Vanderbilt Law Review

Volume 20
Issue 6 *Issue 6 - November 1967*

Article 3

11-1967

Attorney's Fees: Where Shall the Ultimate Burden Lie?

James H. Cheek, III

NOTES

Attorney's Fees: Where Shall the Ultimate Burden Lie?

I. INTRODUCTION

Unfettered access to the courts is the cornerstone of the American concept of justice, yet even today we are far from achieving this ideal. Recently much progress has been achieved in improved legal services for the poor;[1] but the poor will never have completely free access to the courts unless the American rule that each litigant must bear the burden of paying his own attorney's fees is changed. Surely reform in this area is as vital as in any other, for a legal system which refuses an innocent party full compensation for expenses incurred in asserting his right necessarily denies him full redress for the injury he has suffered.

Since the first note of protest in 1925,[2] a few writers,[3] recognizing the intimate relationship between attorney's fees and full relief for the wronged party, have urged the adoption of some form of the English system, which taxes all costs, including attorney's fees, to the losing litigant. Much of their work went unnoticed and, as a result, the reform movement became quiescent; however, expanding concepts of social responsibility have revived interest in the subject.[4] This note will analyze the reform movement, the conflicting policies involved, and the reasons for the previous failures of reform, with a view toward formulating a meaningful solution to the problem.

1. For an excellent discussion of this "new wave in legal services," see Note, *Neighborhood Law Offices: The New Wave in Legal Services for the Poor*, 80 HARV. L. REV. 805 (1967). The authors suggest that the neighborhood law office furnishes the key for the concept of decentralized legal assistance. It is further suggested that the source of the growing awareness of this problem is an increased realization that equal justice can be accomplished only through increased accessibility of legal services. *See also* Cheatham, *A Lawyer When Needed: Legal Services for the Middle Classes*, 63 COLUM. L. REV. 973 (1963).

2. The first public protest issued against the American system of fees, and in favor of the English system, was the 1925 Report of the Massachusetts Judicial Council. *See First Report of the Judicial Council of Massachusetts*, 11 MASS. L.Q. 7 (1925). For a description of its contents, see text accompanying note 27 *infra*.

3. *See* Avilla, *Shall Counsel Fees Be Allowed?*, 13 CALIF. ST. B.J. 42 (1938); COSWAY, *Attorney's Fees as an Element of Damages*, 15 U. CIN. L. REV. 313 (1941); Ehrenzweig, *Shall Counsel Fees Be Allowed?*, 26 CALIF. ST. B.J. 107 (1951); Coodhart, *Costs*, 38 YALE L.J. 849 (1929).

4. *See* Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966); Kuenzel, *The Attorney's Fee: Why not a Cost of Litigation?*, 49 IOWA L. REV. 75 (1963); Stirling, *Attorney's Fees: Who Should Bear the Burden?*, 41 CALIF. ST. B.J. 874 (1966); Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 U. COLO. L. REV. 202 (1966).

Further, the note will focus upon one aspect of the law on fees that has received remarkably little attention—the interrelation of federal and state laws on fees. As a result of the conflict between the policy of uniformity of result demanded by *Erie* and the policy of a uniform federal procedure established by the Federal Rules, federal courts sitting in diversity suits must decide whether the issue of attorney's fees is "substantive" or "procedural" in order to determine whether federal or state law is to be applied. This problem, accentuated by the fact that courts and authorities are divided on the matter, will be examined in connection with the overall question of who should bear the ultimate burden of attorney's fees.

Throughout this note it is important to keep in mind the distinction between costs and fees. Fees are those charges which a party to a suit must pay his attorney for services rendered in the progress of the case, while costs are those expenses of litigation awarded by statute, usually, but not always, to the prevailing party and taxed against the losing party.[5] Both will be discussed in this note, but the term "costs" will not include fees, since under the American system fees are rarely awarded by statute as costs.

II. The Social Problem

A. *The Historical Background*

Outside the Chancellor's power to award costs and fees to a victorious party,[6] no costs were awarded to parties at early English law.[7] The idea that the losing party should be taxed with costs and fees developed early in the English system.[8] The common law rule as to costs in actions at law was modified in 1275, when the

5. O'Neil v. Kansas City, S. & M. Ry., 31 F. 663, 664 (W.D. Tenn. 1887). Several additional meanings may be attributed to the term "costs." First, it may include all items of litigation expense; second, it may refer only to those items whose actual expense may be taxed as costs; third, it may mean statutory costs, or those costs allowed by statute even though they fail to represent actual costs. *See* Vincennes Steel Corp. v. Miller, 94 F.2d 347, 348 (1938). *See also* Distler, *The Course of Costs of Course*, 46 Corn. L.Q. 76 (1961). In this Note the term is being used in the third sense which is the one used by most practitioners.

6. According to the great weight of authority, the Chancellor's power to award costs originated by statute, 17 Rich. 2, ch. 6. However, courts of equity now can award costs as an inherent power independent of statutory authority. *See* Stallo v. Wagner, 245 F. 636, 638 (2d Cir. 1917); Andrews v. Barnes, 39 Ch. D. 133 (1888); Jones v. Coxeter, 26 Eng. Rep. 642, 2 Atk. 400 (Ch. 1742).

7. 2 F. Pollock & F. Maitland, The History of English Law 597 (2d ed. 1898). At early common law the unsuccessful plaintiff was amerced, with the revenue of the fine going to the crown and not to the prevailing defendant. Further, even if the plaintiff won, the defendant was not liable for any of the costs. *See* Day v. Woodworth, 54 U.S. (13 How.) 362, 371 (1851); Hullock, Law of Costs 2 (1793).

8. For a thorough discussion of the English history of costs and attorney's fees, see Goodhart, *supra* note 3, at 851-72.

Statute of Gloucester[9] awarded costs to successful plaintiffs. Through subsequent legislation, culminating in the Statute of 1607,[10] similar costs were granted to successful defendants. Thus, by the time of the American Revolution, the English system was well developed and courts awarded costs, including attorney's fees, to the prevailing party.[11]

In early colonial America, most courts adopted the classical English rule, whereby costs and fees were awarded to the prevailing party in actions at law.[12] Subsequent statutes, however, limited the recovery of fees to specific maximum amounts, such as "fifteen shillings or one hundred and fifty pounds of tobacco."[13] Moreover, these early courts and statutes never adopted as their basis the theoretical goal of the English system—that of full compensation for the wronged party. Therefore, fees allowed by the early colonial statutes were never increased to keep pace with the continual decline in the value of money.[14] Moreover, states subsequently joining the Union rarely provided for any attorney's fees to be taxed as costs, and in no case

9. 6 Edw. 1, c.1 (1275). This statute originally applied only to an action for land, but through subsequent modification full costs were given to any successful plaintiff in any action at law. *See* Goodhart, *supra* note 3, at 852-53.

10. 4 Jac. 1, c.3 (1607). Professor Goodhart suggests that the slower development of the law which gave costs to a suecessful defendant was due to the amercement of the unsuccessful plaintiff, which was considered a sufficient punishment, though it could not have been of much satisfaction to the victorious defendant. Goodhart, *supra* note 3, at 853.

11. Later, important changes were made in the English system by the Supreme Court of Judicature Acts, 36 & 37 Vict. c.66 (1873), 38 & 39 Vict. c.77 (1875). Under the previous aets, costs followed the action, but these later acts placed the awarding of all costs in the discretion of the court. The amount of costs is determined by the use of complicated schedules in the court rules, and if the parties can not agree upon a cost bill on that basis, a special officer known as a "taxing master" decides the costs. *See* Goodhart, *supra* note 3, at 854-60.

