie Park Enters., 390 U.S. 400, 401 (1967); Oliitkey v. O'Malley, 597 F.2d 303, 305 (1st Cir. 1979); Hughes v. Repko, 578 F.2d 483, 489 (3d Cir. 1978).

\textsuperscript{25} See, e.g., Brown v. Culpepper, 559 F.2d 274, 278 (5th Cir. 1977); Gates v. Collier, 559 F.2d 241, 242 (6th Cir. 1977); Johnson v. Combs, 471 F.2d 84, 86 (5th Cir. 1972); Rowe v. General Motors Corp., 437 F.2d 348, 359-60 (5th Cir. 1972); Miller v. Amusement Enters., 426 F.2d 534, 538 (5th Cir. 1970).

\textsuperscript{26} See, e.g., Cooper v. Singer, 719 F.2d 1496, 1500 (10th Cir. 1983); Sargeant v. Sharp, 579 F.2d 645, 649 (1st Cir. 1982); Gore v. Turner, 563 F.2d 159, 164 (5th Cir. 1977); Swann v. Charlotte-Mecklenburg Bd. of Educ., 66 F.R.D. 483, 492 (W.D.N.C. 1975); Gunther v. Iowa State Men's Reformatory, 466 F. Supp. 367, 369 (N.D. Iowa 1969); cf. Zarcone v. Perry, 581 F.2d 1039 (2d Cir. 1978). The Zarcone court is credited with establishing the "bright prospects" rule: a plaintiff whose case possesses the potential for a large damage award and who can therefore secure private counsel through a contingency arrangement, cannot utilize the Act because he does not need it to attract competent counsel. \textit{Id.} at 1044. However, other courts have questioned the Zarcone opinion because it ignores the deterrent effect fee awards can have on defendants. See, e.g., Cooper v. Singer, 719 F.2d 1496, 1503 (10th Cir. 1983); Sanchez v. Schwartz, 688 F.2d 503, 505 (7th Cir. 1982).

\textsuperscript{27} Of course, every plaintiff assumes the risk of not prevailing on the merits. This is a risk that an experienced lawyer should be able to reasonably quantify for the potential litigant before proceeding to trial. However, unlike the risk of losing the substantive claim, counsel cannot reliably predict the chance of recovering fees because of such additional factors as the plaintiff's good faith at trial.
“special circumstances” exist. They have asserted two bases for this authority: 1) the judicial discretion granted in assessing fees by the Act\(^28\) and 2) the Supreme Court’s *Newman* opinion requiring that a prevailing party receive attorney’s fees unless special circumstances would render it unjust.\(^29\) For instance, courts have denied prevailing plaintiffs attorney’s fees where the complaint was in reality a tort action cloaked in a constitutional due process claim,\(^30\) where the public was not benefitted by the litigation,\(^31\) where only nominal damages were awarded,\(^32\) and in other situations.\(^33\)

\(^{28}\) See note 8 supra. (“[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee.”) (emphasis added).

\(^{29}\) See note 22 supra and accompanying text.

\(^{30}\) Martin v. Hancock, 466 F. Supp. 454, 456 (D.C. Minn. 1983) (case was no more than a common law negligence dog-bite case clothed as a constitutional claim under 42 U.S.C. § 1983); Zarcone v. Perry, 438 F. Supp. 788, 790 (E.D.N.Y. 1977) (tort action for false imprisonment and false arrest couched in a constitutional due process claim). Justice Rehnquist warned in dissent in *Butz v. Economou*, 438 U.S. 478, 522 (1978) that “[t]here are a large number of claims that can be converted by a legal neophyte into a claim of denial of procedural due process.” *Cf.* *Milne v. Cavuato*, 653 F.2d 80, 83 (2d Cir. 1981) (award of attorney’s fees proper where plaintiff prevailed on wholly statutory, non-civil rights claim pendent to a substantial state claim); Konczak v. Tyrell, 503 F.2d 13, 19 (7th Cir. 1979), (award of attorney’s fees proper even if only a private wrong is righted), *cert. denied*, 444 U.S. 1016 (1980); Kow v. New York City Housing Auth., 539 F. Supp. 708, 709 (S.D.N.Y. 1982) (rejecting defendant’s contention that fee award was inappropriate since case provided only a private benefit, but allowed only one-half of the award requested).

