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Judgment on the Merits Leaving Attorney's Fees Issues Undecided: A Final Judgment?

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JUDGMENT ON THE MERITS LEAVING ATTORNEY'S FEES ISSUES UNDECIDED: A *FINAL* JUDGMENT?

INTRODUCTION

In this era of proliferating and high-cost litigation,[1] parties increasingly are turning to the myriad exceptions to the American rule that a litigant must bear his own attorney's fees.[2] For example, parties that prevail at trial may seek attorney's fees from their opponents under many federal statutes that contain fee-shifting provisions.[3] Courts also possess an inherent power to assess fees against those who bring bad faith claims.[4] Similarly, when an attorney fails to conduct a reasonable inquiry into the merits of a case, the court may sanction him by requiring that he pay his opponent's fees.[5] Contracting parties also may opt out of the American rule prior to litigation by including a clause that requires the breaching party to pay the other party's attorney's fees in any action for breach of contract.[6]

A determination that the prevailing party is entitled to fees, however, results in an entirely new series of difficulties. Before they can establish fee awards, courts often must await the lawyer's submission of detailed and complicated affidavits describing fees charged and tasks performed.[7]

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1. *See* Green, *From Here to Attorney's Fees: Certainty, Efficiency, and Fairness in the Journey to the Appellate Courts*, 69 Cornell L. Rev. 207, 209 (1984).

2. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975); Green, *supra* note 1, at 209. The escalation of litigation costs, increased use of private class actions, and growth in public interest litigation have led to an increase in the frequency of attempts to shift attorney's fees. *See* Green, *supra* note 1, at 210.

3. *See, e.g.*, Lanham Trade-Mark Act, 15 U.S.C. § 1117 (1982); 28 U.S.C. § 1927 (1982); Equal Access to Justice Act, 28 U.S.C. § 2412(b) (1982); Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982). For an exhaustive list of statutes that contain fee-shifting provisions, *see* Marek v. Chesny, 473 U.S. 1, 43-51 (1985) (Brennan, J., dissenting).

4. *See* Roadway Express, Inc. v. Piper, 447 U.S. 752, 765 (1980); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59 (1975) (citing F.D. Rich Co. v. United States *ex rel.* Industrial Lumber Co., 417 U.S. 116, 129 (1974)).

5. *See* Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 253 (2d Cir. 1985), *cert. denied*, 108 S. Ct. 269 (1987); Fed. R. Civ. P. 11.

6. *See, e.g.*, Bank South Leasing, Inc. v. Williams, 769 F.2d 1497, 1500 (11th Cir.) (per curiam) (clause in lease agreement), *vacated on other grounds*, 778 F.2d 704 (1985) (per curiam); Columbia Plaza Corp. v. Security Nat'l Bank, 676 F.2d 780, 790-91 (D.C. Cir. 1982) (promissory note); *In Re* Intaco Puerto Rico, Inc., 357 F. Supp. 1122, 1123-24 (D.P.R. 1973) (same); *see also* Leubsdorf, *Recovering Attorney Fees as Damages*, 38 Rutgers L. Rev. 439, 448 & n.49 (1986) (courts usually uphold attorney's fees liability provisions in promissory notes).

7. *See* Metcalf v. Borba, 681 F.2d 1183, 1187 (9th Cir. 1982); Obin v. District No. 9 of the Int'l Ass'n of Machinists & Aerospace Workers, 651 F.2d 574, 579-80 (8th Cir. 1981) (quoting White v. New Hampshire Dept. of Employment Security, 629 F.2d 697, 702-03 (1st Cir. 1980), *rev'd on other grounds*, 455 U.S. 445 (1982)); *see also* Beckwith Mach. Co. v. Travelers Indem. Co., 815 F.2d 286, 294 (3d Cir. 1987) (Gibbons, C.J., dissenting) ("litigation over the quantification of attorneys' fees has, since the development of the trend away from the American rule, become a very time-consuming enterprise").

Moreover, courts have devised extensive lists of factors to consider when deciding whether to make an award and how to calculate an appropriate dollar amount.[8] As a result, fee issues are often determined many months after liability issues have been resolved.[9] This delay, when considered in light of the requirement that a judgment be "final" before it may be appealed,[10] poses serious problems for litigants who, understandably, wish to expedite the resolution of their disputes by appealing as early as possible.

The federal courts of appeals disagree whether a decision on the merits of a case represents a "final" judgment, and thus is appealable, when the district court has awarded, but not quantified, attorney's fees.[11] They also conflict on whether a judgment on the merits is final when the court has reserved fee issues for later consideration altogether.[12] Some courts have fashioned a bright-line rule that a judgment deciding the merits but reserving questions regarding attorney's fees is final and appealable because attorney's fees issues always are collateral to the merits of an action.[13] Other courts, however, reject the bright-line rule in favor of a case-by-

8. *See, e.g.*, Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) (using product of number of hours spent multiplied by fee per hour charged as starting point for inquiry); Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974) (listing 12 factors).

9. *See, e.g.*, Ierna v. Arthur Murray Int'l, 833 F.2d 1472, 1474 (11th Cir. 1987) (approximately one year between request and district court's entry of award); United States v. Armendaris, 790 F.2d 860, 863 (11th Cir. 1986) (per curiam) (four months between motion for fees and district court's decision on motion); Alcorn County v. U.S. Interstate Supplies, Inc., 731 F.2d 1160, 1163 (5th Cir. 1984) (two-and-one-half months); Obin v. District No. 9 of the Int'l Ass'n of Machinists & Aerospace Workers, 651 F.2d 574, 576 (8th Cir. 1981) (two months).

10. *See infra* notes 18-41 and accompanying text.

11. *Compare* Barrington Press, Inc. v. Morey, 816 F.2d 341, 342 (7th Cir.) ("reservation of the determination of the amount of attorney's fees does not deprive the initial judgment of finality" (citations omitted)), *cert. denied*, 108 S. Ct. 249 (1987) *with* Beckwith Mach. Co. v. Travelers Indem. Co., 815 F.2d 286, 290 (3d Cir. 1987) (when attorney's fees are integral to the merits, reservation of quantification of a fee award renders judgment non-final).

12. *Compare* Bank South Leasing, Inc., v. Williams, 769 F.2d 1497, 1500 (11th Cir. 1985) (per curiam) (when fees are integral to merits, reservation of question of fees for later consideration renders judgment on the merits non-final), *vacated on other grounds*, 778 F.2d 704 (1985) (per curiam) *with* International Ass'n of Bridge, Structural, Ornamental & Reinforcing Ironworkers' Local Union 75 v. Madison Indus., 733 F.2d 656, 658-59 (9th Cir. 1984) (judgment on the merits is final where court reserves question of fees for later consideration).

13. *See, e.g.*, Budinich v. Becton Dickinson & Co., 807 F.2d 155, 157-58 (10th Cir. 1986) (per curiam), *cert. granted*, 108 S. Ct. 226 (1987); United States v. Estridge, 797 F.2d 1454, 1459 (8th Cir. 1986) (per curiam); Exchange Nat'l Bank v. Daniels, 763 F.2d 286, 292-93 (7th Cir. 1985); Morgan v. Union Metal Mfg., 757 F.2d 792, 795 (6th Cir. 1985); International Ass'n of Bridge, Structural, Ornamental & Reinforcing Ironworkers' Local Union 75 v. Madison Indus., 733 F.2d 656, 658-59 (9th Cir. 1984); Bernstein v. Menard, 728 F.2d 252, 253 (4th Cir. 1984). *See generally* Note, Morgan v. Union Metal Manufacturing: *Finality of a Judgment on the Merits When Attorney Fee Issues Remain Undecided*, 17 U. Tol. L. Rev. 579 (1986) (collecting cases and arguing for bright-line rule).

case analysis.[14] These courts hold that the finality of a judgment that reserves fee questions depends on whether the issues of attorney's fees are integral or collateral to the merits of a case.[15] Under this approach, a judgment reserving fee issues that are collateral to the merits is final and appealable.[16] If, however, fee issues intertwine with the merits, the fee issues must be resolved before either party may appeal the judgment.[17]

This Note addresses the confusion concerning the determination of the finality and appealability of a judgment on the merits when attorney's fees issues await resolution. Part I of this Note briefly summarizes the final judgment rule and its underlying policies. Part II compares the arguments favoring both the bright-line and case-by-case approaches and analyzes them in light of the rationales underlying the finality requirement. This Note concludes that the policies underlying the final judgment rule compel adoption of the case-by-case analysis.

I. THE FINAL JUDGMENT RULE

Discussion of the appealability of cases that are final but for the determination of attorney's fees issues requires a brief review of the final judgment rule. The federal courts of appeals have statutory jurisdiction to hear appeals from all final judgments issued by the United States district

14. *See, e.g.*, Ierna v. Arthur Murray Int'l, Inc., 833 F.2d 1472, 1475 (11th Cir. 1987); Cobb v. Miller, 818 F.2d 1227, 1235-36 (5th Cir. 1987); Beckwith Mach. Co. v. Travelers Indem. Co., 815 F.2d 286, 290 (3d Cir. 1987); F.H. Krear & Co. v. Nineteen Named Trustees, 776 F.2d 1563, 1564 (2d Cir. 1985) (per curiam); Holmes v. J. Ray McDermott & Co., 682 F.2d 1143, 1146 (5th Cir. 1982), *cert. denied* 459 U.S. 1107 (1983).