12. *See* C. MCCORMICK, DAMAGES 235 (1935) [hereinafter cited as MCCORMICK.]; Note, *Use of Taxable Costs to Regulate the Conduct of Litigants*, 53 COLUM. L. REV. 78, 80 n.15 (1953), citing Atkinson v. Williams (1670), 3 RECORDS OF THE COURT OF ASSISTANTS, MASSACHUSETTS BAY COLONY 203 (1928); Clarke v. Davis (1662), *id.* at 130; Hakins v. Gooden (1660), *id.* at 86. However, not all writers agree that our colonial courts initially followed the English rule. *See* Goodhart, *supra* note 3, at 873; Note, *Distribution of Legal Expense Among Litigants*, 49 YALE L.J. 699, 700 (1940). *Compare* Ehrenzweig, *supra* note 3, at 108, *with* Ehrenzweig, *supra* note 4, at 798. It is submitted that the more persuasive authority follows the view that the early colonial courts did adopt the English rule as to fees, along with other English procedure, but that the prevailing attitudes of the period toward lawyers and the legal profession were sufficiently strong to prevent the English rule from gaining any lasting support.

13. 5 LAWS OF VIRGINIA 344 (Henning's ed. 1819). *See also* MASS. GEN. LAWS ch. 261, §§ 1, 23 (1932) (enacted 1795, maximum attorney's fee $2.50); COLONIAL LAWS OF N.Y. ch. 185 (enacted 1709, maximum fee of 50 shillings); 2 SOUTH CAROLINA COOPER'S STATUTES 86 (enacted 1694, maximum fee of 16 shillings).

14. *See, e.g.*, DEL. CODE ANN. tit. 10 § 8710 (1953) (enacted in 1825, $2.67 fee awarded for several different tasks); MASS. ANN. LAWS ch. 261, § 23 (1956) (enacted 1795, maximum fee of $2.50); N.H. REV. STAT. ANN. ch. 525, § 13 (1955) (enacted 1815, awards $1 attorney's fee); PA. STAT. ANN. tit. 17, § 1635 (1962) (enacted in 1821, fee of from $1.50 to $3.00 awarded in prosecution of suit to judgment).

made an adequate award.[15] Consequently, early in the history of our judicial system, the idea that fees should not be taxed as costs to the losing party became firmly imbedded in our tradition; and even where fees were allowed as costs, the sums remained nominal.

There is some disagreement concerning why the American states developed a different rule. Professor Ehrenzweig has suggested that this difference is due merely to an historical accident which occurred when the state legislatures placed fixed limits on the amounts of fees which could be recovered.[16] He reasons that this mistake caused lawyers and courts gradually to forget the real purpose and meaning of those amounts.[17] However, this explanation ignores the motivating forces which initially induced those legislatures to place specific limits on the amounts recoverable. Other writers have carried their analysis one step further toward the origin of the problem, and have submitted that the determining factors in the abandonment of the English system were the distrust and hostility which early Americans felt toward lawyers and the legal profession.[18] Undoubtedly this early suspicion of lawyers, which was induced in a large part by the feeling that the law was so simple a body of rules that counsel was not needed to present a case, was influential in the shaping of restrictive legislation; yet this attitude was simply a product of the social and economic conditions of the time. The real basis of the rejection of the English rule lies not in mere historical accident nor even in the distrust of lawyers, but cuts much deeper into the basic philosophies generated by the nature of our society in its early history.[19]

Although it is true that those who formed our legal system drew heavily upon the English tradition, it is equally true that this tradition was tempered by the particular attitudes of early American

15. In New Hampshire, for example, the prevailing party's recovery even today is limited to the sum of $1. N.H. REV. STAT. ANN. ch. 525, § 13 (1955); *see* Jacques v. Manchester Coal & Ice Co., 78 N.H. 248, 100 A. 47 (1916). *See also* KY. REV. STAT. ANN. § 453.060 (1963) (fee of $2.50 to $5 at law; $5 to $10 in equity); MINN. STAT. ANN. § 549.02 (1945) (costs allowed of $5 to $10).

16. *See* Ehrenzweig, *supra* note 4, at 798-99. In faet, Professor Ehrenzweig uses the specific example of the New York legislature of 1848, which, he asserts, made "the fatal mistake of fixing the amount recoverable in dollars and cents rather than in percentages of the amount recovered or claimed."

17. In summation, Professor Ehrenzwcig comments that "it was this process of gradual forgetting rather than a deep-seated moral argument that has apparently caused the abolition of the prevailing party's right to the recovery of his counsel fees." *Id.* at 799.

18. *See* Goodhart, *supra* note 3, at 873; Note, *Use of Taxable Costs to Regulate the Conduct of Litigants*, 53 COLUM. L. REV. 78, 80 (1953); Note, *Distribution of Legal Expense Among Litigants*, 49 YALE L.J. 699, 701 (1940).

19. That something more fundamental underlies the uniqueness of our system than mere attitudes may be supported from an examination of the social and intellectual histories of our country. *See generally* R. CARRINGTON, A MILLION YEARS OF MAN (1963); L. HARTZ, FOUNDING OF NEW SOCIETIES (1964); F. TURNER, THE FRONTIER IN AMERICAN HISTORY (1920).

life.[20] Our early society was characterized by the sparsely settled frontier community and by the rugged individualistic spirit of the pioneers who lived in those communities.[21] The special effect this attitude has had upon our system of judicial administration cannot be underestimated, and is well stated in the following passage from Dean Pound's *The Spirit of the Common Law*:

> Its [our legal tradition's] respect for the individual makes procedure, civil and criminal, ultracontentious, and preserves in the modern world the archaic theory of litigation as a fair fight, according to the canons of the manly art, with a court to see fair play and to prevent interference. Moreover it is so zealous to secure fair play to the individual that often it secures very little fair play to the public. It relies on individual initiative to enforce the law and vindicate the right. It is jealous of all interference with individual freedom of action, physical, mental, or economic. In short, the isolated individual is the center of many of its most significant doctrines.[22]

It is this early philosophy of intense individualism which, it is submitted, underlies the development of the American rule and the subsequent rejection of the English rule on fees. In our early days, the pioneer's very existence depended upon his individual ability to cope with the particular situation at hand. It was only natural that when legal disputes arose, he relied upon himself to achieve justice inside the courtroom, or outside it, rather than upon those "characters of disrepute"[23] who demanded payment for their services. Lawyers were clearly a luxury and the legal system was a great forensic battlefield of individual rights. Further, the assertion of individual rights was so important to the early American that litigation flourished and was encouraged under "[w]hat Dean Wigmore has called the sporting theory of justice, the idea that judicial administration of justice is a game to be played to the bitter end."[24] Inherent in the rules of this "sport" is the idea from which our rule on fees developed, that is, the idea that each individual must bear whatever burdens,

20. One explanation for this fact is that a new government must "be the creation of a willingness in its citizenry to submit" to the system designed and established for the resolution of their disputes. Thus, "[a]t this stage of development, concern over points of justice . . . is less important than encouraging persons into the established system." Kuenzel, *supra* note 4, at 81.

21. Dean Pound has emphasized the great impact the early American concern with individual rights has had on our legal tradition, and much of the following analysis in the text is based upon his conception of our legal tradition. *See* R. POUND, THE SPIRIT OF THE COMMON LAW (1921). Turner, in his essay on the significance of the pioneer, also concluded that the peculiarity of many American institutions may be traced from the development of our nation as a frontier society. *See* F. TURNER, *supra* note 19.

22. R. POUND, *supra* note 21, at 13-14.

23. *See* C. WARREN, HISTORY OF THE AMERICAN BAR 4 (1911).

24. R. POUND, *supra* note 21, at 127. In fact, the courthouse was looked upon as an arena of entertainment to which the public flocked to cheer on their favorite in the battle of wits. Fair play during this "game" was demanded, and even the fist fights which broke out in the courthouse were not interfered with. *See* MCCORMICK 258.

including all costs, litigation might cause.[25] Thus, the early American not only favored litigation but believed that each litigant was to wage his fight for justice by his own means. It was due to this attitude, which was clearly fashioned by the demands of a frontier society, that we chose to develop our own rule on fees rather than adopt the one favored by the English legal tradition.