\(^{31}\) *See*, e.g., *Perez v. University of P.R.*, 600 F.2d 1, 2 (1st Cir. 1979); Buxton v. Patel, 595 F.2d 1181, 1185 (9th Cir. 1979); Martin v. Hancock, 466 F. Supp. 454, 456 (E.D.N.Y. 1977); Zarcone v. Perry, 438 F. Supp. 788, 791 (E.D.N.Y. 1977). For instance, in *Zarcone*, the plaintiff, a coffee vendor, was handcuffed and brought into night traffic court so that the presiding judge could criticize the quality of the coffee he sold. Zarcone subsequently succeeded in recovering compensatory and punitive damages in excess of $140,000. *Id.* at 789. The district court, however, refused to award attorney’s fees under § 1988 because the suit was basically one for damages for false imprisonment and benefitted the public only in a general sense. *Id.* at 790. Rather than precluding an award, other courts view the lack of public benefit as reason for reducing the amount of the award. *See*, e.g., *Oliver v. Kalamazoo Bd. of Educ.*, 576 F.2d 714 (6th Cir. 1978); *Beazer v. New York City Transit Auth.*, 558 F.2d 97 (2d Cir. 1977), *rev’d on other grounds*, 440 U.S. 568 (1979); *Foster v. Gloucester County Bd.*, 465 F. Supp. 923 (D.N.J. 1978); *Naprstek v. City of Norwich*, 433 F. Supp. 1369 (N.D.N.Y. 1977).

It seems anomalous for courts to provide § 1983 relief to a plaintiff whose individual civil rights are violated but to award fees only where the litigation impacts favorably on the public in the district court’s view. All successful civil rights suits benefit the public in that the particular defendant and others will be deterred from such conduct in the future.

\(^{32}\) Huntley v. Community School Bd., 579 F.2d 738, 742 (1978) ($100 nominal damages award deemed a “moral victory” insufficient to warrant an award of attorney’s fees). Other courts view the award of nominal damages as relevant in determining the amount of the fee’s award, but not its availability. *See* *Skoda v. Fontani*, 646 F.2d 1193 (7th Cir. 1981); *Perez v. University of P.R.*, 600 F.2d 1, 2 (1st Cir. 1979); *Rhueark v. Shaw*, 477 F. Supp. 897 (N.D. Tex. 1979).

\(^{33}\) *See* Buxton v. Patel, 595 F.2d 1181, 1184 (9th Cir. 1979) (plaintiff’s chance of success sufficiently high to attract competent counsel); *Zarcone v. Perry*, 581 F.2d 1039 (1978); *Pharr*
Some commentators have forcefully argued that granting courts the discretion to deny fee awards in undefined, "special circumstances" has ultimately frustrated the Act’s purpose. The lack of objective criteria upon which an attorney can assess his chance of an award under the Act eventually discourages private enforcement. Therefore, courts should use their discretion only to determine the amount of the fee award and not its availability.

B. The Prevailing Defendant

The Act’s legislative history indicates that prevailing defendants may also recover attorney’s fees. However, in contrast to the liberal \textit{Newman-Northcross} standard applicable to prevailing plaintiffs, the Supreme Court stated in \textit{Christianburg Garment Co. v. EEOC}, that defendants may only recover a fee award where the “action was frivolous, unreasonable or without foundation.” The court noted that this high standard appropriately favors prevailing plaintiffs over prevailing defendants for two reasons: 1) the plaintiff is the “chosen instrument” to advance congressional policy; and 2) when a plaintiff

\begin{thebibliography}{9}
\item See note 22 supra and text accompanying notes 18-23 supra.
\item 434 U.S. 412 (1978).
\item \textit{Id.} at 421. The court also noted that when a plaintiff acts in bad faith, the court needs no statutory authority to award attorney’s fees given the common-law exception recognized in Alyeska Pipeline Co. v. Wilderness Soc’y, 421 U.S. 240, 257 (1975). See note 1 supra; cf. text accompanying note 44 infra; Harris v. Group Health Ass’n Inc., 662 F.2d 869 (D.C. Cir. 1981); Copeland v. Martinez, 603 F.2d 981 (D.C. Cir. 1979); EEOC v. First Ala. Bank, 595 F.2d 1050 (5th Cir. 1979); Richardson v. Hotel Corp., 468 F.2d 951 (5th Cir. 1971); Moss v. ITT Continental Banking Co., 468 F. Supp. 420 (E.D. Va. 1979); Reed v. Sisters of Charity, 447 F. Supp. 309 (N.D. La. 1978); Goff v. Texas Instruments Inc., 429 F. Supp. 973 (N.D. Tex. 1977). While courts generally will not look at the defendant’s ability to pay when the plaintiff prevails, they will do so where the prevailing defendant seeks attorney’s fees from the plaintiff under the \textit{Christianburg} standard. See, e.g., Hughes v. Rowe, 449 U.S. 5 (1980); Lee v. Chesapeake & O. Ry., 389 F. Supp. 84 (D. Md. 1975); Carrion v. Yeshiva Univ., 297 F. Supp. 852 (S.D.N.Y. 1975).
\item \textit{Christianburg}, 434 U.S. at 418-19.
\end{thebibliography}
prevails, the fee award is against a defendant who has violated federal laws, but when a defendant prevails, this is not true.\textsuperscript{40} A more persuasive reason for this double standard, as recognized in the Senate Judiciary Report,\textsuperscript{41} is that if made responsible for their opponent's attorney's fees when unsuccessful, plaintiffs might be deterred from prosecuting valid claims, thereby frustrating the Act's purpose.\textsuperscript{42}