15. *See, e.g.*, Hooper v. F.D.I.C., 785 F.2d 1228, 1231-32 (5th Cir. 1986); *Holmes*, 682 F.2d at 1146. Courts have held attorney's fees to be integral when they are part of the scope of relief to be awarded the prevailing party, akin to damages. *See* Beckwith Mach. Co. v. Travelers Indem. Co., 815 F.2d 286, 290 (3d Cir. 1987); *Holmes*, 682 F.2d at 1147. Courts have deemed attorney's fees issues collateral, however, in cases where they resemble court costs. *See Holmes*, 682 F.2d at 1147; McQurter v. City of Atlanta, 724 F.2d 881, 882 (11th Cir. 1984).

16. *See, e.g.*, Cobb v. Miller, 818 F.2d 1227, 1229 (5th Cir. 1987) (42 U.S.C. § 1988 fees found collateral); Beckwith Mach. Co. v. Travelers Indem. Co., 815 F.2d 286, 291 n.8 (3d Cir. 1987) (fees awarded pursuant to "separate statute" deemed collateral (citing West v. Keve, 721 F.2d 91, 94-95 (3d Cir. 1983) (§ 1988 fees))); Donaldson v. Clark, 786 F.2d 1570, 1575 (11th Cir.) (fees awarded under Fed. R. Civ. P. 11 sanction found collateral), *vacated*, 794 F.2d 572 (1986) (en banc); McQurter v. Atlanta, 724 F.2d 881, 882 (11th Cir. 1984) (§ 1988 fees found collateral).

17. *See, e.g.*, Jaffe v. Sundowner Properties, Inc., 808 F.2d 1425, 1427 (11th Cir. 1987) (per curiam) (award of fees as sanction under Fed. R. Civ. P. 37(d) for failure to comply with discovery mechanisms not collateral because it arises from same factual basis as dismissal of claim); Bank South Leasing, Inc. v. Williams, 769 F.2d 1497, 1500 (11th Cir. 1985) (per curiam) (fees stipulated in contract found integral to merits of breach of contract action), *vacated on other grounds*, 778 F.2d 704 (1985) (per curiam); C.I.T. Corp. v. Nelson, 743 F.2d 774, 775 (11th Cir. 1984) (contractually stipulated fees integral to merits); Holmes v. J. Ray McDermott & Co., 682 F.2d 1143, 1147-48 (5th Cir. 1982) (fees awarded under Jones Act "bound hand in hand" with merits), *cert. denied*, 459 U.S. 1107 (1983).

courts.[18] Once a final judgment has been rendered at the trial level, a party seeking an appeal must file a written notice of appeal with the district court within thirty days of the judgment's entry or the right to appeal is lost.[19] Both the finality requirement and the notice limitation are mandatory and jurisdictional.[20] Thus, the courts of appeals have no discretion to entertain an appeal from a non-final judgment or one that is filed in an untimely fashion.[21]

A final judgment is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[22] The court must intend the judgment to be final[23] and must contemplate no further action in the case.[24] Despite the apparent simplicity of these definitions, courts historically have found them difficult to apply.[25] One commentator has suggested that, because courts prefer to give the finality rule a pragmatic rather than a formal construction, a concrete test has proved elusive.[26] This continued difficulty stands at odds with the need for jurisdictional rules, such as the final judgment rule, to be explicit and unambiguous in order to provide guidance for parties that must comply

18. *See* 28 U.S.C. § 1291 (1982). An exception to this rule exists when the Supreme Court may review directly the district court decision. *Id.*

19. *See* 28 U.S.C. § 2107 (1982); Fed. R. App. P. 4(a)(1). Section 2107 permits later filings of appeal in suits to which the United States is a party and in admiralty cases. 28 U.S.C. § 2107. The section also allows the district court to extend the period for an additional 30 days when it finds excusable neglect by the filing party. *Id.* Federal Rule of Appellate Procedure 4 provides similar exceptions and, in addition, allows the filing of certain post trial motions to toll the 30-day appeal limitation. Fed. R. App. P. 4.

20. *See* Browder v. Director, Dept. of Corrections, 434 U.S. 257, 264 (1978); United States v. Robinson, 361 U.S. 220, 229 (1960); *see also* Fed. R. App. Proc. 3(a) ("[f]ailure of an appellant to take any step *other than the timely filing of a notice of appeal* does not affect the validity of the appeal . . . ." (emphasis added)).

21. *See Browder*, 434 U.S. at 264-65; *Robinson*, 361 U.S. at 229. Moreover, a party need not challenge the appellate court's jurisdiction in her filings; the court may address the issue sua sponte. *See* Bender v. Williamsport Area School Dist., 475 U.S. 534, 541 (1986); Woodard v. Sage Products, Inc., 818 F.2d 841, 844 (D.C. Cir. 1987); Kuster v. Block, 773 F.2d 1048, 1048 (9th Cir. 1985).

22. Catlin v. United States, 324 U.S. 229, 233 (1945); *see* Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 373-74 (1981); Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978); St. Louis, Iron Mountain & S. R.R. v. Southern Express Co., 108 U.S. 24, 28-29 (1883).

23. *See* United States v. F.& M. Schaefer Brewing Co., 356 U.S. 227, 232-35 (1958); Peterson v. Lindner, 765 F.2d 698, 704 (7th Cir. 1985).

24. *See F.&M. Schaefer Brewing*, 356 U.S. at 232; *see also* Fort v. Roadway Express, Inc., 746 F.2d 744, 747 (11th Cir. 1984) (order finding party liable for fees without quantifying fees not appealable since it contemplates further proceedings before party's obligations become final).

25. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170 (1974) ("No verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future."); Gillespie v. United States Steel Corp., 379 U.S. 148, 152 (1964) ("it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality"). *See generally* Frank, *Requiem for the Final Judgment Rule*, 45 Texas L. Rev. 292, 295-96 (1966) (recognizing imprecise nature of finality requirement).

26. *See* Frank, *supra* note 25, at 295-96.

with such rules or risk forfeiture of their appeal.[27]

The existence of two fundamental, competing policies that underlie the final judgment rule explains this continued confusion. These conflicting policy considerations are the prevention of burdensome and costly piecemeal review, on the one hand, and the lessening of delay in appealing a judgment, which may deny justice to a party, on the other.[28] The finality rule primarily aims to combine into one appeal all issues decided by the lower court.[29] By avoiding the harrassment of and expense to a party resulting from a succession of separate appeals from the various rulings incidental to a single litigation, the rule facilitates review of meritorious claims.[30] In addition, requiring appellate courts to review the component claims in a single appeal ensures efficient judicial administration.[31]

Recognizing, however, that complex cases often take years to reach complete resolution,[32] Congress and the Supreme Court have crafted exceptions to the finality rule to afford relief to parties whose rights may be harmed irreparably by orders that become effectively unreviewable if not appealed immediately.[33] For example, one federal statute grants appellate courts jurisdiction to hear appeals from interlocutory orders issued by district courts that grant, continue, modify, refuse, or dissolve injunctions.[34] The Supreme Court has created another exception to the final

27. *See* Browder v. Director, Dept. of Corrections, 434 U.S. 257, 266-67 (1978); Budinich v. Becton Dickinson & Co., 807 F.2d 155, 157 (10th Cir. 1986) (per curiam), *cert. granted* 108 S. Ct. 226 (1987); 9 J. Moore, B. Ward & J. Lucas, Moore's Federal Practice ¶ 110.07, at 109 (2d ed. 1985) [hereinafter Moore].

28. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 171 (1974); Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950); Green, *supra* note 1, at 215-16.

29. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949); *see also* Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981) (finality rule "[promotes] efficient judicial administration").

30. *See Firestone*, 449 U.S. at 374; Cobbledick v. United States, 309 U.S. 323, 325 (1940); *see also* Catlin v. United States, 324 U.S. 229, 234 (1945) ("elimination of delays caused by interlocutory appeals" one reason behind finality requirement).

31. *See Catlin*, 324 U.S. at 233-34; *Cobbledick*, 309 U.S. at 325. *See generally* Moore, *supra* note 27, ¶ 110.07, at 107-11 (discussing various policies behind finality rule).

32. *See, e.g.*, Boeing Co. v. Van Gemert, 444 U.S. 472, 482 (1980) (Rehnqhist, J., dissenting) (litigation lasting 14 years); Halderman v. Pennhurst State School & Hospital, 673 F.2d 628, 629 (3d Cir. 1982) (en banc) (sur petition for rehearing) (civil rights litigation lasting eight years), *cert. denied*, 465 U.S. 1038 (1984).

33. *See* DiBella v. United States, 369 U.S. 121, 124-25 (1962) (reviewing various exceptions to the finality rule).

34. *See* 28 U.S.C. § 1292(a)(1) (1982). In Carson v. American Brands, Inc., 450 U.S. 79 (1981), a case in which the plaintiffs alleged employment discrimination, *id.* at 84, the Supreme Court held a district court order denying a motion to enter a consent decree appealable under § 1292(a)(1) because inability to appeal might cost petitioners their chance to settle the case on their negotiated terms. *See id.* at 86. Also, because the essence of the consent decree at issue was to effect a restructuring of the respondent's transfer and promotion policies, the court found that non-appealability of the district court's order would lead to irreparable harm caused by respondent's continued discrimination. *See Id.* at 89 & n.15.