B. *The Reform Movement*

As our civilization became more and more centralized in the great cities, concern with the individual necessarily gave way to a growing concern for society in general. Man was no longer considered in isolation, but rather his rights were balanced with his fellow man's. Thus, if one injured another, the latter should be compensated fully for his losses. As a consequence of this change in attitude, reform of our judicial system, including its rules on fees, received increasing attention. Furthermore, the phenomenal increase in court congestion emphasized the need for reassessing many concepts of judicial administration. Thus, a few writers, feeling our society no longer needed the kind of "fair play" demanded by a philosophy of individualism, urged that social righteousness, plus the practical necessity of relieving court congestion, demanded a change in our rule on fees.[26]

In the first public pronouncement stressing the need for a new system of costs, the Judicial Council of Massachusetts made the following comment:

> In England the costs which the unsuccessful party has to pay consist (in substance) in the expense he has wrongfully made the other party incur; in other words, the unsuccessful party in England has to pay his opponent's lawyer's bill as well as his own. The possibility of having to pay the lawyer's bills of both parties to the action makes a plaintiff think twice before he sues out a writ and a defendant think twice before he defends an action which ought not be defended, and that is a direct deterrent on the number of cases put or kept in suit. . . . There is another reason for adopting the principle of substantial costs . . . [and] that is that it does justice. . . . On what principle of justice can a plaintiff wrongfully run down on a public highway recover his doctor's bill but not his lawyer's bill? And on what principle of justice is a defendant who has been wrongfully haled into

25. "Fair play" seemed to demand that no additional burden be placed on the party unfortunate enough to be the loser. This attitude was clearly visible in many of the early judicial decisions. For example, in St. Peter's Church v. Beach, 26 Conn. 355 (1857), the court stated that "[t]he parties in these cases should be encouraged to appeal to the court on equal terms. The defendant should not be punished by being compelled to pay not only his own counsel but such as the plaintiff may please to select to advocate his claims against the defendant, but each should be left to conduct his own case, and in his own way, and at his own expense beyond what the statute allows in a bill of costs to the prevailing party." *Id.* at 366-67.

26. *See* note 3 *supra.*

court made to pay out of his own pocket the expense of showing that he was wrongfully sued?[27]

Later advocates of reform continued to emphasize that taxing of fees to the losing party served the cause of justice and relieved court congestion by discouraging unfair and unnecessary litigation.[28] There is much merit in these ideas, for surely the possibility of having to pay fees of both litigants would encourage a plaintiff to reconsider groundless litigation, or a defendant to consider carefully defending an action justifiably brought, and would consequently encourage compromises and settlements. Thus, one may see a shift from the early public attitude of encouraging litigation as a means of asserting individual rights, to the more modern social concept of encouraging settlement and compromise.[29]

Moreover, the shift of emphasis from man's importance as an individual to his role as a member of society—perhaps best illustrated by "The Great Society" and its "War on Poverty"—emphasized the need for justice to be equally available to all, whether rich or poor.[30] Crucial to this concept is a rule which places the burden of fees on the wrongdoer who has caused the litigation. Under our present rule, for example, the legal rights of the "little" man of our society are not equated with those of the rich,[31] since a party may utilize a financial advantage to force, by delays and extended litigation, his less fortunate opponent into an unfavorable settlement or into abandoning his valid claim.[32] Ironically an outstanding example of abuse

27. *First Report of the Judicial Council of Massachusetts*, 11 MASS. L.Q. 7, 63-64, (1925).

28. *See* Avilla, *supra* note 3, at 43; Ehrenzweig, *supra* note 3, at 109; Geller, *Unreasonable Refusal to Settle and Calender Congestion—Suggested Remedy, Report of Committee on Comparative Procedure and Practice*, 1962 ABA INTERN'L & COMP. LAW SECTION 117, at 134; Kuenzel, *supra* note 4, at 80. It is interesting to note that this same result has been urged as a reason for maintaining the present system, since some writers retain the idea that one must encourage litigation and avoid the encouragement of settlements. *See generally* Note, *Distribution of Legal Expense Among Litigants*, *supra* note 18, at 702.

29. In recent years the constantly reiterated policy of our courts has been in favor of disputed claims being settled outside the courtroom. *See* Bakke v. Bakke, 242 Iowa 612, 47 N.W.2d 813 (1951); Johnson v. Norfolk, 76 S.D. 565, 82 N.W.2d 656 (1957).

30. Since the injured party must bear the expense of litigation, only one who is financially able can seek justice, despite the fact that the one who can afford justice will be least likely to need it. For the view that the abolition of our rule on fees is an essential part of the War on Poverty, *see* Ehrenzweig, *supra* note 4, at 793.

31. An example of this inequity is given by Professor Ehrenzweig from his own personal experience as a penniless Austrian immigraut who was cheated out of his belongings by an American moving company, and yet was prevented from recovering his goods by the cost of his attorney's fees. The "little" man today, he asserts, is only given legal aid, not legal rights which he can enforce. *See* Ehrenzweig, *supra* note 4, at 792, 796.

32. One writer has suggested that a large number of disputed claims remain in our courts not only to seek proper remedies, but also to gain the financial advantage

involves the Government, as many individuals and corporations will yield to tax and antitrust claims simply because the maximum fine would be much less than the cost of litigation.[33] Additionally, many feel that the ideal of justice is to make the wronged party whole, at least so far as may be done by money, and that this ideal may be reached only if the wronged party is relieved of all litigation expense.[34] For example, in answer to the argument that attorney's fees are too remote to be included in damages,[35] it is urged that due to today's complex legal system which necessitates hiring a lawyer,[36] fees may be foreseen as a direct result of a wrong, and thus must be included in the judgment if a party is to be fully compensated.[37] Thus, at the heart of the reform movement lie two fundamental concepts: (1) the idea that conflicts in our contemporary society should be settled by compromise and adjustment rather than by litigation; and (2) the idea that aims of justice, which can be achieved only if the wronged party is made whole, are best served by a legal system available to all on equal terms.

Such suggestions for reform of our present rule became even more persuasive when it is realized that the United States is one of the few countries in the world which does not allow the prevailing party to recover some part of his attorney's fees. Most countries, such as

---

realized by being there. Kuenzel, *supra* note 4, at 78. The author further suggests that an attorney so extracting a financial advantage may violate Canon 30 of the ABA Canons of Professional Ethics, which states that "[t]he lawyer must decline to conduct a civil cause or to make a defense when convinced it is intended merely to harass or to injure the opposite party or to work oppression or wrong." *Id.* at 79. Such an abuse, it is submitted, is encouraged by our present rule on fees. *Id.* at 80.

33. For example, in two recent antitrust cases, 29 oil firms laid out $10,000,000 in expenses before the case was thrown out of court, and three salt firms spent $750,000 in defending charges which would have carried fines of only $150,000. *See Growing Issue: High Cost of Justice,* NATION'S BUS., May, 1963, at 78, cited in Kuenzel, *supra* note 4, at 86 n.29. Similar situations have arisen where the Government asserts a tax deficiency which would be far less costly to pay than to contest. This abuse surely should be avoided.

34. A typical judicial expression of this attitude is found as follows in Sullivan v. Old Colony St. Ry., 197 Mass. 512, 516, 83 N.E. 1091, 1092 (1908); "The rule of damages is a practical instrumentality for the administration of justice. The principle on which it is founded is compensation. Its object is to afford the equivalent in money for the actual loss caused by the wrong of another." *See also* Stoebuck, *supra* note 4, at 202 n.1.

35. *See* Stapley Co. v. Rodgers, 25 Ariz. 308, 216 P. 1072 (1923); St. Peter's Church v. Beach, *supra* note 25; United Power Co. v. Matheny, 81 Ohio St. 204, 90 N.E. 154 (1909).

36. It is glaringly apparent that our legal system demands a lawyer at every stage of its criminal proceedings. *See* Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Gidcon v. Wainwright, 372 U.S. 335 (1963). Additionally, the great complexity of today's everyday life requires the presence of lawyers in civil matters which, 60 years ago, would have been handled by the parties themselves.

37. It should be evident that for a wronged party to be made whole, all expense directly caused by the wrong committed should be borne by the wrongdoer. *See* Cosway, *supra* note 3, at 315; Stirling, *supra* note 4, at 877.