As previously mentioned, an established exception to the "American rule" which forbids federal courts from awarding attorney's fees is where one party has proceeded in bad faith or vexatiously.\textsuperscript{43} A court, therefore, could arguably award attorney's fees to a defendant against a vexatious plaintiff without a specific statutory authorization. However, there is apparently a fine distinction between this common law exception and the \textit{Christianburg} "bad faith" exception. In \textit{Goff v. Texas Instruments Co.},\textsuperscript{44} the federal district court concluded that since section 1988 includes a separate standard for defendants, it requires a more liberal application than the traditional common law bad faith test.\textsuperscript{45} While the court's interpretation is reasonable, the judges must proceed with caution in applying section 1988 to prevailing defendants since they risk deterring potential plaintiffs and their counsel.

\section*{C. Attorneys Who May Recover}

Section 1988 indicates that the plaintiff, and not his attorney, is technically entitled to the fee award.\textsuperscript{46} While the client may be the real party in interest,\textsuperscript{47} the practical benefit inures entirely to the at-

\textsuperscript{40} \textit{Id.} at 419.
\textsuperscript{41} [P]rivate attorneys general should not be deterred from bringing good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose. Such a party, if unsuccessful, could be assessed his opponent's fee only where it is shown that his suit was clearly frivolous, vexatious or brought for harassment purposes.


\textsuperscript{43} \textit{See} note 1 supra.

\textsuperscript{44} 429 F. Supp. 973 (N.D. Tex. 1977).

\textsuperscript{45} \textit{Id.} at 975.

\textsuperscript{46} \textit{See} note 8 supra.

\textsuperscript{47} \textit{See} Richards v. Reed, 611 F.2d 545, 546 (5th Cir. 1980) ("It was proper for client to be made real party in interest in proceeding to recover attorney's fees, . . . since recovery would go to client in the first instance, though lawyer would ultimately benefit."); \textit{see also} Proctor v. Gissendaner, 579 F.2d 876, 880 (5th Cir. 1975).
attorney. Therefore, which attorneys are eligible becomes an appropriate consideration.

The Act undoubtedly applies where a party is represented by a private attorney. However, courts have also found organizational attorneys and members of legal aid societies entitled to a fee equivalent to that which would have been awarded to a party represented by a private attorney. Recently, the Supreme Court reaffirmed this position in Blum v. Stenson. In this case, the Court concluded that Congress intended fee awards to be based on "prevailing market rates in the relevant community, . . . regardless of whether the prevailing party is represented by private profit-making attorneys or nonprofit legal aid organizations." Whether the client is obliged to pay less than the normal fee, or no fee at all is therefore irrelevant to whether, and to what extent, a court awards attorney's fees. Of course, courts premise such holdings on the assumption that any award will be turned over to the organization, and not retained by the client or the responsible attorney.

The Act's legislative history provides no authority for treating a legal aid attorney differently than a private attorney. According to the Senate Judiciary Committee report, "[b]ees under the Act are to be governed by the same standards which prevail in other types of equally complex federal litigation, such as antitrust cases." There-

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48 In this context, "private attorney" means an attorney procured by a private individual to handle his lawsuit for a fee—not a salaried attorney who works for an institution.

49 See Palmigiano v. Garrahay, 616 F.2d 598 (1st Cir. 1980); Lund v. Affleck, 587 F.2d 75 (1st Cir. 1978); Torres v. Sachs, 538 F.2d 10 (2d Cir. 1976); Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974); Becker v. Blum, 487 F. Supp. 873 (S.D.N.Y. 1980); cf. Page v. Priesner, 468 F. Supp. 399 (S.D. Iowa 1979) (award of attorney's fees to Legal Services Corporation of Iowa should be based, in part, on attorney's salary and other ascertainable overhead expenses); and from the same court, Alsager v. District Court, 447 F. Supp. 572 (S.D. Iowa 1977) (fees paid to plaintiff's American Civil Liberties Union based on attorney's annual salary and time expended on case). See generally Note, Awards of Attorney's Fees to Legal Aid Offices, 87 HARV. L. REV. 411 (1973).


51 Id. at 4379. The defendant in Blum argued that the fee award should be based on the costs incurred by the legal aid organization. Id. The court rejected this proposition as flatly contrary to the Act's legislative history. Id.


53 See Oldham v. Ehrlich, 617 F.2d 163, 168 n.10 (8th Cir. 1980) (awarding fees to Legal Aid Society of Omaha-Council Bluffs, Inc., which will go not to the individual attorneys, but to their organization employer); Hairston v. R. & R. Apartments, 510 F.2d 1090, 1093 (1975); Brandenburger v. Thompson, 494 F.2d 865, 889 (9th Cir. 1974); Miller v. Amusement Enterprises, 426 F.2d 534, 539 (5th Cir. 1970).