In Shanks v. City of Dallas, 752 F.2d 1092 (5th Cir. 1985), however, appellant sought review of the trial court's denial of class certification. *Id.* at 1093. The court of appeals, in dictum, distinguished the situation where a party seeks to appeal denial of a prelimi-

judgment rule, known as the collateral order doctrine.[35] Under this doctrine, a party may appeal immediately an order that finally determines important rights yet is too independent of the cause of action itself to defer appellate review until the whole case has been decided.[36] These exceptions ensure that the final judgment rule, by delaying appeal of certain preliminary or collateral orders, does not unfairly restrict a party's rights.[37] Consistent with this policy, courts have continued to construe the finality requirement practically, rather than technically, in an effort to avoid an overemphasis on formalism.[38]

The Supreme Court also has justified the final judgment rule on the subsidiary ground that it emphasizes the deference appellate courts properly should accord to district court judges.[39] The Court has expressed fear that, absent the finality rule, appellate judges constantly would look

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nary injunction. *See id.* at 1096-97. The court noted that because a party seeking a preliminary injunction must prove an immediate threat of irreparable harm to obtain the injunction, denial of such an injunction "will necessarily result in the type of serious consequence that § 1292(a)(1) is designed to prevent." *Id.* at 1097. Finding the irreparable harm alleged by appellants "too contingent and remote" to warrant interlocutory appeal under § 1292(a)(1), the court dismissed the appeal for lack of jurisdiction. *Id.* at 1098.

35. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546-47 (1949); *accord* Stringfellow v. Concerned Neighbors in Action, 107 S. Ct. 1177, 1181-82 (1987).

36. *See Cohen*, 337 U.S. at 546-47; *see, e.g.*, Mitchell v. Forsyth, 472 U.S. 511, 530 (1985) (order denying claim of qualified immunity appealable as a collateral order); Lynk v. LaPorte Superior Ct. No. 2, 789 F.2d 554, 561 (7th Cir. 1986) (order granting or denying writ of habeas corpus *ad testificandum* appealable under collateral order doctrine).

37. *See* DiBella v. United States, 369 U.S. 121, 125-26 (1962). Federal Rule of Civil Procedure 54(b) provides another exception to the final judgment rule. Rule 54(b) allows for appeal from a judgment against one or more, but fewer than all, the claims or parties in circumstances where the judge certifies "that there is no just reason for delay." *Id.* The Rule was intended to afford relief to parties involved in litigation that includes multiple claims relating to separate and distinct rights of many persons. *See* 6 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice ¶ 54.15[1] at 191-94 (2d ed. 1988). "[I]f all these determinations had to await an appeal from a decree finally terminating the proceeding, rights of many persons would either be irreparably lost or seriously impaired . . . ." *Id.* at 191; *see also* Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 428-29 (1956) (multiple claim action in which district court's judgment for defendant as to two, but not all, claims for relief deemed appealable under Rule 54(b)); Allis-Chalmers Corp. v. Philadelphia Elec. Co., 521 F.2d 360, 366-67 (3d Cir. 1975) (grant of summary judgment before adjudication of defendant's counterclaim not properly certifiable under Rule 54(b)). For a discussion of factors considered by courts in determining whether a given order is appealable under Rule 54(b), see *id.* at 364.

38. *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 471 (1978) (rigidity would sometimes conflict with purpose of § 1291); Dibella v. United States, 369 U.S. 121, 125-26 (1962) (overly rigid insistence on finality defeats rule's purpose where appealed orders are collateral); Frank, *supra* note 25, at 295 (noting Court's preference for practical construction of the finality rule); *see also* Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 517-18 (1950) (Black, J., dissenting) (advocating flexible approach to finality requirement such that appellate courts review all cases where question of finality is close and can be answered either way by equally persuasive arguments).

39. *See* Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981); Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978).

over the shoulders of their colleagues at the trial level, usurping the trial judges' role as finder and interpreter of facts.[40] The Court, however, seldom has relied on this policy, justifying the finality rule most often on the ground that it prevents piecemeal review.[41]

II. THE FINALITY OF JUDGMENTS INVOLVING UNRESOLVED ATTORNEY'S FEES ISSUES

A. *Collateral/Integral Distinction: Proper Treatment of Fee Awards that are Akin to Damages*

Distinguishing fee awards integral to the merits from those that are collateral best serves the policies behind the final judgment rule. Because integral awards closely resemble compensatory damages,[42] courts must treat them differently than collateral awards to avoid frustrating the policies supporting the finality requirement, which favor appeal of the judgment on the merits and the assessment of damages in one proceeding.[43]

The case-by-case method of determining finality when attorney's fees questions are unresolved is necessary when fee issues are so intertwined with the merits of a case as to constitute a part of the damages.[44] For example, when the agreement at issue in a breach of contract action contains a provision requiring the breaching party to pay the other party's attorney's fees in any action for breach,[45] the fee award is a stipulated part of the damages,[46] tantamount to a liquidated damages clause.[47] Similarly, fee-shifting provisions in certain statutes are connected so

40. *See Firestone Tire & Rubber*, 449 U.S. at 374. Further, the *Coopers & Lybrand* Court expressed its concern that permitting an appellate court to review a non-final judgment would result in the improper involvement of appellate courts in the trial process. *See* 437 U.S. at 476.

41. *See* Green, *supra* note 1, at 214-15.

42. *See infra*, notes 44-52 and accompanying text.

43. *See infra*, notes 51-52 and accompanying text.

44. See Beckwith Mach. Co. v. Travelers Indem. Co., 815 F.2d 286, 290-91 (3d Cir. 1987); *see also* Leubsdorf, *supra* note 6, at 439 (arguing for general inclusion of attorney's fees in damage awards).

45. *See, e.g*, Ierna v. Arthur Murray Int'l, Inc., 833 F.2d 1472, 1476 (11th Cir. 1987); C.I.T. Corp. v. Nelson, 743 F.2d 774, 775 (11th Cir. 1984); Oxford Prod. Credit Ass'n v. Duckworth, 689 F.2d 587, 588 (5th Cir. 1982).

46. *See* F.H. Krear & Co. v. Nineteen Named Trustees, 776 F.2d 1563, 1563-64 (2d Cir. 1985) (per curiam); *Oxford*, 689 F.2d at 589; *see also* Ierna v. Arthur Murray Int'l, Inc., 833 F.2d 1472, 1475-76 & n.5 (11th Cir. 1987) (contractually stipulated fees are designed to compensate for the injury).

47. *See* Beckwith Mach. Co. v. Travelers Indem. Co., 815 F.2d 286, 290 (3d Cir. 1987). In his dissent from *Beckwith Mach.*, Judge Gibbons points out that the case did not involve breach of an agreement that included a clause providing for liability for attorney's fees. *Id.* at 293 (Gibbons, C.J., dissenting). Judge Gibbons stressed that fees had been awarded pursuant to either common law or state statute and thus were not properly viewed as integral to the merits. *Id.* at 293 (Gibbons, C.J., dissenting). The majority nonetheless concluded that expenses incurred by plaintiff in hiring counsel resulted directly from defendant insurer's breach of the insurance contract by failing to defend plaintiff in a separate liability action. *See id.* at 290. The court concluded that because the jury would have awarded attorney's fees as part of the damages in the suit against the

closely to the substantive statutory provisions that the fees form part of the damages.[48] For example, attorney's fees awarded under the Lanham Trade-Mark Act in "exceptional circumstances"[49] are intended to "make whole" the prevailing party.[50] In such cases, appeal of a judgment on the issue of liability before the trial court has resolved fee questions, which is permissible under the bright-line rule, amounts to an appeal on the merits before the court has assessed damages.[51] The Supreme Court expressly has disapproved of this result, reasoning that the appeal of a judgment as to liability before the trial court calculates damages frustrates the policy behind section 1291.[52]

Courts following the bright-line rule reject any need for the collateral/integral distinction, maintaining that questions of attorney's fees, akin to costs, always raise issues collateral to the merits.[53] Some of these courts rely heavily on the Supreme Court's decision in *White v. New Hampshire Department of Employment Security*[54] to support their argument.[55] In

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defendant, "the fee award [formed] an integral part of the damage award and [arose] directly out of the initial determination of liability." *Id.*

48. *See, e.g.*, Holmes v. J. Ray McDermott & Co., 682 F.2d 1143, 1144, 1147 (5th Cir. 1982) (fees awarded pursuant to Jones Act), *cert. denied*, 459 U.S. 1107 (1983); Hairline Creations, Inc. v. Kefalas, 664 F.2d 652, 660 (7th Cir. 1981) (fees awarded under Lanham Act); *see also* Jaffe v. Sundowner Properties, Inc., 808 F.2d 1425, 1427 (11th Cir. 1987) (per curiam) (fees awarded under Fed. R. Civ. P. 37(d) as a sanction for failure to comply with discovery requests held not similar to costs).

49. 15 U.S.C. § 1117(a) (1982).

50. *See* Noxell Corp. v. Firehouse No. 1 Bar-b-Que Restaurant, 771 F.2d 521, 524 (D.C. Cir. 1985).

51. In *Holmes*, an action under the Jones Act for failure of the employer to provide maintenance and cure to plaintiff, the court stated: "We simply cannot distinguish this case from any other judgment of liability that leaves undetermined the relief as to the amount of damages to which the plaintiff is entitled. The policies against piecemeal appeals apply fully to such a situation; they are also applicable here." Holmes v. J. Ray McDermott & Co., 682 F.2d 1143, 1148 (5th Cir. 1982) (citation omitted).

52. *See* Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 744 (1976) (summary judgment only as to liability "where assessment of damages or awarding of other relief remains to be resolved have never been considered to be 'final' within the meaning of 28 U.S.C. § 1291" (citation omitted)).