Austria,[38] Switzerland,[39] France,[40] and Hungary,[41] allow fees to the prevailing party although the manner in which the awards are made varies widely. The use of these rules on fees has apparently worked with some success, especially in relieving crowded courts by encouraging settlement.[42]

C. *The Failure of the Reform Movement*

In spite of the fact that the arguments in favor of reform are quite persuasive, the movement has not been notably successful. Unquestionably, the early philosophy of fair play and individualism embodied in Wigmore's "Sporting Theory of Justice" still acts as a major obstacle to reform. The bar in its innate conservatism has always resisted change, and as a result has been reluctant to depart from the tradition of encouraging litigation.[43] Thus, despite the obvious need to relieve our system of judicial administration from the strains of pioneer attitudes, many of the bar firmly believe that "the right to sue without deterrence by the specter of the possibility of paying an adversary's legal fees is part of our democratic tradition and a bulwark of equality," and feel it is unfair further to penalize the losing party.[44]

38. Generally, the Austrian rule follows the English tradition of awarding fees to the prevailing party. The court decides which expenses are necessary or reasonable on the basis of a bill which the attorneys must submit at the end of a trial; if it appears a party is not fully defeated, then the court will apportion the expenses pro rata. *See* Baeck, *Imposition of Fees of Attorney of Prevailing Party Upon the Losing Party under the Laws of Austria, Report of Committee on Comparative Procedure and Practice*, 1962 ABA INTERN'L & COMP. LAW SECTION 119; Schima, *The Treatment of Costs and Fees of Procedure in the Austrian Law, Id.* at 121.

39. Although each Swiss canton has its own procedure, the general rule in each is that the court in its discretion decides which party bears the costs, including attorney's fees. *See* Baeck, *Imposition of Legal Fees and Disbursements of Prevailing Party Upon the Losing Party—Under the Laws of Switzerland, Id.* at 124.

40. Since 1667, the French have required the unsuccessful party to pay court costs, which include fees for the services of *avoués* (solicitors), though not of *avocats* (barristers). However, the court hearing the case does in many instances have the power to allocate either of the fees in any manner it deems fit. *See* Freed, *Payment of Court Costs by the Losing Party in France, Id.* at 126.

41. In Hungary the loser must pay the winner's fees, but only in proportion to his actual defeat which is to be determined by the court. Since the Communist takeover, the court's discretion has been limited by the scale fixed by the state organization of attorneys, and the importance of fees has declined somewhat since attorneys are considered state employees. *See* Dietz, *Payment of Court Costs by the Losing Party under the Laws of Hungary, Id.* at 131.

42. "That the Continental systems are accepted and workable is attested by an Austrian lawyer, who writes that, while there is some criticism of the fixed rates of allowable fees, 'it can be said that no change of the system as such has ever been requested by anyone.'" Schima, *supra* note 38, at 124.

43. An additional barrier to change, it is suggested, is the quite natural fear on the part of attorneys that the resulting decrease in litigation would correspondingly decrease their fees and income.

44. Geller, *supra* note 28, at 118.

So deeply ingrained in our legal tradition is this belief in the assertion of individual rights by litigation that it may be included in our constitutional concept of due process. The following language of Mr. Justice Black could support such an assertion:

> [T]he Due Process Clause embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due Process is that which comports with the deepest notions of what is fair and right and just. The more fundamental the beliefs are the less likely they are to be explicitly stated. . . . In applying such a large, untechnical concept as "due process," the Court enforces those permanent and pervasive feelings of our society as to which there is compelling evidence of the kind relevant to judgments on social institutions.[45]

Clearly those who believe that an individual has an inalienable right of free access to the courts, which access is not to be blocked by the fear of having to pay an opponent's fees, would assert that due process, as defined above, demands the retention of the present rule. Such judicial attitude is well exemplified in the following statement by the Supreme Court:

> It has not been accident that the American litigant must bear his own cost of counsel and other trial expense save for minimal court costs, but a deliberate choice to insure that access to the courts be not effectively denied those of moderate means.[46]

Although most would agree that the concept that every man has a right to go to the courts is included in due process as defined, the contention that taxing fees to the losing party would violate due process is subject to two criticisms: (1) This assertion is premised upon the belief that the fear of paying the fees of another would deter a man from the courts. Such a view assumes that our judicial decisions are more often wrong than right, for otherwise a man with a just claim would surely not fear having to pay his opponent's costs.[47] (2) Such

45. Solesbee v. Balkcom, 339 U.S. 9, 16 (1950).

46. Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 236 (1964) (Goldberg, J., concurring opinion). In the same case, Mr. Justice Black indicated that the right to litigate is not one that should be so burdened, when he commented that: "Items proposed by winning parties as costs should always be given careful scrutiny. Any other practice would be too great a movement in the direction of some systems of jurisprudence that are willing, if not indeed anxious, to allow litigation costs so high as to discourage litigants from bringing lawsuits." *Id.* at 235.

47. In an oft-quoted passage, Professor Goodhart commented: "Is not the answer to this that the costs must be paid by one party or the other, and that . . . it is at least more probable that the losing party was in the wrong? If New Jersey justice is so much a matter of luck, it hardly seems worthwhile to have courts and lawyers; it would be cheaper, and certainly less dilatory, to spin a coin." Goodhart, *supra* note 3, at 877. Other writers suggest that even if the unjust decision is reached, one cannot ignore the fact that at the same time a great majority of litigants, who do justly lose a case, unjustly burden their prevailing opponent with the heavy burden of attorney's fees. *See* Ehrenzweig, *supra* note 4, at 797.

a conclusion is equally applicable to the present rule, since its operation discourages just claims by those who cannot expect to recover more than the expense to litigate.

An additional factor in the reluctance to change our rule is the large part of the bar which relies upon the contingent fee for a major portion of its income.[48] A major, if not the sole, cause of our congested court calendars is the vast number of personal injury cases which are handled on a contingent fee basis.[49] While contingent fees do serve a needed function in our society by providing a means for the poor to litigate their claims, surely the necessity of a contingent fee system is in part attributable to the refusal of our system to recognize fees as costs. The contingent fee system is unique to our country, probably because most countries have a system of fees which does not require the aid of contingent fees to enable the poor to litigate a valid claim.[50] The bar is very reluctant to adopt a rule, however, that would eliminate a major source of its income. This factor, plus the force of legal tradition, has maintained an emphasis on litigation and a desire to retain the present rule on fees.

D. *Qualifications of the General Rule*

Despite the general rule that a winning party cannot recover his attorney's fees, in some situations courts may tax fees as costs to the losing party either through court-created exceptions or through special statutory provisions. The court-created exceptions have been based either upon the court's inherent equity power or upon strong policy considerations, while in certain other situations both federal and state legislatures have deemed it wise to award fees to the prevailing party.

Federal courts are endowed with those equitable powers possessed by the English Chancery Court,[51] among which is the power to grant

48. The large plaintiffs' bar has resulted necessarily in a large defendants' bar. Together they form a large vested interest in retaining the contingent fee system. That this interest is strong today, *see* Knepper, *Defense Foreword*, 1 AM. JUR. TRIALS xv (1964); Lambert, *Plaintiff's Foreword*, 1 AM. JUR. TRIALS xi (1964).

49. For an excellent treatment of contingent fees, see F. MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES (1964). *See also* Geller, *supra* note 28.

50. In most countries contingent fees are illegal as a champertous deviee. Additionally, there exists in these countries strong public policy against the increased litigation caused by a contingent fee system. Early economic and social pressure, generated by a system of fees which resulted in an injustice to the poor who could not pay their attorney to press a valid claim, resulted in the development of the contingent fee system in the United States. Comment, *Are Contingent Fees Ethical Where Client Is Able To Pay a Retainer?*, 20 OHIO ST. L.J. 329 (1959); *see* F. MACKINNON, *supra* note 49, at 36-38.