54 S. REP. NO. 94-1011, supra note 9, at 6, reprinted in 1976 U.S. CODE CONC. & AD.
fore, under section 1988, courts should award organizational attorney’s fees equal to that charged by private firms within the community. Theoretically, fee awards permit such public organizations, often understaffed and underfunded, to finance additional litigation in the civil rights area.

Opponents of fee awards to organizational attorneys argue that the awards are not necessary to attract competent counsel in civil rights cases because these attorneys are paid by their employer to handle the case. Opponents also argue that the fee awards come out of the public sector, which in part funds the organization’s operations. However, these arguments ignore the Act’s main goal: promoting private civil rights enforcement. Awarding fees to a prevailing public organization will permit it to hire additional attorneys, service more clients, and generally further the Act’s goal.

Finally, courts have also awarded fees to court appointed attorneys and attorneys working pro bono. Once again, these awards promote private enforcement of civil rights laws by encouraging other attorneys to accept such cases in the future.

II. Who May be Liable

Ordinarily, an individual defendant becomes liable for attorney’s fees if unsuccessful in defending against the substantive claim. However, the question of who can be liable for a fee award is complicated when the defendants, often government entities or their officers under 42 U.S.C. section 1983, claim immunity from such an award.

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News at 5913. Despite this congressional intent, members of public interest law firms frequently complain that fee awards under the civil rights laws are unreasonably low as compared to awards in private antitrust actions under the Clayton Act. Berger, supra note 34, at 292-93. See generally Council for Public Interest Law, Balancing the Scales of Justice: Financing Public Interest Law in America 321 (1976).

55 See Blum v. Stenson, 52 U.S.L.W. 4377, 4379 (U.S. Mar. 20, 1984); Dennis v. Chang, 611 F.2d 1302, 1306 (9th Cir. 1980); Leeds v. Watson, 630 F.2d 675, 677 (9th Cir. 1980); Palmigiano v. Garrahay, 616 F.2d 598, 600 (1st Cir. 1980); Hairston v. R. & R. Apartments, 510 F.2d 1090, 1092 (7th Cir. 1975); Brandenberger v. Thompson, 494 F.2d 885, 889 (9th Cir. 1974); cf. New York State Ass’n v. Carey, 711 F.2d 1136 (2d Cir. 1983) (court adopted a new “break-point” approach to setting § 1988 fee awards for non-profit firms, finding $75 per hour to be the point at which the organization is adequately compensated without receiving a windfall).

56 The opponent’s argument also erroneously implies that the fee award will go to the individual attorney when in actuality, it goes to his employer. See cases cited in note 53 supra.


This section of the note discusses the Act’s applicability where the defendants are the United States, state or local governments, or their administrative or judicial officers.

A. The United States

Prior to October, 1981, prevailing parties could not recover attorney’s fees under section 1988 from the United States.59 The courts so holding relied on 28 U.S.C. section 2412,60 wherein Congress prohibited attorney’s fees awards against the United States absent an express statutory waiver of immunity. For example, in Shannon v. United States Department of Housing and Urban Development,61 the Court of Appeals for the Third Circuit noted both the prohibition in section 2412 and the lack of an express provision in section 1988 for fee awards against the United States.62 The court noted that other federal civil rights statutes, such as Title II of the Civil Rights Act of 1964, contain a fee provision.63

Since one purpose of section 1988 was to achieve consistency in the civil rights laws,64 why Congress allowed courts to award fees against the United States under Title II but not under section 1988 is unclear. At least one court has suggested that it was mere oversight.65

Whatever the reason, on October 1, 1981, Congress promulgated the Equal Access to Justice Act (“EAJA”).66 The EAJA

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60 Prior to amendment in October, 1981, § 2412 provided:
Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action.
61 577 F.2d 854, 855-56 (3d Cir. 1978).
62 Id. at 855-56; see, e.g., Freedom of Information Act, 5 U.S.C. § 552(a)(4)(e) (1982) (“The court may assess against the United States reasonable attorney fees.”); see also note 17 supra.
64 S. REP. NO. 94-1011, supra note 9, at 1, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 5909; see text accompanying note 9 supra.
amended 28 U.S.C. section 2412 to permit courts to charge the United States with "[attorney's] fees and expenses to the same extent that any other party would be liable . . . under the terms of any statutes which specifically provides for such award." The House Judiciary Committee, which reported favorably on the amendment, recognized that certain individuals were deterred from seeking review of, or defending against, unreasonable government intrusion because of the disparity in resources available to the parties. The Committee further noted that this disparity was also a significant factor because of the proliferation of the federal bureaucracy and governmental regulation.

Recently, in *Premachandra v. Mits*, the Court of Appeals for the Eighth Circuit became the first court to consider the relationship between the EAJA and section 1988. In that case, a Veteran's Administration research scientist sought and received reinstatement to his job after claiming that his termination violated his fifth amendment procedural due process rights. Although the case was settled out of court, the district court determined that the plaintiff was a prevailing party and, relying on section 1988 and the EAJA amended section 2412, awarded attorney's fees. On appeal the Eighth Circuit affirmed. Referring extensively to the legislative history of the EAJA, the court of appeals noted Congress' intent to "place the federal government and civil litigants on completely equal footing" and to "clarify[ ] the liability of the United States under such statutes as the

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> Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the cost which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or her professional capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.