53. *See, e.g.*, United States v. Estridge, 797 F.2d 1454, 1459 (8th Cir. 1986) (Lay, C.J.); Bernstein v. Menard, 728 F.2d 252, 253 (4th Cir. 1984); *see also* Budinich v. Becton Dickinson & Co., 807 F.2d 155, 157 (10th Cir. 1986) (per curiam) ("attorney's fees motions [are] procedural equivalents and uniformly require separate notices of appeal when such motions are resolved after judgment has been rendered on the merits"), *cert. granted*, 108 S. Ct. 226 (1987).

54. 455 U.S. 445 (1982). In *White*, the plaintiff had prevailed at trial in an action alleging the defendant's discriminatory failure to determine certain unemployment compensation entitlements in a timely manner. *Id.* at 447. The plaintiff moved for attorney's fees under § 1988 four-and-one-half months after the district court had entered judgment in accordance with the parties' consent decree. *Id.* at 447-48. Claiming that had it known that the consent decree would not fix its total liability it would have eschewed settlement, the defendant won reversal of the fees award on appeal to the First Circuit. *See* White v. New Hampshire Dep't of Employment Sec., 629 F.2d 697, 699 & n.2 (1st Cir. 1980), *rev'd*, 455 U.S. 445 (1982). The court of appeals reasoned that Fed. R. Civ. P. 59(e) applied to motions for attorney's fees and hence, ruled plaintiff's motion untimely since it was made more than ten days following the judgment. 629 F.2d at 700.

White, the Court held that Federal Rule of Civil Procedure 59(e), which requires that motions to amend a judgment be filed within ten days of entry of a final judgment, does not apply to motions for attorney's fees under section 1988 of the Civil Rights Attorney's Fees Act of 1976 ("section 1988")[56] because such motions involve issues collateral to the merits and do not constitute motions to amend the judgment.[57] Relying on the *White* Court's statement that requests for section 1988 fees are "uniquely separable" from the cause of action,[58] proponents of the bright-line rule infer that the Supreme Court intends that attorney's fees issues be treated as collateral in every case.[59] One court, although recognizing that *White* applied expressly only to requests for fees under section 1988, found nothing in the decision to indicate the Supreme Court's intent to distin-

55. *See, e.g.*, Budinich v. Becton Dickinson & Co., 807 F.2d 155, 157-58 (10th Cir. 1986) (per curiam) *cert. granted*, 108 S. Ct. 226 (1987); Morgan v. Union Metal Mfg., 757 F.2d 792, 794 (6th Cir. 1985); Bernstein v. Menard, 728 F.2d 252, 253 (4th Cir. 1984); Abrams v. Interco Inc., 719 F.2d 23, 26-27 & n.2 (2d Cir. 1983).

The appellant in *Budinich* argued that because the issue of whether fees represent an integral part of relief is a matter of state law, a bright-line rule may violate the principles set forth in Erie R.R. v. Tompkins, 304 U.S. 64 (1938), where state law allows a party to appeal the merits and fee issues in the same proceeding when fee issues are determined after the judgment on the merits. *Budinich*, 807 F.2d at 158. The court in *Budinich*, however, rejected this argument, holding that although the relationship of fees to the merits implicates substantive law, governed by state law under *Erie*, the specification of time for filing an appeal is a matter of procedure. Thus, under Hanna v. Plumer, 380 U.S. 460, 471-75 (1965), federal law should control. *Budinich*, 807 F.2d at 158. In essence, the court held that whether it should apply the bright-line or case-by-case approach is a matter of the law of the particular circuit. *Id.*

The Supreme Court granted *certiorari* to review *Budinich*, 108 S. Ct. 226 (1987), and heard oral argument on March 21, 1988. The question presented to the Court was whether, under *Erie*, its opinion in White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445, 454 (1982), holding that attorney's fees authorized by federal statute are collateral, applies to diversity cases where state law deems such fees integral. In deciding the *Erie* issue, the Court may address whether the *White* decision mandates application of the bright-line rule or whether it should be limited to its facts. Its opinion also may decide the main issue of the propriety of the collateral/integral distinction. *See* Respondent's Brief at 20-25.

56. 42 U.S.C. § 1988 (1982). Section 1988 provides:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of [Title 42], Title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], or Title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Id; *see also* Seattle School Dist. No. 1 v. Washington, 633 F.2d 1338, 1348 (9th Cir. 1980) (discussing purpose behind § 1988), *aff'd*, 458 U.S. 457 (1982).

57. *See* White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445, 450-54 (1982).

58. *Id.* at 452. The Court reasoned that since § 1988 fees are not compensation for the cause of action, but are "uniquely separable from the cause of action to be proved at trial," they could not be characterized as an element of relief, indistinguishable from other elements. *Id.* Thus, the Court's use of the phrase, "*uniquely* separable" (emphasis added) in describing the relationship of § 1988 fees to the merits of an action further supports an inference that the Court did not intend to treat all attorney's fees awards alike.

59. *See* cases cited *supra* note 98.

guish other types of attorney's fees as integral.[60]

These courts, however, interpret *White* too broadly.[61] The *White* Court held only that motions for section 1988 attorney's fees are collateral for Rule 59(e) purposes, relying specifically on the policies underlying the statute and the Rule.[62] The drafters of Rule 59(e) intended the Rule to permit a district court to reconsider matters properly encompassed in a decision on the merits in order to rectify its own mistakes during the period immediately following judgment.[63] In addition, Congress enacted section 1988 to facilitate redress by private parties under federal civil rights laws.[64] Because a court may not award section 1988 fees until a party has prevailed at trial,[65] determinations under this section require an inquiry wholly beyond the scope of the merits.[66] Thus, the *White* Court held that section 1988 fee requests fall outside the scope of Rule 59(e).[67]

The collateral nature of a section 1988 fee award distinguishes it from other federal statutes whose fee-shifting provisions relate closely to the statutes' substantive provisions,[68] thus mandating the collateral/integral

60. *See* Budinich v. Becton Dickinson & Co., 807 F.2d 155, 158 (10th Cir. 1986) (per curiam), *cert. granted*, 108 S. Ct. 226 (1987).

At least two bright-line courts have found implicit approval of the bright-line rule in the *White* Court's citation, 455 U.S. at 452 n.14, to Memphis Sheraton Corp. v. Kirkley, 614 F.2d 131, 133 (6th Cir. 1980). *See* Morgan v. Union Metal Mfg., 757 F.2d 792, 794 (6th Cir. 1985); Abrams v. Interco Inc., 719 F.2d 23, 26-27 (2d Cir. 1983). The court in *Kirkley* held that a judgment on the merits was final although contractually based fees remained unquantified. 614 F.2d at 133.

The reliance on the *White* Court's citation of *Kirkley*, however, is misplaced. The Court in *White* merely cited that case as support for its holding that § 1988 fees could be found collateral for purposes of Rule 59(e). *See* White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445, 452-53 & n.14 (1982). Nothing in *White* indicates that the Court intended to hold that the contractual fees addressed in *Kirkley* could not be integral to the merits for finality purposes.

61. *See* Beckwith Mach. Co. v. Travelers Indem. Co., 815 F.2d 286, 290 (3d Cir. 1987).

62. *See White*, 455 U.S. at 450-52.

63. *See* Fed. R. Civ. P. 59(e) advisory committee's note, *reprinted in* 5 F.R.D. 436, 476 (1946); *id.* at 450-51; *see also* Metcalf v. Borba, 681 F.2d 1183, 1184-85 (9th Cir. 1982) (following *White*'s reading of Rule 59(e) as applied to § 1988 attorney's fees).

64. *See* Seattle School Dist. No. 1 v. Washington, 633 F.2d 1338, 1348 (9th Cir. 1980), (citing S. Rep. No. 1011, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Admin. News at 5908; H.R. Rep. No. 1558, 94th Cong., 2d Sess. (1976)), *aff'd*, 458 U.S. 457 (1982).

65. *See* White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445, 451-52 (1982); 42 U.S.C. § 1988 (1982).

66. *See White*, 455 U.S. at 451-52.

67. *See id.* at 452. Arguably, § 1988 attorney's fees may be integral to the merits in contexts other than Rule 59(e) because the court awards fees in its discretion, presumably basing its decision on the underlying facts of the case. Such fees are more properly viewed as collateral, however, because the award is nearly presumptive and is only denied under special circumstances where the award would be unjust. *See* Newman v. Piggie Park Enter., 390 U.S. 400, 402 (1968) (per curiam).

68. *See* Hairline Creations, Inc. v. Kefalas, 664 F.2d 652, 659-60 (7th Cir. 1981). The *Hairline Creations* court recognized the uniquely collateral nature of a § 1988 attorney's fees award. *See Hairline Creations*, 664 F.2d at 659-60 (7th Cir. 1981). That court distin-

distinction. Although at least one case has found this distinction too "metaphysical,"[69] other courts have disagreed.[70] In the past, the Supreme Court has recognized a distinction between various fee-shifting provisions based on their functions in the litigation process.[71] For example, the Court has held that a request for fees out of a common fund created pursuant to a class action is collateral to the merits.[72] The Court reasoned that the creation of the fund itself determines the defendant's full liability and that questions as to what portion of that fund would pay for attorneys fall wholly beyond the issues of liability.[73] In another case,

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guished § 1988 fees from fees awarded under the Lanham Trade-Mark Act, holding that a Lanham Act fee award requires consideration of issues intertwined with the merits. Because such fees are integral to the merits, requests for fees constitute a motion to amend the judgment within the scope of Rule 59(e). *Id.* at 660.