51. Payne v. Hook, 74 U.S. (7 Wall.) 425 (1869); Fontain v. Ravenel, 58 U.S. (17 How.) 369 (1855); Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518 (1852). For a complete examination of this equitable power to

costs, including attorney's fees. In *Guardian Trust v. Kansas City Southern Ry.*,[52] a federal judge, after an exhaustive study of the limits of equity jurisdiction, concluded that "it is clearly established that the federal courts of equity have jurisdiction to allow *in proper cases* costs 'as between solicitor and client.' "[53] There is much uncertainty, however, as to what those "proper cases" are, and in only two areas has this equitable power consistently been applied. First, it is well established that one who has created, increased, or protected a common fund which is in the hands of the court for distribution to claimants is equitably entitled to be reimbursed from the fund for his reasonable attorney's fees.[54] Second, where litigation is clearly vexatious and in bad faith, the court has the equitable power to tax counsel fees and costs to the losing party.[55] In this latter situation, however, the power has been sparingly exercised.[56] Similarly, state courts have exercised their equitable power to award fees as costs in these two situations.[57]

Several other judicial exceptions to the general rule have developed. For example, it is well settled that where one has wrongfully caused another to defend or prosecute an action, then the latter can recover all expenses, including attorney's fees reasonably incurred by him in that action.[58] Moreover, the policy of upholding the parties' inten-

---

grant costs, see Guardian Trust Co. v. Kansas City S. Ry., 28 F.2d 233, 241 (8th Cir. 1928), *rev'd on other grounds*, 281 U.S. 1 (1929).

52. Guardian Trust Co. v. Kansas City S. Ry., *supra* note 51.

53. *Id.* at 246 (emphasis added). The case specifically held that a federal court may award fees where a fiduciary has incurred expense in protecting property against groundless actions.

54. *See* Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939) (protection of trust funds); Trustees of Internal Improvement Fund v. Greenough, 105 U.S. 527 (1882) (creditor's suit to protect secured property held by trustee); Drain v. Wilson, 117 Wash. 34, 200 P. 581 (1921)(recovery of fund for an estate). *See also* McCormick 237-39; Annot., 49 A.L.R. 1149 (1927).

55. Guardian Trust Co. v. Kansas City S. Ry., *supra* note 51; Gazan v. Vadsco Sales Corp., 6 F. Supp. 568 (E.D.N.Y. 1934)(fees taxed against plaintiff who lent his name to vexatious stockholder's suit). The Sprague case, *supra* note 54, has been interpreted to approve the idea that fees may be awarded not only in a common fund situation, but also in the case of vexatious conduct or bad faith. Note, *Distribution of Legal Expense Among Litigants*, 49 Yale L.J. 699, 708 (1940).

56. *See* Oelrichs v. Spain, 82 U.S. (15 Wall.) 211 (1872) (fees not awarded under injunction bond); Byram Concretanks, Inc. v. Warren Concrete Prods. Co., 374 F.2d 649 (3d Cir. 1967)(no fees allowed to successful defendant in vexatious private antitrust suit); Gold Dust Corp. v. Hoffenberg, 87 F.2d 451 (2d Cir. 1937)(no fees allowed for successful defendant of bad faith trademark suit). The policy which caused reluctance here is probably the same which has caused the retention of our rule, *i.e.*, the principle of free access to the courts demands that all must be allowed to assert their claims without fear of penalty more severe than simple defeat.

57. *See* Strang v. Taylor, 82 Ala. 213, 2 So. 760 (1887); Weigand v. Alliance Supply Co., 44 W. Va. 133, 28 S.E. 803 (1897). For a complete list of both federal and state courts, *see* Annots., 49 A.L.R. 1149 (1927), 107 A.L.R. 749 (1937).

58. *See* McCormick 246-52; Restatement of Torts § 671(b) (1938); Restatement of Contracts § 334 (1932); Annot., 45 A.L.R. 2d 1183 (1956). For example,

tions enables litigants to contract that the losing party will reimburse the other for expenses incurred during litigation,[59] or each may agree to give a bond which will cover attorney's fees.[60] Furthermore, due to the special duty of a husband to support his wife, most courts have required the husband to pay the wife the fees involved in the prosecution or defense of suits for divorce or separation.[61]

Many federal and state statutes have been passed allowing the recovery of counsel fees in specified matters. In the federal area, Congress has provided for the recovery of fees by the winning litigant in certain actions under the antitrust,[62] copyright,[63] and patent[64] laws and to a limited degree under the statutes regulating interstate com-

---

where one is forced to incur the expense of litigation by another's fraud or other tortious conduct, or by another's breach of contract or duty, the former in a new action may recover attorney's fees incurred in the prior action. For cases where persons were wrongfully forced to incur litigation by another's tortious activity, see Turner v. Zip Motors, Inc., 245 Iowa 1091, 65 N.W.2d 427 (1954)(fees recovered from defendant who caused plaintiff to defend action of replevin for goods defendant wrongfully sold); McOsker v. Federal Ins. Co., 115 Kan. 626, 224 P. 53 (1924)(plaintiff recovered fees incurred in defending suit by BFP of insurance premium notes fraudulently taken from plaintiff by defendant). For cases where persons were wrongfully forced to bear the expenses of litigation by another's breach of contract or duty, see Edwards v. Beard, 211 Ala. 251, 100 So. 101 (1924)(recovery by buyer of goods sold with warranty of title where third party successfully established his claim); Seitz v. People's Savings Bank, 140 Mich. 106, 103 N.W. 545 (1905)(recovery by land purchaser who, relying upon defendant's covenants of title, unsuccessfully defended his title).

59. Generally there is no question that parties may contract to pay the fees of another, but problems arise in interpreting the scope of the contract. *See* Eastman v. Sunset Park Land Co., 35 Cal. App. 628, 170 P. 642 (1918). *See also* MCCORMICK 253.

60. Such bonds are commonly given to serve the issuance of injunctions, attachments, writs of replevin and the like, and contain covenants to pay "all expenses" if the writ is wrongfully issued.

61. *See* Cason v. Cason, 158 Ga. 395, 123 S.E. 713 (1924); Jensen v. Jensen, 119 Neb. 469, 229 N.W. 770 (1930); Richard v. Richard, 142 Okla. 302, 286 P. 900 (1930). This rule has been codified in the majority of states. *See, e.g.*, CAL. CIV. CODE § 173.3 (West Supp. 1954)(reasonable fees to innocent party in divorce); MINN. STAT. ANN. § 518.14 (Supp. 1966)(reasonable fees to wife in divorce); WASH. REV. CODE ANN. § 26.08.090 (1961)(reasonable fees to either party in divorce).

62. *See* 15 U.S.C. § 15 (1964), which allows any person injured by reason of any violation of the antitrust laws treble damages and the cost of the suit, including reasonable attorney's fees. However, even with this explicit statutory authorization, courts have been relnctant to award fees in cases where only injunctive relief is granted. *See* Decorative Stone Co. v. Building Trades Council, 23 F.2d 426 (2d Cir. 1928); Clabaugh v. Southern Wholesale Grocers' Ass'n, 181 F. 706 (C.C.N.D. Ala. 1910). Similarly, successful defendants in private treble damage suits have been denied recovery of fees. *See* Byram Concretanks, Inc. v. Warren Concrete Prods. Co., *supra* note 56; Gillam v. A. Shyman, Inc., 205 F. Supp. 534 (D. Alas. 1962).

63. 17 U.S.C. § 116 (1964)(reasonable fees may be awarded as costs).

64. 35 U.S.C. § 285 (1964)(reasonable fees awarded in exceptional cases). It is interesting to note that although Congress has provided for fees in copyright and patent laws, it has not done so in the trademark laws. *See* Maier Brewing Co. v. Fleischman Distilling Corp., 539 F.2d 156 (7th Cir. 1966), *aff'd*, 386 U.S. 714 (1967).

merce,[65] trust indentures,[66] and securities.[67] Where Congress has not specifically provided for recovery, it is clear that a court will not award fees to the successful party in an action under a federal statute.[68]

Although the majority of states either have no general provision for recovery of fees or have retained in their statutes the amounts set in earlier times which are now quite inadequate compensation,[69] some states in recent years have enacted provisions modifying these restrictions. Alaska, for example, allows the supreme court to determine at their discretion what costs, including attorney's fees, shall be allowed the prevailing party in any case.[70] Other states, although permitting the recovery of fees, have placed specific limitations on the court's discretion in awarding fees as costs.[71] In addition, despite the absence of general legislation, most states have enacted special attorney's fees statutes which direct that "reasonable" fees be awarded the prevailing party in certain limited types of actions. The most common situations where such fees are allowed are actions against insurance companies which do not pay claims promptly[72] and actions against carriers for damages to freight or property.[73] Among the numerous other classes sometimes selected are workmen's compensation cases,[74] eminent domain proceedings,[75] and statutory lien fore-

65. 49 U.S.C. § 16(2) (1964)(reasonable fees in action to enforce ICC award); 49 U.S.C. § 908(b) (1964)(reasonable fees in suit against water carrier for violation of act).