69 Id. at 8, reprinted in 1980 U.S. CODE CONG. & AD. NEWS at 4988.

70 Premachandra v. Mits, No. 82-2441, slip op. (10th Cir. Feb. 9, 1984).

71 Id. at 2.

72 Id. at 5. The court used the *Nadeau* two prong test to so decide. See text accompanying notes 100-01 infra.

73 Id. at 19, 20 (citing H.R. REP. NO. 96-1418, supra note 68, at 8, 9, reprinted in 1980 U.S. CODE CONG. & AD. NEWS at 4987).
Civil Rights Attorney’s Fees Awards Act of 1976.” The court concluded that the EAJA required the imposition of attorney’s fees on a federal agency where, had a state or state official committed the same acts or omissions, it would be liable under section 1988.

By adopting the EAJA, Congress corrected the anomaly which permitted the federal government to insulate itself from its own civil rights laws. Congress has now submitted the federal government to the same penalties levied upon state governments who violate civil rights laws.

B. State and Local Governments

In *Hutto v. Finney*, the Supreme Court rejected the position that the eleventh amendment provides state and local governments immunity to section 1988 assessments of attorney’s fees. The Court first relied upon legislative history to show that Congress intended liability for attorney’s fees under section 1988 to extend to the states. The Senate Judiciary Report on section 1988 stated: “[I]t is intended that the attorney’s fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the state and local government . . . .” Likewise, the corresponding House Report stated: “The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities.” The Court also noted that Congress had rejected two recent attempts to amend section 1988 to provide for state governmental immunity.

Although the eleventh amendment normally bans retroactive relief against the states, the Court found the fee award in *Hutto* constitutional. The Court noted that in *Fitzpatrick v. Bitzer*, it had held

75 Id. at 19.
77 The eleventh amendment reads:
   The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subject of any foreign state.
U.S. Const. amend. XI.
that the eleventh amendment’s bar to retroactive relief was limited by the fourteenth amendment’s enforcement clause. Since section 1988 applies to laws arising under the enforcement clause, the Court found section 1988 a valid exercise of congressional authority.

C. Government Officials

When a court finds a state or local government official liable in his official capacity, the employing governmental unit is responsible for any fee award. However, when the government official is found liable as a private individual, two policy considerations collide. On one hand, to encourage private enforcement of civil rights, all defendants should be held to the same standard of conduct, thereby achieving consistent application of the Act. On the other hand, public officials, fearing personal liability for their acts, might not zealously and properly discharge their duties. In Hutto, the Supreme Court resolved this conflict in favor of the latter consideration and held that section 1988 does not apply where the governmental official is liable as a private individual. In such cases, the prevailing plaintiff may recover fees from the individual official only by showing the official’s bad faith.

D. Judicial Officers

Judges who violate section 1983 present a particularly troublesome problem of immunity. The problem arises more frequently than one might think; in the last three years over two hundred lawsuits have alleged section 1983 violations against judges. Until abrogated by statute, judges and prosecutors enjoy absolute immunity from liability for money damages. The House Judiciary Commit-

82 427 U.S. at 453. The fourteenth amendment provides in relevant part:

Section 1 . . . No state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5 . . . The Congress shall have power to enforce by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV.


84 See text accompanying note 78 supra.

85 437 U.S. at 699 n.32.

86 Id.

87 Diamond, supra note 14.

tee, in its report on section 1988, said that because of this judicial immunity from money damages, "awarding counsel fees to prevailing plaintiffs . . . [as costs] is particularly important and necessary if federal civil and constitutional rights are to be adequately protected." 89

The federal courts of appeals appear divided on whether judicial immunity extends to declaratory and prospective relief, as distinct from retroactive money damages. 90 However, in *Allen v. Burke*, the Court of Appeals for the Fourth Circuit, a circuit where judicial immunity does not bar injunctive relief against judges, 91 held that a court may charge attorney's fees to state court judges under section 1988 where injunctive relief is properly granted. 92 In so holding, the Fourth Circuit relied upon *Supreme Court v. Consumer's Union*. 93 In *Consumer's Union*, the Supreme Court sustained a district court's levy of attorney's fees under section 1988 against the justices of the Virginia Supreme Court in their "enforcement capacity." 94 The Court distinguished between the justices' "enforcement capacity" in regulating the Virginia bar and their "judicial capacity" and found that actions in the former capacity were not entitled to judicial immunity. 95 In summary, while the extent to which judicial immunity bars prospective relief remains an open question, those circuits which allow injunctive relief against judicial officers may also permit the concurrent

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90 The Second, Fourth, and Seventh Circuits do not extend judicial immunity to bar prospective relief. Heimbach v. Village of Lyons, 597 F.2d 344, 347 (2d Cir. 1979); Fowler v. Alexander, 478 F.2d 694, 696 (4th Cir. 1973); Hansen v. Algrim, 520 F.2d 768, 769 (7th Cir. 1975). The Eighth and Ninth Circuits appear to agree. Kelsey v. Fitzgerald, 574 F.2d 443, 444 (8th Cir. 1978) (only damage portion of suit against judge properly dismissed because of judicial immunity); Shipp v. Todd, 568 F.2d 133, 134 (9th Cir. 1978) ("quasi-judicial" immunity enjoyed by the clerk of the state court did not extend to suits for injunctive relief).