The court in Exchange National Bank v. Daniels, 763 F.2d 286 (7th Cir. 1985), questioned the validity of *Hairline Creations* in light of the holding in *White*. *See Daniels*, 763 F.2d at 293-94. The *Daniels* court did not overrule *Hairline Creations*, however, preferring instead to limit it to trade-mark cases. *Id.* at 294. Arguably, in doing so, the *Daniels* court recognized the existence of at least one category of fees integral to the merits of an action, thereby undermining its own rejection of the collateral/integral distinction.

69. *See Daniels*, 763 F.2d at 293. The court stated:

> We reject as altogether too metaphysical the distinction between fees that are "compensation for injury" and those that are not. All awards of fees make the prevailing party better off. Whether this benefit is "really" a way to compensate for the underlying hurt or instead a way to reduce the cost of litigation, thus making redress of the underlying hurt more likely and leaving the prevailing party with a greater net award, is a question of semantics rather than substance. Resolution of this question would depend on the legislative (or bargaining) history of a given statute or contract—if indeed such a question ever has a sensible answer.

Id.

70. *See* Ierna v. Arthur Murray Int'l, Inc., 833 F.2d 1472, 1475 & n.5 (11th Cir. 1987); Beckwith Mach. Co. v. Travelers Indem. Co., 815 F.2d 286, 290 (3d Cir. 1987). The court in *Ierna* rejected the concept that all attorney's fees awards are alike insofar as they all benefit the prevailing party, stating: "We believe that there is a difference between an award of attorneys' fees that is designed to compensate for the injury, and an award that reduces the costs of seeking compensation through litigation." *Ierna*, 833 F.2d at 1475 n.5. The court, however, should have gone further in assailing the *Daniels* court's position. Although the *Daniels* court rejected the case-by-case approach merely because it requires individual case analysis, the court failed to address the possibility that the complexity of the case-by-case approach might be justified by other policies, such as the avoidance of piecemeal review.

71. *Compare* Vaughan v. Atkinson, 369 U.S. 527, 530-31 (1962) (fees awarded in admiralty suit, for maintenance and cure, compensate plaintiff for harm suffered) *with* Boeing Co. v. Van Gemert, 444 U.S. 472, 478-81 (1980) (fees awarded under common fund doctrine intended to reduce unjust enrichment of those who benefit from a class action without contributing to its cost). In light of such distinctions, it is unlikely that the Court in *White* intended to rule that *all* attorney's fees are collateral for finality purposes.

72. *See* Boeing Co., 444 U.S. at 481 n.7. The common fund doctrine rests on the notion that those receiving the benefit of a class action recovery, in the form of a claim to a common fund established by the losing party, are unjustly enriched if they have not contributed to the cost of the suit. *See id.* at 478. The doctrine allows attorneys to recover their fees from the fund so that each beneficiary of the suit pays a portion of the attorney's fees proportionate to his claim to the fund. *Id.*

73. *See id.* at 479-80 & n.5.

however, the Court held that attorney's fees formed an essential part of the damages suffered by a seaman in a suit for maintenance and cure, reasoning that the attorney's fees incurred by the plaintiff in pursuing his claim directly resulted from his employer's failure to provide assistance to plaintiff during his illness.[74]

Further, in various situations, fees have been included in awards of damages,[75] despite general resistance to overturning the American rule, which traditionally disallows recovery of attorney's fees as damages.[76] The Fifth Circuit has followed the Supreme Court's lead, finding fees to be included in damages for failure of maintenance and cure under the Jones Act.[77] In a contract context, the same court held that reasonable attorney's fees comprise part of the foreseeable damages recoverable for breach of the warranty of workmanlike performance.[78] In addition, the Court of Appeals for the District of Columbia Circuit has found a common law exception to the non-recovery aspect of the American rule when one party seeks fees for litigation against a third party, provided such

74. *See* Vaughan v. Atkinson, 369 U.S. 527, 530-31 (1962). The requirement that an employer provide maintenance and cure affords an injured or ill seaman food and shelter for the duration of his incapacitation sustained through his work. *See Vaughan*, 369 U.S. at 531. The primary rationale behind imposing such a duty on shipowners is to maintain a commercial and military merchant marine and to induce persons to accept seaman's work. *Id.* (quoting Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 528 (1938)).

75. *See, e.g.*, Todd Shipyards Corp. v. Turbine Serv., Inc., 763 F.2d 745, 751 (5th Cir. 1985); *see also* Answering Serv., Inc. v. Egan, 728 F.2d 1500, 1503 (D.C. Cir. 1984) (award of fees from third party because of defendant's tortious conduct).

76. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 263-64 (1975) (Court, absent congressional authorization, declined to create common law "private attorney general" exception to American rule to make prosecution of federal civil rights claims more feasible).

One commentator argues persuasively that attorney's fees should be included in damage calculations in general. *See* Leubsdorf, *supra* note 6, at 440. Professor Leubsdorf suggests that damages not including fees are adequate only if society is concerned with what the defendant pays, rather than what the plaintiff receives. *See id.* at 442-43. Clearly, such concern conflicts with the traditional view of damages as compensation to the plaintiff. *See* W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser & Keeton on the Law of Torts § 4, at 20 (5th ed. 1984) (discussing general compensatory function of tort law).

77. *See* Holmes v. J. Ray McDermott & Co., 682 F.2d 1143, 1147 (5th Cir. 1982), *cert. denied*, 459 U.S. 1107 (1983). Citing Vaughan v. Atkinson, 369 U.S. 527, 530 (1962), the *Holmes* court noted that a defendant who arbitrarily and willfully refused to pay maintenance and cure would be liable for attorney's fees as part of the "necessary expenses" incurred by the plaintiff. *See Holmes*, 682 F.2d at 1147. Thus, impliedly, a merely negligent defendant might not be so liable. Insofar as a fee award would be contingent in part on the degree of the defendant's willfulness, fee questions in a maintenance and cure action are "subsumed by the merits." *Id.*

78. *See* Todd Shipyards Corp. v. Turbine Serv., Inc., 763 F.2d 745, 751 (5th Cir. 1985). In Strachan Shipping Co. v. Koninklyke Nederlandsche Stoomboot Maalschappy, N.V., 324 F.2d 746, 747 (5th Cir. 1963), *cert. denied* 376 U.S. 954 (1964), a stevedore was held liable to a shipowner for breach of warranty of workmanlike performance. The shipowner recovered attorney's fees incurred in defending a longshoreman's suit as an element of the damages because the stevedore's breach "in all likelihood exposed the shipowner to liability." *Id.*

litigation is neccesitated by the defendant's wrongful acts.[79] Because such fees fall within the scope of damage relief, courts should adopt the case-by-case analysis of determining the finality of a judgment reserving fee issues for later consideration. Application of the general bright-line rule to such fees improperly results in appeal of a judgment on liability before determination of damages.[80]

One court following the case-by-case method has noted the difficulty of deciding when an award of attorney's fees is integral to the merits of a case.[81] Indeed, courts applying the case-by-case approach offer little guidance on how to distinguish integral fees from collateral fees.[82] A test, however, is easily devised by focusing the inquiry on the function of a fee award, rather than on the source of the award. A difference exists between awards of attorney's fees intended to compensate for the underlying injury and awards designed to facilitate redress of the injury by reducing litigation costs.[83] An integral, or compensatory attorney's fees award is made as part of the "initial determination of liability"[84] and requires the court to consider the very factors that bear upon the decision as to which party prevails. A collateral award, on the other hand, such as one under § 1988, is made as a matter of course to the victorious party,[85] without regard to the underlying issues of the case.

Where a party alleges that the expenditure of attorney's fees forms a part of his injury, such as where the defendant insurer's breach of duty to defend the plaintiff forced the plaintiff to hire his own attorney in a liability action,[86] or where a union's breach of its duty of fair representation

79. *See* Answering Serv., Inc. v. Egan, 728 F.2d 1500, 1503 (D.C. Cir. 1984) (defendant liable for fees in "wrongful involvement in litigation" action, where plaintiff forced to defend third party action proximately caused by defendant's misrepresentation concerning sale of plaintiff's stock). In Scott v. Local Union 377, Int'l Bhd. of Teamsters, 548 F.2d 1244, 1246 (6th Cir.), *cert. denied*, 431 U.S. 968 (1977), the Court of Appeals for the Sixth Circuit held that an award of attorney's fees forms part of the damages assessed in an action for breach of a union's duty of fair representation. After noting that the Supreme Court in Alyeska Pipeline Service Co. v. Wilderness Soc'y, 421 U.S. 240, 262 (1975), *see supra* note 2 and accompanying text, reaffirmed the American rule of nonrecoverability of attorney's fees in federal litigation, the *Scott* court distinguished *Alyeska*, stating: "We do not read [*Alyeska*] as in any way affecting those cases in which the attorney fees are not an award to the successful litigant in the case at hand, but rather *are the subject of the law suit itself.*" *Scott*, 548 F.2d at 1246 (emphasis added).

80. *See supra* note 52 and accompanying text.

81. *See* Cobb v. Miller, 818 F.2d 1227, 1236 n.12 (5th Cir. 1987); *see also* Exchange Nat'l Bank v. Daniels, 763 F.2d 286, 293 (7th Cir. 1985) (resolution of question whether fees are collateral or integral may never have sensible answer).

82. *See, e.g.*, *Cobb*, 818 F.2d at 1236 n.12; Jackson Marine Corp. v. Harvey Barge Repair, Inc., 794 F.2d 989, 991 (5th Cir. 1986); Donaldson v. Clark, 786 F.2d 1570, 1574-75 (11th Cir.), *vacated*, 794 F.2d 572 (1986) (en banc); McQurter v. City of Atlanta, 724 F.2d 881, 882 (11th Cir. 1984) (per curiam).