66. 15 U.S.C. § 77www (1964) (reasonable fees).

67. 15 U.S.C. § 77k (1964) (reasonable fees); 15 U.S.C. § 78i (1964) (reasonable fees).

68. *See* Philip v. Nock, 84 U.S. (17 Wall.) 460 (1873); Teese v. Huntingdon, 64 U.S. (23 How.) 2 (1860); Maier Brewing Co. v. Fleischman Distilling Corp., *supra* note 64. Although there is no current decision in point, it may be that courts could award fees under the previously discussed equitable power or one of the court-created exceptions.

69. *See* notes 14 & 15 *supra* and accompanying text.

70. ALASKA STAT. § 9.60.010 (1962). Another modern example is the New York statute which allows the court in its discretion to award sums as expenses in extraordinary or difficult cases. N.Y. CIV. PRAC. LAW § 8303 (McKinney 1963).

71. *See, e.g.,* GA. CODE ANN. § 20-1404 (1965) (fees awarded by jury only if defendant acted in bad faith and jury has awarded fees to plaintiff); NEV. REV. STAT. § 18.010 (1965) (fees awarded only if amount sought to be recovered does not exceed $3000).

72. *See* TEX. INS. CODE ANN. art. 3.62 (1963); FLA. STAT. ANN. § 627.0127 (1959). For decisions interpreting such statutes, see Fidelity Mut. Life Ass'n v. Mettler, 185 U.S. 308 (1902); Hartford Fire Ins. Co. v. Wilson & Toomer Fertilizer Co., 4 F.2d 835 (5th Cir. 1925).

73. *See, e.g.,* TENN. CODE ANN. § 65-1230 (1955); TEX. REV. CIV. STAT. ANN. art. 2226 (1964).

74. *See, e.g.,* CONN. GEN. STAT. REV. § 31-127 (1962); MINN. STAT. ANN. § 176.511 (1961); TENN. CODE ANN. §§ 50-1019, 50-1020 (1955).

75. *See, e.g.,* CAL. CIV. PROC. CODE ANN. § 1255a (West 1961); MINN. STAT. ANN. §§ 117.34, 117.35 (1961).

closures.[76] However, in these areas of statutory authorization, one problem of judicial administration remains, and that is the determination of what constitutes "reasonable" expenses. Nevertheless, courts have not found this to be insurmountable,[77] and these statutes based on "reasonableness" have worked very satisfactorily.[78]

E. *Conclusions and Solutions*

Although it may be argued that due to the above exceptions to the general textbook rule, our system of judicial administration would not be altered substantially by a new rule, the need for change clearly remains. Fees, constituting the greatest single expense of a litigant, have an immense impact on litigation in our judicial system. In fact, the fundamental choice of whether to litigate is substantially affected by the way in which the financial costs of litigation are distributed. Although many contend that our present rule must be retained because it encourages litigation and gives each man an inalienable right to go to court, such a view disregards the fact that many, if not more, potential litigants are denied access to the courts because litigation expenses would exceed any amount which could be recovered. True, the contingent fee has been devised to aid those who cannot afford litigation, but in many ways its results have been unsatisfactory, since the contingent fee has been a major impetus of litigation and, thus, of the court congestion which plagues our judicial system. Our system of fees, which in effect denies the basic rights to many by allowing the innocent injured party to go uncompensated, creates nothing but dissatisfaction and disrespect for the law and the legal profession. As the importance of legal advice and representation increases, the public will surely demand a more effective system of justice. If the bar continues to neglect needed reform, not only in its system of fees but also in the availability of legal services, the legal profession could conceivably suffer the same fate as did the medical profession—that is, some form of "Legicare," a Government-

76. *See, e.g.*, MINN. STAT. ANN. § 514.14 (1961); TENN. CODE ANN. §§ 29-202, 29-203 (1955); WASH. REV. CODE ANN. § 60.08.050 (1950).

77. Generally, the courts have used Rule 12 of the Canons of Professional Ethics as a guide to what constitutes reasonableness. Rule 12 mentions a number of factors to be considered, namely, time spent, difficulty of the question, skill required, loss of other employment, customary charges, amount involved, benefit resulting, certainty of fee and nature of client. For an analysis of courts using these factors as measuring rods, see 6 U. CHI. L. REV. 484 (1936).

78. One federal judge, for example, has commented that "it is possible to arrive at a proper charge . . . without much difficulty." *In re* Osofsky, 50 F.2d 925, 927 (S.D.N.Y. 1931). For an analysis of the problem, see Note, *Distribution of Legal Expense Among Litigants*, 49 YALE L.J. 699, 711 (1940), which concluded that "the task has not been highly complicated and in general the results have not aroused serious opposition."

financed legal service for all.[79] Undoubtedly a system of legal service offices established by the Government would improve the accessibility of justice, but surely our democratic tradition is better served if the answer comes from within the profession. Thus, the legal profession must act out of both professional responsibility and self-interest, or the Government may well be forced to act in its place.

Before effective reform can be undertaken, the need for a change in our rule must be studied in light of the two different philosophical forces which underlie the problem. On the one hand our legal tradition is closely tied with our system of settling conflicts by litigation, while on the other hand, as our civilization has matured into the complicated society of today, we have begun to realize the necessity of settling conflicts by adjustments and compromise. Our judicial administration must be modernized to meet this necessity.[80] Our courts are clogged with personal injury cases; many are deterred from bringing suits on just claims by the expense they must bear; others will settle or withdraw a valid claim due to the long delays which mean greater expense in fees. Surely a more enlightened system would discourage the bringing of vexatious suits, would encourage the settlement and compromise of the doubtful claim, and would assure litigation of the bona fide claims. Our present rule as to fees accomplishes none of these objectives.

Once the reasons that the existing rule is unsatisfactory are fully grasped, then the alternatives of reform must be considered. The English system may seem at first glance to be the solution. Yet this system not only relies too heavily upon lengthy detailed schedules of fees, but also is subject to the following criticisms: (1) a litigant may be ruined if he is not successful; (2) justice is not completely black and white, and it is difficult to say that all the rights are on the side of the winning party; (3) due to the great technicalities of our system, it is possible for a party with all the merits to lose; (4) risk of losing may well deter any doubtful litigant from asserting his rights.

Professor Ehrenzweig has suggested that a statutory scheme of percentage compensation for each service performed would be best;[81]

79. *See* Bradway, *Will "Socialized Law" Be Next?*, 29 J. AM. JUD. SOC'Y 13 (1945); Note, *Providing Legal Services for the Middle Class in Civil Matters: The Problem, The Duty and a Solution*, 26 U. PITT. L. REV. 811, 813 (1965).

80. This point was emphatically stated by Professor Cheatham: "The law and its institutions change as social conditions change. They must change if they are to preserve, much less advance, the political and social values from which they derive their purposes and their life. This is true of the most important of legal institutions, the profession of law. The profession too must change when conditions change in order to preserve and advance the social values that are the reasons for its being." Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and the Organized Bar*, 12 U.C.L.A.L. REV. 438, 446 (1965).

81. Such a scheme was based upon a synthesis of the present New York and California codes. *See* Ehrenzweig, *supra* note 4, at 799-800.

yet surely this complicated administrative scheme would not solve the problem of fully compensating the innocent injured party, nor the problem of our congested courts.