91 See note 90 supra.

92 690 F.2d 376, 379 (4th Cir. 1982), cert. granted, 104 S. Ct. 29 (1983).

93 446 U.S. 719 (1980).

94 Id. at 736. In Virginia, the Supreme Court has sole authority to regulate and discipline its attorneys. Pursuant to this authority, the Virginia Supreme Court promulgated and enforced the Virginia Code of Professional Responsibility, wherein Rule 2-102(A)(6) strictly prohibited lawyer advertising and inclusion in legal directories except under well-defined circumstances. In *Consumer's Union*, the plaintiff sought to publish a legal directory and filed suit contending that the Code's prohibitions violated the first and fourteenth amendments. Id. at 726. The district court, relying on Bates v. State Bar, 433 U.S. 350 (1977), declared Rule 2-102(A)(6) unconstitutional and permanently enjoined the Virginia Supreme Court from enforcing it. Id. at 721-27.

95 Id. at 736.
award of attorney's fees as costs.\textsuperscript{96}

III. Formal Relief Unnecessary

Section 1988 permits district courts to award attorney’s fees to the prevailing party in any “action or proceeding”\textsuperscript{97} to enforce the civil rights laws enumerated in the statute. Whether the Act applies in those situations where the parties settle the litigation before judgment is unclear, given this language.

When the parties settle the case by consent decree, the policies behind the Act suggest that a fee award is proper. Not only has the plaintiff secured compliance with congressional directives, but judicial economy has also been served by lessening the court’s docket. In \textit{Maher v. Gange},\textsuperscript{98} the Supreme Court held that the applicant whose section 1983 suit terminated in a favorable consent decree, was as entitled to a fee award as an applicant who had obtained formal relief at trial.\textsuperscript{99} Clearly, the party securing the favorable consent decree is the “prevailing” party.

However, when the parties have settled outside of court, it is sometimes difficult to determine if the applicant for a fee award is the “prevailing” party. In \textit{Nadeau v. Helgemoe},\textsuperscript{100} the Court of Appeals for the First Circuit announced a two prong test for determining whether a plaintiff who settled out of court was entitled to an attorney’s fee award. The court held that a party was entitled to an award if: 1) the plaintiff’s action was a necessary and important factor in achieving the defendant’s concessions; and 2) the relief sought was required by law.\textsuperscript{101} In evaluating the second prong of the \textit{Nadeau} test, a court, however, must consider the merits of the case. This unnecessary adjudication could eventually consume whatever court time the pretrial settlement saved. Also, requiring the plaintiff to prove that he would have succeeded at trial discourages settlements.

This concern about discouraging settlements led the District Court of Maryland in \textit{Unemployed Workers Organizing Commission v. Batterton},\textsuperscript{102} to dispense with the second prong of the \textit{Nadeau} test. The

\textsuperscript{97} See note 8 supra.
\textsuperscript{98} 448 U.S. 122 (1980).
\textsuperscript{99} \textit{Id.} at 130.
\textsuperscript{100} 581 F.2d 275 (1st Cir. 1978).
\textsuperscript{101} \textit{Id.} at 280-81.
court said the focus should instead be on whether the plaintiff obtained the relief sought, regardless of whether he would have prevailed at trial. The Batterton holding is subject to criticism, however, for removing any incentive for the defendant to settle. Under Batterton, a defendant who settles out of court would be automatically liable for attorney's fees but, should the case go to trial, the defendant's liability for fees would be contingent upon the plaintiff successfully proving the defendant liable on the merits. In order to solve this problem, courts that anticipate a subsequent petition for attorney's fees should refuse to approve a settlement that does not contain fee provisions.

Finally, the most troublesome situation with regard to fee awards occurs when a defendant's voluntary act renders the case moot. In these situations, the parties do not execute a settlement agreement and therefore obviously cannot negotiate a fee agreement. If the plaintiff subsequently applies for attorney's fees, the court must assess the impact of the plaintiff's suit on the defendant's conduct. The critical issue is whether the plaintiff catalyzed the defendant's corrective actions, or if the defendant did so voluntarily. Although no court has yet addressed the problem, the Nadeau test utilized in settlement cases is also applicable where the defendant's remedial actions render the case moot. If the court finds that the plaintiff's suit was a substantial impetus for the defendant's corrective action, and that the relief sought would have been required by a court, then he should be entitled to a fee award as a prevailing party.