83. *See* Ierna v. Arthur Murray Int'l, Inc., 833 F.2d 1472, 1475-76 n.5 (11th Cir. 1987).

84. Beckwith Mach. Co. v. Travelers Indem. Co., 815 F.2d 286, 290 (3d Cir. 1987).

85. *See supra* notes 65-67 and accompanying text.

86. *See* Beckwith Mach. Co. v. Travelers Indem. Co., 815 F.2d 286, 287 (3d Cir. 1987).

causes an employee to seek private counsel,[87] the fees are integrally related to the merits. Conversely, where the fee award is statutorily authorized, for example, as a means of encouraging private enforcement of civil rights laws[88] or to punish an attorney's carelessness[89] or bad faith, the fees are collateral.

B. *Case-by-Case Approach Accords with Finality Policy*

Applying the case-by-case method of determining whether a judgment on the merits is final and appealable when fee issues remain unresolved reduces piecemeal review,[90] thereby promoting the central policy underlying the final judgment rule.[91] When attorney's fees are integral to the merits of an action, requiring a party to await fee determination before appealing the judgment on the merits properly allows the appellate court to consider the issues of liability and fees in one proceeding.[92] This result

87. *See* Scott v. Local Union 377, Int'l Bhd. of Teamsters, 548 F.2d 1244, 1246 (6th Cir.), *cert. denied*, 431 U.S. 968 (1977).

88. *See* Seattle School Dist. No. 1 v. Washington, 633 F.2d 1338, 1348 (9th Cir. 1980), *aff'd*, 458 U.S. 457 (1982); S. Rep. No. 1011, 94th Cong., 2d Sess. 2, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908, 5910 (legislative history to 42 U.S.C. § 1988) ("civil rights laws depend heavily upon private enforcement, and fees awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain").

89. *See* Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 253 (2d Cir. 1985), *cert. denied*, 108 S. Ct. 269 (1987).

90. *See* Ierna v. Arthur Murray Int'l, Inc., 833 F.2d 1472, 1475 & n.3 (11th Cir. 1987); Beckwith Mach. Co. v. Travelers Indem. Co., 815 F.2d 286, 290 (3d Cir. 1987); C.I.T. Corp. v. Nelson, 743 F.2d 774, 775 n.1 (11th Cir. 1984).

91. *See supra* notes 28-31 and accompanying text.

92. *See* Union Tank Car Co. v. Isbrandtsen, 416 F.2d 96, 97 (2d Cir. 1969) (per curiam); *see also* Exchange Nat'l Bank v. Daniels, 763 F.2d 286, 293 (7th Cir. 1985) (adopting bright-line rule but recognizing that single appeal raising multiple issues promotes judicial economy to a greater degree than multiple appeals); *cf.* Rodriguez v. Handy, 802 F.2d 817, 821 (5th Cir. 1986) (consolidating appeal of order awarding fees with appeal of order quantyifying fee award avoids piecemeal review); Fort v. Roadway Express, Inc., 746 F.2d 744, 748 (11th Cir. 1984) (same).

In both *Rodriguez* and *Fort*, the appellant sought review of the order granting unquantified fees, rather than review of the judgment on the merits. *Rodriguez*, 802 F.2d at 820-21; *Fort*, 746 F.2d at 747. Both courts distinguished the situation at bar from a case in which a party appeals the judgment on the merits prior to determination of fee issues. *Rodriguez*, 802 F.2d at 820-21; *Fort*, 746 F.2d at 747 n.6. Finding it unnecessary to decide whether the fees at issue were integral or collateral to the merits, these courts held that no award of attorney's fees may be appealed before the amount is determined. *See Rodriguez*, 802 F.2d at 821; *Fort*, 746 F.2d at 747.

The reasons supporting the requirement that full liability for fees be determined before appeal apply whether a party seeks to appeal the judgment on the merits or the order granting fees prior to quantification of the fees. In cases where attorney's fees are integral to the merits of an action, an appeal of the judgment on the merits before fees are quantified virtually amounts to an appeal of such judgment before the court determines damages. *See infra* notes 95-96 and accompanying text. Because damages are considered part of the merits, such a result undermines the policy of preventing piecemeal review that underlies the finality requirement. *See* Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 744-46 (1976). Similarly, an appeal of an unquantified fee award itself is tantamount to an appeal of a liability determination before damages have been computed. *See Rodri-*

benefits parties by reducing the harrassment of successive appeals, which threatens effective review of meritorious claims,[93] and by allowing parties to decide whether to appeal based on whether they received the relief for which they sued.[94] Moreover, because integral fee issues are so intertwined with the merits of a case and the scope of relief, a separate appeal on the fee award requires the appellate court to conduct a detailed inquiry into the merits.[95] Such an inquiry duplicates the work of the first appellate tribunal, thereby wasting judicial resources.

Proponents of the bright-line rule, however, have questioned the desirability of unitary review of fees and merits under the case-by-case approach.[96] These courts maintain that combining fee issues and merits in one appeal is inappropriate. Such unified review harms parties whose property and other interests may be bound up in litigation for long periods by requiring them to await the court's fee determination before appealing substantive issues.[97] This argument applies particularly to a defendant subject to a coercive remedy that is not appealable under the collateral order doctrine,[98] such as a civil contempt order, or an interlocutory order,[99] because such a defendant may suffer irreparable harm through delay.[100] The argument fails, however, because Congress, in creating specific exceptions to the final judgment rule for circumstances in

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guez, 802 F.2d at 821. Courts have distinguished the situation in which the judgment on the merits is appealed before the fees are quantified from the situation in which the unquantified award of fees itself is appealed. *See id.*; *Fort*, 746 F.2d at 747 n.6; *see also* Morgan v. Union Metal Mfg., 757 F.2d 792, 795 (6th Cir. 1985) ("An award of attorneys' fees is collateral to a decision on the merits, but a determination of the amount of attorneys' fees is not collateral to a determination of liability for attorneys' fees.") The two situations are similar, however, insofar as both involve an appeal of a judgment on a portion of the merits prior to the judgment as to all of the merits.

93. *See supra* notes 29-30 and accompanying text.

94. *Cf.* Giordano v. Roudebush, 565 F.2d 1015, 1018 (8th Cir. 1977) (per curiam) (plaintiff bases decision to appeal on whether he receives relief he seeks).

95. *See* Beckwith Mach. Co. v. Travelers Indem. Co., 815 F.2d 286, 290 (3d Cir. 1987); Hairline Creations, Inc. v. Kefalas, 664 F.2d 652, 658-59 (7th Cir. 1981); *see also* Crossman v. Maccoccio, 792 F.2d 1, 3-4 (1st Cir. 1986) (per curiam) (single appeal desirable where propriety of fee award is closely intertwined with merits and appellate court must consider reasonableness of hours spent on litigation (dictum)).

96. *See* International Ass'n of Bridge, Structural, Ornamental & Reinforcing Ironworkers' Local Union No. 75 v. Madison Indus., 733 F.2d 656, 659 (9th Cir. 1984); Halderman v. Pennhurst State School & Hosp., 673 F.2d 628, 636 (3d Cir. 1982) (en banc), *cert. denied*, 465 U.S. 1038 (1984).

97. *See Halderman*, 673 F.2d at 636; Note, *Procedure: Effect of Attorney Fees on Finality of Judgment—Amendment to Rule 1.11(c)*, 40 Okla. L. Rev. 145, 152 (1987) (discussion limited to Oklahoma state law).

98. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546-47 (1949); Stringfellow v. Concerned Neighbors in Action, 107 S. Ct. 1177, 1181-82 (1987); *supra* notes 35-36 and accompanying text.

99. *See* 28 U.S.C. § 1292(a)(1) (1982); *see also supra* note 34-36 and accompanying text (giving examples of orders appealable and not appealable under § 1291(a)(1) and *Cohen* rule).

100. *See* Halderman v. Pennhurst State School & Hosp., 673 F.2d 628, 636 (3d Cir. 1982) (en banc) (unappealability of civil contempt order, under which some defendants

which delaying appeal might irreparably harm parties' rights,[101] contemplated the full range of exceptions allowed.[102] Thus, appellate courts must defer to Congress and should not expand these categories absent congressional authorization.[103] Moreover, while in most cases parties would prefer expeditious appeal of non-final judgments,[104] the policies surrounding the finality requirement, particularly the avoidance of piecemeal review, prohibit this. These policies should not be subverted by indiscriminate appellate court action.[105]

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are incarcerated, pending fee determination causes irreparable consequences), *cert. denied*, 465 U.S. 1038 (1984).

Civil contempt orders, however, are appealable in certain situations. In United States Steel Corp. v. Fraternal Ass'n of Steel Haulers, 601 F.2d 1269, 1270-71 (3d Cir. 1979), appellants sought review of a civil contempt order, issued for violation of an injunction. The court held that the order was unappealable but stated in dictum that a party could appeal such an order when the court has sought to punish the contemnor or coerce him into compliance with the injunction. *See id.* at 1273; *see also* In re Arthur Treacher's Franchisee Litigation, 689 F.2d 1150, 1155 (3d Cir. 1982) (civil contempt appealable because issued in conjunction with appealable order).

101. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 545-46 (1949); 28 U.S.C. § 1292(a) (1982); Fed R. Civ. P. 54(b); *supra* notes 33-34 and accompanying text.