The Evershed Committee,[82] an English committee commissioned by Parliament to study in detail what the proper system of costs should be, suggested a number of alternatives, both to the American rule and to the English rule.[83] The alternative which gained the strongest support was the Canadian system which awards fees found in a series of scales based on the amount in issue. However, the scales are not conclusive, and the trial judge has overriding discretion to vary the costs where special reason is shown.[84] Although favored by the Committee, this system was rejected due to objections by the bar that it decreased the remuneration of lawyers and resulted in a system of costs based not upon the actual amount of work done but upon some artificial standard, such as the amount in issue.[85]

Another writer has proposed a statute based on the premise that the judge shall award a reasonable attorney's fee to the prevailing party. He submits that the exceptions to the general rule have become the rule and thus bases his statute on the principle of "reasonable" fees found in those exceptions.[86]

Of the systems proposed, this last suggestion would seem to have the most merit, yet to use the author's own words "some departures need to be made." The ideal system, however, would incorporate the basic structure of his statute. The awarding of fees should be mandatory, for judges would be reluctant to depart from the traditional way of assessing costs, unless a duty was placed upon them to do so. Thus, legislation should be enacted directing the judge in any court to award, in his discretion, fees as an item of costs to the prevailing party.[87] The standard again would be one of "reasonableness" as determined by the guidelines set out in the Canons of Professional Ethics.[88] To meet the criticisms of the English system, and to improve upon the inadequacies of the present system, the following provisions should also be included in any statute:

82. REPORT ON SUPREME COURT PROCEDURE, CMD. No. 8878, at 232-68 (1953).

83. Among the alternatives considered and rejected were the German system of providing fixed costs in every case, based solely on the amount at stake, and a system under which, at an early stage, a hearing would be held before a master who would fix a lump sum for costs to be recovered. *Id.* at 238-39.

84. *Id.* at 241-44.

85. *Id.* at 245.

86. Additional guidelines for specific situations facing the court are included in this model statute. *See* Stoebuck, *supra* note 4, at 211-18.

87. There is no constitutional impediment to such legislation. *See* Life & Cas. Ins. Co. v. McCray, 291 U.S. 566 (1934); Fidelity Mut. Life Ass'n v. Mettler, *supra* noto 72; Atchison, T. & S.F.R.R. v. Matthews, 174 U.S. 96 (1899).

88. For a discussion of the guidelines of Canon 12, see note 77 *supra.*

1. A provision to encourage settlements and compromises. For example, if a plaintiff recovers no more than the sum formally offered by the defendant, then the judge should be permitted either to award fees to the defendant or to penalize the winning plaintiff by denying him some part of his counsel fees. Such a rule would surely serve the needed social function of clearing the courts' calendars.

2. A provision to compensate for the hard case, that is, the case where a party with all the merits loses due to some technicality. In such a situation, the judge should have the discretion to split the burden of attorney's fees as he sees fit.

3. A provision to prevent an unjust result where neither party is completely right. Again the judge should be able to apportion costs, including attorney's fees, as he sees fit.

The purpose of this legislation is to deter vexatious litigation, while encouraging the litigation of bona fide claims, and thus meet the needs of our society without perverting the traditional sense of American justice.

III. Interrelation of Federal and State Law

The discussion in Part II has set forth the development of our present system of fees, as well as comments on its faults and suggestions for its improvement. Part III examines a technical problem arising out of our federal system, the resolution of which in many cases determines which party shall bear the burden of fees. The proper solution of this technical problem may be a key to the improvement of our system of fees.

A. *Setting of the Problem*

The nature of our federal system has produced many complex choice of law problems. Generally, the determination of what law should be applied to resolve a particular problem is governed by three major authoritative bodies of law—state law, federal law, and federal courts law.[89] Federal law is that law, such as the Constitution, which is applied nationally by all courts, while federal courts' law is that law, such as the Federal Rules of Civil Procedure, which is peculiar to federal courts. A brief discussion of the law on attorney's fees de-

89. The fourth authoritative body of law, international law, is not involved in this discussion. For an excellent introduction into the problems presented by these authoritative sources as applied to choice of law problems, see E. Cheatham, E. Griswold, W. Reese & M. Rosenburg, Cases on Conflict of Laws 595-697 (5th ed. 1964).

veloped by each body of law is necessary before examining the problems presented by the interrelation of these three bodies of law.

1. *State Law.*—Generally, state law as to attorney's fees, as discussed in Part II, does not allow fees to be taxed as costs. However, by statute and through certain qualifications of the general rule, counsel fees are often taxed as costs to the losing litigant.[90]

2. *Federal Law.*—As noted in Part II, there are several federal statutes which expressly provide for the awarding of attorney's fees to the prevailing party.[91]

3. *Federal Courts Law.*—Federal Rule 54(d)[92] provides that costs shall be allowed to a prevailing party as a matter of course[93] unless the court directs otherwise or unless other provision is made by federal statute or rule.[94] The phrase "unless the court directs otherwise" makes the awarding of costs discretionary with the court; however, the Supreme Court has warned that "the discretion given district judges to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute."[95] Thus, generally, other than the courts' inherent power to grant equitable relief in the limited situations of a common fund or a vexatious suit,[96] federal courts have been reluctant to tax an item as costs unless such authority is found

90. *See* notes 69-78 *supra* and accompanying text.

91. *See* notes 52-54 *supra* and accompanying text. One other source of federal law is federal common law. Although *Erie* eliminated the area of federal courts common law, the advent of such cases as Clearfield Trust v. United States, 318 U.S. 363 (1943), and Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957), which held federal policy to control over state law in areas of national concern, surely indicates that highly important federal common law exists. *See* Friendly, *In Praise of Erie—and of the New Federal Common Law,* 19 RECORD OF N.Y.C.B.A. 64 (1964). However, there is no federal substantive common law as to attorney's fees. *See* note 104 *infra.*

92. FED. R. CIV. P. 54(d).

93. Prior to the adoption of the Federal Rules, the general rule in federal courts was that in absence of a controlling federal statute or rule of court, the prevailing party was entitled to costs as a matter of right only in an action at law, while in equity the court had the discretion to allow costs to either party. *Ex parte* Peterson, 253 U.S. 300 (1920). For an extensive study of costs in federal courts prior to the Federal Rules, see Payne, *Costs in Common Law Actions in Federal Courts,* 21 VA. L. REV. 397 (1935).

94. One further qualification confines the imposition of costs against the United States, its officers, and agencies to those expressly allowed by law. Section 2412(a) of the Judicial Code similarly provides that the United States shall be liable for fees and costs only when such liability is expressly provided for by act of Congress. 28 U.S.C. § 2412(a) (1964). For a thorough discussion of costs in litigation when the United States is a party, see Schiller, *Costs in Litigation When the United States Is a Party: A Modest Proposal,* 6 VILL. L. REV. 189 (1961).

95. Farmer v. Arabian Am. Oil Co., *supra* note 46, at 235. *See also* Cohen v. Lovitz, 255 F. Supp. 302 (D.D.C. 1966) (discretion used only in rare and unusual instances).

96. *See generally* notes 49-54 *supra* and accompanying text.

in a federal statute, a particular Federal Rule, or in the practice of a particular local district.[97]

The Federal Rules do not define what items may be taxed as costs, but several Rules expressly allow the court to include expenses, such as attorney's fees, as a sanction for certain proscribed conduct.[98] There is no rule, however, which states that counsel fees are always included in taxable costs. Moreover, with the exception of the conventional docket fee,[99] the federal Judicial Code, in listing items which may be included in costs in federal courts, omits all reference to attorney's fees.[100]

B. *The Interrelation Problem*

The most crucial problem in the interrelation of these bodies of law arises when one law awards fees and another denies them, and the court must choose which law is to be applied. The following discussion will examine this situation as it occurs in state and federal courts.

1. *State Courts.*—Assuming no horizontal conflict of laws question exists, there is no problem with a state cause of action in a state court, for the court will apply the existing state statutory and decisional law to determine whether fees may be taxed to the losing party as an item of costs. Similarly, where the cause of action is based upon a federal statute which speaks in mandatory terms as to the awarding of fees as costs, there is no problem, for the state court must follow such direction even though contrary to its own law.[101] However, if the federal statute is silent on the matter, then in most cases the state court may follow its own law to determine whether or not to award counsel fees as costs to the prevailing party.[102]

97. *See* Newton v. Consolidated Gas Co., 265 U.S. 78 (1924); United States v. Kolesar, 313 F.2d 835 (5th Cir. 1963); Swalley v. Addressograph-Multigraph Corp., 168 F.2d 585 (7th Cir. 1948), *cert. denied*, 335 U.S. 911 (1949).