IV. Calculating a Reasonable Fee

Once a party has established that he is entitled to a fee award, the court must calculate the proper amount. This determination is crucial to promoting the Act's purpose. The size of these fee awards will directly affect the private bar's willingness to litigate such suits. The award must not be a windfall to the attorney, yet it must be competitive with that which the attorney would have earned had he spent his time in other work. Given the frequency with which fee awards are litigated and their potential impact upon the bar's willingness to accept civil rights cases, courts should employ a systematic and consistent approach to calculating fees. The courts currently do not use a consistent approach: a study of civil rights cases from 1974-103 Id. at 512-13. 104 S. REP. No. 94-1011, supra note 9, at 6, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 5913.
1979 indicated that compensation rates varied by as much as 685 percent.\textsuperscript{105}

One reason for this wide variance is the minimal guidance on fee calculation found in the Act's legislative history.\textsuperscript{106} Another is the failure of many courts to articulate their fee calculation method—an undisclosed method obviously cannot be followed by other courts.\textsuperscript{107} One exception to this, however, is the oft-cited case of \textit{Johnson v. Georgia Highway Express, Inc.},\textsuperscript{108} where the Court of Appeals for the Fifth Circuit announced twelve criteria for trial courts to consider in determining a proper fee award. In \textit{Johnson}, the trial court had awarded attorney's fees without explaining how they arrived at the particular amount.\textsuperscript{109} On appeal, the Fifth Circuit noted that effective appellate review is impossible unless district courts record their reasons for arriving at a certain amount.\textsuperscript{110} In remanding the case, the Fifth Circuit instructed the district court to consider the following twelve criteria in calculating the fee amount:

1. the time and labor expended by counsel;
2. the novelty and difficulty of the case;
3. the particular attorney's skill;
4. any preclusive effect this case might have had on counsel's ability to take other cases;
5. the attorney's customary fee;
6. the contingent nature of the litigation;
7. any unusual time limitations imposed by the litigant;
8. the amount of money involved in the case, or relief sought;
9. the experience, ability and reputation of counsel;
10. any undesirability in being associated with the cause;
11. the length of relationship between attorney and client;
12. awards in similar cases.\textsuperscript{111}

\textsuperscript{105} Comment, \textit{supra} note 34, at 378.
\textsuperscript{106} The legislative history merely referred to \textit{Johnson v. Georgia Highway Express, Inc.}, 488 F.2d 714 (5th Cir. 1974) (discussed in text accompanying notes 108-11 \textit{infra}), and cited cases where courts properly applied the \textit{Johnson} criteria. \textit{See} S. REP. NO. 94-1011, \textit{supra} note 9, at 6, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 5913.
\textsuperscript{108} 488 F.2d 714 (5th Cir. 1974). For cases citing \textit{Johnson}, see note 112 \textit{infra}.
\textsuperscript{109} 488 F.2d at 715.
\textsuperscript{110} \textit{Id.} at 717.
\textsuperscript{111} \textit{Id.} at 717-19. The 12 criteria are analogous to those enumerated in the \textit{MODEL CODE OF PROFESSIONAL RESPONSIBILITY} DR 2-106(B) (1979), for calculating attorney's fees with one exception: criterion number 10—the undesirability of being associated with the case. Ethically, the undesirability of a case should not impact upon the lawyer's billing rate, but as the Fifth Circuit apparently realized, in reality it does. \textit{See also} \textit{MODEL RULES OF PROFES-
Other courts quickly accepted the *Johnson* criteria. Indeed, even the Senate Judiciary Committee Report on section 1988 cited the *Johnson* case with approval.

The *Johnson* criteria, however useful, have not substantially reduced the confusion regarding calculation of fee amounts. Commentators have criticized the list because the court did not state which factors, if any, should be weighed more heavily, because some criteria appear redundant, and because other criteria contradict the legislative history of section 1988. Among the courts that claim adherence to the factors, many have applied them quite differently. Still other courts, the Second Circuit in particular, altogether reject the criteria due to their inherent complexity and subjectivity. The end result is that private attorneys cannot confi-
ently evaluate their chances of receiving an adequate reward and are ultimately discouraged from participating in civil rights cases.

Recently, in *Hensley v. Eckerhart*,\(^\text{119}\) the Supreme Court handed down its first opinion regarding the proper method of calculating fee awards.\(^\text{120}\) In this case, involuntarily confined patients at a Missouri state hospital filed a section 1983 action alleging numerous statutory violations in the conditions at the hospital.\(^\text{121}\) The district court found constitutional violations in five of six general areas of treatment.\(^\text{122}\) The trial judge awarded $133,332.25 in section 1988 attorney’s fees, and included in fee calculations the hours spent by the plaintiff’s attorneys on the unsuccessful claims.\(^\text{123}\) The Court of Appeals for the Eighth Circuit affirmed.\(^\text{124}\)

In remanding the case for recomputation of the fees, the Supreme Court directed the district court to consider the extent of the plaintiff’s success in calculating the proper fee amount.\(^\text{125}\) The Court explained that the district court should initially determine the fee by multiplying hours reasonably expended by the prevailing hourly rate.\(^\text{126}\) According to the Court, “hours reasonably expended” are those necessarily spent in achieving the results obtained.\(^\text{127}\)

However, in some situations, calculating the hours expended may be more difficult than in others. The Court noted that where the plaintiff presents distinct, unrelated claims of civil rights deprivation, his attorney’s time, if properly recorded, can easily be allo-

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\(^{119}\) 103 S. Ct. 1933 (1983).