102. *See* Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 746 (1976). Congress excepted from the final judgment rule only certain interlocutory orders, such as injunctions. *Id.* at 744-46; *see supra* note 34 and accompanying text.

103. *See Liberty Mutual*, 424 U.S. at 746 (1976). The Court in *Liberty Mutual*, holding that summary judgment only as to liability in a Title VII action is unappealable, wrote:

> We believe that Congress, in enacting present §§ 1291 and 1292 of Title 28, has been well aware of the dangers of an overly rigid insistence upon a "final decision" for appeal in every case, and has in those sections made ample provision for appeal of orders which are not "final" so as to alleviate any possible hardship. We would twist the fabric of the statute more than it will bear if we were to agree that the District Court's order . . . was appealable to the Court of Appeals.

Id; *see also* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 263-64 (1975) (where Congress has created specific provisions for shifting fees, judicial creation of common law "private-attorney-general" exception to American rule would violate Congress' will).

One could argue that the Supreme Court, in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 545-47 (1949), created a judicial exception to the final judgment rule by establishing the collateral order doctrine. The Court, however, based its decision on a practical construction of the final judgment statute, 28 U.S.C. § 1291. *See Cohen*, 337 U.S. at 546; *supra* notes 26, 38 and accompanying texts. This Note attempts to show that to allow immediate appeal of a judgment on the merits pending determination of fee issues is impractical in cases where fees are integral to the merits. Thus, even though one may argue that, in some situations, such as in *Cohen*, practical construction of the finality requirement dictates appealability of a certain type of "non-final" order, a judgment on the merits pending fee determination is not such an order.

104. *See* Rodriguez v. Handy, 802 F.2d 817, 821 (5th Cir. 1986); *see also* Crick, *The Final Judgment as a Basis for Appeal*, 41 Yale L.J. 539, 539 (1932) ("Decisions of the trial court from which counsel will wish to appeal may occur, of course, in many stages of the case. It may be a ruling relating to service of process or an order with regard to the pleadings.").

105. *See* Mall Properties, Inc. v. Marsh, No. 87-1827, slip op. at 11 (1st Cir. March 11, 1988) (to review non-final interlocutory order because reversal would expedite case "undermines" final judgment rule); *Rodriguez*, 802 F.2d at 821 (appeal of fee award prior to

The case-by-case approach also reduces the burden of cases before appellate tribunals by diminishing the number of appeals and promoting settlement in cases in which the award of attorney's fees forms a major portion of the total monetary judgment.[106] Forcing the district court judge to determine a party's entitlement to, as well as the amount of, an integral fee award prior to appeal often requires the judge to reconsider the merits of the case.[107] This is especially true because most courts consider the novelty and difficulty of the issues litigated in quantifying attorney's fees.[108] Upon this further reflection, the trial judge might conclude that an award of attorney's fees is not warranted.[109] Thus, when attorney's fees otherwise would have constituted the bulk of a monetary judgment, the district court's refusal to grant fees often will induce a losing party to forgo a costly appeal.[110] Even if the district court, after its further consideration, awards the prevailing party substantial attorney's fees, the losing party might prefer to reach a fee settlement rather than risk having the fee award affirmed after a protracted, expensive appeal.[111] Last, requiring the trial judge to determine integral fee issues comports with the policy behind the finality rule favoring appellate court deference to the factfinding judgments of the trial judge.[112]

Advocates of the bright-line rule, however, maintain that requiring trial courts to resolve integral fee issues prior to appeal will produce increased, wasteful litigation.[113] Courts that apply the bright-line rule contend that if a party is not allowed an immediate appeal of a judgment on

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determining quantity of fees "abolish[es] the limitations on appellate jurisdiction"); Fort v. Roadway Express, Inc., 746 F.2d 744, 748 (11th Cir. 1984) (appeal of fee award before quantification contravenes policies supporting the final judgment rule).

106. *Cf.* Rodriguez v. Handy, 802 F.2d 817, 821 (5th Cir. 1986) (holding unquantified fee award non-appealable but using reasoning applicable to issue of appealability of judgments on the merits leaving integral fee issues unresolved); *Fort*, 746 F.2d at 748 (same); *see also supra* note 92 (discussing application of reasoning in *Rodriguez* and *Fort* to decision whether to apply case-by-case approach or bright-line rule).

107. *See Fort*, 746 F.2d at 748. The court in *Fort* noted that the avoidance of appeals on issues that might otherwise be mooted once the district court has decided the entire case is a primary policy underlying the finality rule. *Id.* (citing Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981)).

108. *See* Fort v. Roadway Express, Inc., 746 F.2d 744, 748 (11th Cir. 1984). For a list of factors commonly used by courts to calculate fee awards, see Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974). In addition, the Model Code of Professional Responsibility DR 2-106 (1980) lists the novelty and difficulty of issues litigated among the factors for attorneys to consider in billing their clients.

109. *See Fort*, 746 F.2d at 748.

110. *See* Rodriguez v. Handy, 802 F.2d 817, 821 (5th Cir. 1986); *Fort*, 746 F.2d at 748.

111. *See Rodriguez*, 802 F.2d at 821. In addition, the prevailing party to whom fees are awarded likely will settle to avoid reversal or reduction on appeal. *See id.*; *Fort*, 746 F.2d at 748.

112. *See supra* notes 39-40 and accompanying text.

113. *See, e.g.*, Beckwith Mach. Co. v. Travelers Indem. Co., 815 F.2d 286, 292 (3d Cir. 1987) (Gibbons, C.J., dissenting); International Ass'n of Bridge, Structural, Ornamental & Reinforcing Ironworkers' Local Union 75 v. Madison Indus., 733 F.2d 656, 658-59 (9th Cir. 1984); C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 3915, at 313 (1987 Supp.) [hereinafter Wright].

the merits, courts will have to engage unnecessarily in the time-consuming process of awarding or quantifying fees, which could have been averted had the judgment been reversed on early appeal.[114] This result, however, exceeds the limits on appellate jurisdiction.[115] Although prompt reversal of many district court orders would terminate the case,[116] this does not convert an otherwise non-final judgment into one that is appealable.[117] Further, most trial court judgments that are appealed are affirmed, rather than reversed.[118] Thus, the probability that final disposition of fees and merits at the trial level would lead parties to either forgo appeals of low fee awards, or settle where awards are high,[119] outweighs the possibility that the trial court would not have to resolve fee issues because of subsequent reversal.

Courts applying the bright-line rule also assert that it fosters the clarity[120] appropriate for a jurisdictional rule.[121] Proponents of the bright-line rule criticize the case-by-case approach on the ground that it will yield uncertainty among courts and litigants.[122] The case-by-case approach would spawn a whole new body of law to determine when a judgment on the merits is final where fee questions are undecided, thereby unnecessarily expending judicial resources.[123] Courts and commentators further argue that litigants and courts will have difficulty in successfully

114. *See* Abrams v. Interco Inc., 719 F.2d 23, 27 (2d Cir. 1983); Memphis Sheraton Corp. v. Kirkley, 614 F.2d 131, 133 (6th Cir. 1980); *see also Beckwith Mach.*, 815 F.2d at 292 (Gibbons, C.J., dissenting); Note, *supra* note 13, at 610.

115. *See* Rodriguez v. Handy, 802 F.2d 817, 821 (5th Cir. 1986).

116. *See id.*; Fort v. Roadway Express, Inc., 746 F.2d 744, 748 (11th Cir. 1984).

117. *See* Rodriguez v. Handy, 802 F.2d 817, 821 (5th Cir. 1986). *See generally* Moore, *supra* note 27, ¶ 110.07, at 108-09 (listing non-appealable orders typically issued in course of litigation).

118. In 1984-85, only 15.9 percent of all appeals terminated on the merits were reversed. *See* Annual Report of the Director of the Administrative Office of the U.S. Courts 261 (1985).

119. *See supra* notes 110-11 and accompanying text.

120. *See, e.g.*, Budinich v. Becton Dickinson & Co., 807 F.2d 155, 157 (10th Cir. 1986) (per curiam), *cert. granted* 108 S. Ct. 226 (1987); Exchange Nat'l Bank v. Daniels, 763 F.2d 286, 293 (7th Cir. 1985); *see also* Beckwith Mach. Co. v. Travelers Indem. Co., 815 F.2d 286, 292 (3d Cir. 1987) (Gibbons, C.J., dissenting) (rejecting majority's application of case-by-case approach in favor of clarity offered by bright-line rule).

121. *See Beckwith Mach.*, 815 F.2d at 292 (Gibbons, C.J., dissenting); *Daniels*, 763 F.2d at 293; Wright, supra note 113, § 3915, at 313-14:

> [A clear rule] will forestall any need to worry whether a judgment that fails to pass upon a demand for fees in the complaint is not final, in the way that judgments that fail to dispose of all requests for relief are not final. . . . Complex rules of appellate jurisdiction provide fertile occasion for argument, and too often are overlooked by the parties or even deliberately ignored.

Id.

122. *See Beckwith Mach.*, 815 F.2d at 292 (Gibbons, C.J., dissenting); Budinich v. Becton Dickinson & Co., 807 F.2d 155, 157 (10th Cir. 1986) (per curiam), *cert granted*, 108 S. Ct. 226 (1987); *see also* International Ass'n of Bridge, Structural, Ornamental & Reinforcing Ironworkers' Local Union 75 v. Madison Indus., 733 F.2d 656, 659 (9th Cir. 1984) ("The [bright-line] rule provides counsel with a device for anticipating the future; the [case-by-case] approach merely encourages counsel to make an educated guess.").

123. *See Madison Indus.*, 733 F.2d at 658-59.

distinguishing integral from collateral fee awards[124] in light of the widely divergent reasoning offered by courts that draw the distinction.[125] As a result, attorneys will be forced to file a cautionary appeal following a judgment on the merits to avoid potential unfair dismissal of a later appeal on untimeliness grounds should the fees be deemed collateral.[126] Such a cautionary appeal must be dismissed for prematurity, thus wasting judicial resources.[127]

When the district court, however, decides integral fee issues within a few days or weeks of the substantive issues, the court of appeals, rather than dismissing the cautionary appeal as premature,[128] may consolidate it with a timely appeal filed after the trial court has resolved the fee issue.[129] In addition, filing a second appeal after the trial court has made its fee determination is unnecessary because the court's issuance of the appealable order cures the prematurity of the first notice and permits a single appeal[130] as long as neither party is prejudiced.[131] Thus, even

124. *See* Beckwith Mach. Co. v. Travelers Indem. Co., 815 F.2d 286, 292 (3d Cir. 1987) (Gibbons, C.J., dissenting); Exchange Nat'l Bank v. Daniels, 763 F.2d 286, 293 (7th Cir. 1985); *see also* Wright, *supra* note 113, § 3915, at 313 (clear rule would avoid need to worry whether judgment failing to rule on fee issues is final).

125. Compare the following rationales offered by courts following the case-by-case analysis for finding attorney's fees awards integral to the merits: *Beckwith Mach.*, 815 F.2d at 290 & n.7 (fees integral because jury would award fees as part of damages); Jaffe v. Sundowner Properties, Inc., 808 F.2d 1425, 1427 (11th Cir. 1987) (per curiam) (under Fed. R. Civ. P. 37(d), sanction of fee award and sanction of dismissal each rest on same factual basis); F.H. Krear & Co., v. Nineteen Named Trustees, 776 F.2d 1563, 1564 (2d Cir. 1985) (contractually stipulated fees are integral); C.I.T. Corp. v. Nelson, 743 F.2d 774, 775 (11th Cir. 1984) (finding contractually stipulated fees are " 'compensation for the injury giving rise to an action,' " (quoting White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445, 452 (1982))); Alcorn County v. U.S. Interstate Supplies, Inc., 731 F.2d 1160, 1164-65 (5th Cir. 1984) (fees integral to merits under civil RICO statute because statute creating cause of action provides for both damage award and fee award; fee award under statute is mandatory; defendant has no opportunity to recover fees, thus fees are unlike costs); *see also* Hairline Creations, Inc. v. Kefalas, 664 F.2d 652, 659-60 (7th Cir. 1981) (fees collateral for Rule 59(e) purposes where statute designates them part of "costs").

126. *See* Beckwith Mach. Co. v. Travelers Indem. Co., 815 F.2d 286, 292 (3d Cir. 1987) (Gibbons, C.J., dissenting); International Ass'n of Bridge, Structural, Ornamental & Reinforcing Ironworkers' Local Union 75 v. Madison Indus., 733 F.2d 656, 659 (9th Cir. 1984); *see also* West v. Keve, 721 F.2d 91, 94 (3d Cir. 1983) ("careful appellate advocate will file *two* appeals in each case where attorney fee adjudication is implicated" (emphasis in original)); *see also* Bronze Shields, Inc. v. New Jersey Dept. of Civil Serv., 667 F.2d 1074, 1079 (3d Cir. 1981) (recognizing wisdom of filing cautionary appeal after fee determination because appeal on merits before fee determination must be dismissed as premature (citing Croker v. Boeing Co., 662 F.2d 975 (3d Cir. 1981) (en banc))), *cert. denied*, 458 U.S. 1122 (1982).

127. *See* Beckwith Mach. Co. v. Travelers Indem. Co., 815 F.2d 286, 292-93 (3d Cir. 1987) (Gibbons, C.J., dissenting); Wright, *supra* note 113, § 3905, at 422 (1st ed. 1976).

128. *See supra* note 82 and accompanying text.

129. *See* Alcorn County v. U.S. Interstate Supplies, Inc., 731 F.2d 1160, 1163-66 (5th Cir. 1984) (court may consider premature appeal when judgment becomes final prior to dismissal of such appeal).

130. *See* Norman v. Housing Authority, No. 87-7763, slip op. at 1354 (11th Cir. Feb. 1, 1988); *Interstate Supplies*, 731 F.2d at 1166. *But see* Robinson v. Tanner, 798 F.2d

when the district court delays fee determination, issuance of the fee order cures the prematurity of the first appeal.[132]

Further, the uncertainty inherent in this, as in any case-by-case analysis, will cause only temporary inconvenience.[133] Because courts easily may formulate guidelines to simplify the case-by-case analysis,[134] the new body of law emerging from this approach will eradicate the initial confusion as courts solidify their tests.[135] Moreover, the uncertainty that accompanies any new rule of law is not sufficient justification to reject such rules whenever their benefits outweigh the costs of uncertainty. The value of the case-by-case approach to determining finality, in reducing piecemeal appeals, far outweighs the virtue of the clarity of the bright-line rule.[136]

One court has stated that unified review of fees and merits may be undesirable, because it forces counsel to litigate issues regarding their fees along with substantive issues, thus limiting their strategy of avoiding fee discussions with their clients in the midst of a litigation.[137] To avoid appearing overly concerned with payment, attorneys customarily await the end of post-judgment motions before seeking fees.[138] Requiring them to do otherwise increases the inherent tension between counsel and client regarding fees.[139]

The Supreme Court, however, has rejected the similar argument that fee negotiations between opposing counsel should be delayed until after

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1378, 1384 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 1979 (1987); West v. Keve, 721 F.2d 91, 94 (3d Cir. 1983).

131. *See* Richerson v. Jones, 551 F.2d 918, 922-23 & n.6a (3d Cir. 1977).

132. *See* Norman v. Housing Authority, No. 87-7763, slip op. at 1354 (11th Cir. Feb. 1, 1988); Alcorn County v. U.S. Interstate Supplies, 731 F.2d 1160, 1166 (5th Cir. 1984).

133. *See* Budinich v. Becton Dickinson & Co., 807 F.2d 155, 157 (10th Cir. 1986) (per curiam) (case-by-case analysis would promote uncertainty "until an inclusive and coherent set of principles could be worked out"), *cert. granted*, 108 S. Ct. 226 (1987); Wright, supra note 113, § 3915, at 313 (case-by-case approach causes "*period* of uncertainty as courts work through questions whether some grounds for recovering fees" are more or less separable from the merits (emphasis added)).

134. *See supra* notes 83-89 and accompanying text.

135. *See Budinich*, 807 F.2d at 157 (adopting bright-line rule but recognizing temporary nature of uncertainty caused by case-by-case approach).

136. *See* Beckwith Mach. Co. v. Travelers Indem. Co., 815 F.2d 286, 290-91 (3d Cir. 1987). The *Beckwith Mach.* court wrote:

> [T]he value in having a bright-line rule is severely compromised when the generality of the rule masks important underlying differences—differences that undermine the long-settled jurisdictional principle that appeals may be taken only from orders that are final in that they have disposed of all parties and of all issues. Permitting the fees award in a case such as this one to be treated separately from the merits order of which it is a part can only lead to piecemeal appeals—a practice long since renounced by every appellate court.

Id. at 291.

137. *See* International Ass'n of Bridge, Structural, Ornamental & Reinforcing Ironworkers' Local Union No. 75 v. Madison Indus., 733 F.2d 656, 659 (9th Cir. 1984).

138. *See id.*

139. *See id.*

the court issues a judgment on the merits.[140] As with attorney-client fee negotiations, such a delay protects the attorney-client relationship. Requiring counsel to delay fee negotiations prevents conflicts of interest between plaintiffs seeking recovery of money damages and attorneys concerned with the size of the fee portion of a settlement.[141] While the Court recognized that the prospect of receiving a certain fee might influence the professional judgment of an unethical attorney in deciding whether to accept a settlement that is satisfactory to the client,[142] the Court accorded greater weight to the defendant's need to ascertain the full extent of his liability as early as possible, noting that ethical counsel could successfully negotiate an appropriate fee settlement.[143] Thus, requiring an attorney to appeal fee issues and merits in the same proceeding benefits the client, who prefers to learn as soon as possible whether he must bear his own attorney's fees.

CONCLUSION

Courts should adopt the case-by-case analysis to determine whether a judgment on the merits is final when attorney's fees are left unquantified. While the bright-line rule has the advantage of clarity resulting in ease of application, the tendency of the case-by-case method to reduce piecemeal review outweighs this benefit. Further, insofar as the case-by-case approach may create temporary uncertainty, courts should focus on the purpose for which they award fees. When fees are intended as a measure of substantive relief, and are awarded as part of the initial determination of liability, they are compensatory in nature, and thus, are integral. When fees are awarded merely to reduce litigation costs without regard to the underlying issues of the case, however, they are collateral. Applying these guidelines will allow courts to solidify their tests and restore predictability to the case-by-case approach. Last, ample protection for parties subject to irreparable harm by delay exists in the statutory and judicial exceptions to the finality requirement. It is only through the case-by-case approach that fee issues integral to a case will be reviewed properly in conjunction with the merits rather than at another time, thus furthering the ends of the finality requirement.

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140. *See* White v. New Hampshire Dep't of Employment Sec., 455 U.S. 445, 453 n.15 (1982).

141. *See id.*

142. *See id.*

143. *See id.* Moreover, the Supreme Court in *White* put faith in counsel to act in a responsible manner. *See id.*