\(^{120}\) The Court has, however, considered the availability of an award in several cases: Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978); Alyeska Pipeline Serv. Co. v. Wilderness Soc’y, 421 U.S. 240 (1975); Northcross v. Memphis Bd. of Educ., 416 U.S. 696 (1974); Newman v. Piggie Park Enters., 390 U.S. 400 (1968).

\(^{121}\) 103 S. Ct. at 1936.

\(^{122}\) Id. The district court found that the constitutional rights of involuntarily committed patients were violated in the following areas: physical environment; individual treatment plants; least restrictive environment; visitation, telephone, and mail privileges; and seclusion and restraint. 475 F. Supp. 908, 919-20 (W.D. Mo. 1979).

\(^{123}\) 103 S. Ct. at 1937.

\(^{124}\) 664 F.2d 294 (8th Cir. 1981).

\(^{125}\) 103 S. Ct. at 1940.

\(^{126}\) Id. at 1937.

\(^{127}\) The Court explained:

Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission.

*Id.* at 1940.
cated to the various claims pursued. The district court should then assess a fee based only on hours spent on the plaintiff's successful claims. Any time spent on claims that were unsuccessful, however, should not be compensated, just as they would not be if spent on a separate, unsuccessful lawsuit.\textsuperscript{128} The Court noted that, in other situations, the plaintiff's claims are not distinct, but rather simply rely on alternative legal theories or a series of incidents to support a single claim of civil rights deprivation. The Court said the plaintiff is entitled in such a case to a fee award for all hours expended, if the relief sought was achieved.\textsuperscript{129}

When the district court determines the "hours reasonably expended," multiplying this number by the "prevailing hourly rate" yields an initial amount. The district court may then adjust this amount upward or downward at its discretion.\textsuperscript{130} However, the Supreme Court emphasized that the "results obtained" should be the primary consideration in making further discretionary adjustments, although it would permit consideration of the other Johnson criteria.\textsuperscript{131}

No fee calculation method will yield complete consistency in determining award amounts, just as the jury system never yields consistent compensatory damage awards to similarly situated plaintiffs. However, the Supreme Court's fee calculation guidelines will improve the consistency of section 1988 fee awards. By emphasizing the considerations of "relief obtained" and "hours reasonably expended," the Court has established a starting point for fee calcula-

\textsuperscript{128} Again, the Court explained:

In some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories. In such a suit, . . . counsel's work on one claim will be unrelated to his work on another claim. Accordingly, work on an unsuccessful claim cannot be deemed to have been expended in pursuit of the ultimate result achieved.

\textit{Id.}

\textsuperscript{129} In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

\textit{Id. at 1940-41.}

\textsuperscript{130} The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the results obtained.

\textit{Id. at 1940.}

\textsuperscript{131} \textit{Id.}
tions. Still, the *Hensley* decision might be criticized for overemphasizing the "results obtained" factor in discretionary adjustments to the initial fee amount. District courts must therefore remain mindful of the congressional intent that the amount of the fee award not be reduced because the relief sought is nonpecuniary.132

V. Conclusion

This note has presented a summary of the law of fee awards under the Attorney's Fees Awards Act of 1976. The Act's purpose, as emphasized above, is to encourage private enforcement of civil rights by aggrieved parties who otherwise could not afford competent counsel. In order for section 1988 to be effective, the courts must consistently and systematically apply its provisions. By enacting the Equal Access to Justice Act, Congress took a forward step toward consistency by making the United States subject to the provisions of section 1988. Moreover, the courts' consistent and liberal application of the prevailing party requirement enhances consistency. Finally, the Supreme Court's *Hensley* decision should narrow the range of possible fee awards in a given situation. However, some inconsistencies remain. Ad hoc decisions denying fee awards to prevailing parties because of "special circumstances" inject an unnecessary element of risk in assessing the chance for a fee award. Similarly, courts awarding fees at disparate rates unnecessarily confuses the extent to which fees are available.

As judges continue to apply section 1988, they must consider the impact of their decisions upon the Act's purpose. Decisions which restrict the applicability of section 1988 arguably inhibit an untold number of plaintiffs and counselors from enforcing civil rights laws, a goal of the utmost priority in our society.

*Mark D. Boveri*

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132 The Senate Report indicates that the type of relief sought by the client should not impact the court's calculation of a reasonable fee. *S. Rep. No. 94-1011, supra* note 9, at 6, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 5913.