98. *See, e.g.*, FED. R. CIV. P. 37(a) ("reasonable" costs of obtaining a deposition from a deponent who refuses to answer); FED. R. CIV. P. 37(c)(costs and attorney's fees paid by party denying, without reason, any fact of substantial importance); FED. R. CIV. P. 68 (party recovering judgment less favorable than rejected offer must pay costs); FED. R. CIV. P. 41(d) (costs and fees paid by plaintiff of previously dismissed action). For a list of other Federal Rules which may have some bearing on costs and counsel fees, see 6 J. MOORE, FEDERAL PRACTICE ¶ 54.72, at 1323 (2d ed. 1965) [hereinafter cited as MOORE].

99. An attorney's docket fee of $20 is allowed in most cases in federal courts. 28 U.S.C. § 1923 (1964).

100. 28 U.S.C. § 1920 (1964).

101. In such situations Congress has furnished the answer to the interrelation problem by providing the substantive rule or by specifically referring to state law. Examples of federal statutes speaking in mandatory terms as to attorney's fees are set forth in notes 62-67 *supra* and accompanying text.

102. The only situation where state policy may not control is the case governed by federal common law which is applied in state and federal courts to the exclusion of state law. However, there is no such federal common law as to fees. *See* note 95 *supra*.

2. *Federal Courts.*—The problem of interrelation in federal courts is emphasized by the doctrine of *Erie R.R. v. Tompkins.*[103] The *Erie* doctrine, with its policy of discouraging forum-shopping between federal and state courts and encouraging uniformity of result, ended the existence of a separate federal courts common law on substantive matters.[104] In the same year as *Erie,* the Federal Rules of Civil Procedure established a uniform federal procedural law which is used uniquely by the federal courts, even in the enforcement of rights based upon state substantive law.[105] Thus, in a diversity action to which federal law is inapplicable, a federal court must apply the substantive law of the state in which it sits, while under the Federal Rules it applies its own procedural law.[106] Yet no one test to characterize an issue as substantive or procedural has clearly developed.[107] The problem has been particularly acute when a Federal Rule squarely conflicts with a state policy,[108] thus presenting the court with a

103. 304 U.S. 64 (1938).

104. Although *Erie* obliterated federal courts common law, there clearly remains a true federal common law, *i.e.,* a national law of the land, which is applied by federal and state courts to the exclusion of state law, even as to substantive matters. *See* note 91 *supra. See also* D'Oench, Duhme & Co., v. FDIC, 315 U.S. 447 (1942). For federal common law to arise, there must be present a national interest, such as arises with commercial paper; it is submitted that since no such interest exists as to attorney's fees, no federal common law has developed.

105. The Supreme Court promulgated the Federal Rules of Civil Procedure pursuant to the authority granted to it by the Enabling Act of 1934, 28 U.S.C. § 2072 (1964), which granted the Court "the power to prescribe, by general rules . . . the practice and procedure . . . in civil actions" at law. The Act, however, limits this power by saying that the "rules shall not abridge, enlarge or modify any *substantive* right" (emphasis added). Thus, the Rules govern procedure, but not the substantive rights of the parties before a federal court.

106. The best example of this substance-procedure dichotomy as applied in the federal courts is Sampson v. Channel, 110 F.2d 754 (1st Cir. 1940), *cert. denied,* 310 U.S. 650 (1940).

107. Several so-called tests have been devised. Guaranty Trust Co. v. York, 326 U.S. 99 (1945), established an "outcome determinative" test which required that the results in the federal court be substantially the same, so far as legal rules determined the outcome of a litigation, as it would be if tried in a state court. On the other hand, a subsequent decision, Byrd v. Blue Ridge Rural Elec. Co-op, 356 U.S. 525 (1958), indicated that a balancing of state and federal interest should be determinative. However, Hanna v. Plumer, 380 U.S. 460 (1965), departed from the *Byrd* test and focused upon whether a federal rule so altered substantive rights as to violate the restriction of the Enabling Act that the rules not "abridge, enlarge or modify any substantive rights." It is submitted that in ending federal courts common law, *Erie* has done its work and that courts should not view these situations as calling for application of an *Erie* test, but should realize the real conflict is between the policy favoring a uniform federal procedure and the policy of uniformity of result.

108. Prior to *Hanna,* courts faced with a conflict between a federal rule and a state policy usually applied the state policy. *See, e.g.,* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) (state statute requiring security applied although Federal Rule 23(b) does not so require); Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949) (state rule requiring service of process applied although conflicting with Federal Rule 3); Hoosier Cas. Co. v. Fox, 102 F. Supp. 214 (N.D. Iowa 1952) (state rule of joinder applied although conflicting with Federal Rule 18). *But see*

conflict between the policy of a uniform federal procedure and the policy of uniformity of result. In the latest Supreme Court decision on the matter, *Hanna v. Plumer*,[109] the Court decided in favor of a uniform federal procedure, holding that Federal Rules are paramount to any conflicting state policy, unless the rule exceeds the congressional mandate of the Enabling Act by attempting to "abridge, enlarge, or modify any substantive right."[110]

The problem of interrelating federal courts law and state law as to attorney's fees arises in both the ordinary diversity case based upon a state right, and in the diversity case where jurisdiction is based upon a federal procedural statute, such as the Federal Interpleader Act.[111] More specifically, the problem may be stated as follows: If the state statutory or decisional law allows or disallows the recovery of counsel fees, does *Erie*'s policy of uniformity require the federal court to apply state law? The answer, as will be seen, is not a simple one.[112]

Moss v. Associated Transp., Inc., 344 F.2d 23 (6th Cir. 1965) (Federal Rule 42(b) controls over conflicting state statute); Iovino v. Waterson, 274 F.2d 41 (2d Cir. 1959)(Federal Rule 25(a) used despite contra state policy); D'Onofrio Constr. Co. v. Rccon Co., 255 F.2d 904 (1st Cir. 1958)(Federal Rule 14 upheld over conflicting state rule). *See also* Merrigan, *Erie to York to Ragan—A Triple Play on the Federal Rules*, 3 VAND. L. REV. 711 (1950).

109. 380 U.S. 460 (1965).

110. 28 U.S.C. § 2072 (1964). *Hanna* specifically held that Federal Rule 4(d)(1) controls the service of process despite a conflicting Massachusetts statute. From *Hanna* one may conclude that any matter deemed to be a legitimate subject of the Federal Rules will be controlled by federal courts law, notwithstanding any contrary state policy. The result of such a conclusion is that *Hanna* will clearly promote forum shopping, the very evil *Erie* aimed to destroy. *See* 78 HARV. L. REV. 673, 675 (1965).

111. A suit under the Federal Interpleader Act, 28 U.S.C. § 1335 (1964), is clearly a diversity suit, since the only power source for the Act is the constitutional provision that "The judicial [p]ower shall extend . . . to controversies between [c]itizens of different [s]tates. . . ." U.S. CONST. art. III, § 2. Thus, one of the requirements of the Act is that there be "two or more adverse claimants of diverse citizenship." However, there is a distinction between the ordinary diversity suit and the diversity suit under the Interpleader Act. "Diversity" in the ordinary diversity suit means *maximum* diversity, *i.e.*, all the parties on one side must be citizens of different states from all the parties on the other side. "Diversity" in the interpleader suit means *minimal* diversity, *i.e.*, parties on one side may be from the same state as parties on the other side, so long as the citizenship of at least one party on one side differs from another on the other side. *Compare* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806), *with* Blair Holdings Corp. v. Bay City Bank & Trust Co., 234 F.2d 513 (9th Cir. 1956).

112. The major source of confusion in the resolution of the question arises from the failure to distinguish between federal courts law and federal law, and the resulting failure to visualize the problem correctly. Many courts have concluded that *federal law*, based upon Federal Rule 54(d), and not *state law*, controls the allowance or disallowance of fees. *See, e.g.*, Bank of China v. Wells Fargo Bank & Union Trust Co., 209 F.2d 467 (9th Cir. 1953); Palomas Land & Cattle Co. v. Baldwin, 189 F.2d 936 (9th Cir. 1951). The fallacy is that federal law, except for federal statutory substantive law, is not involved in attorney's fees. Rather the real conflict is between federal courts law, and its uniform procedure for federal courts, and state substantive law, which must be applied to avoid forum shopping.

In the ordinary diversity case, based upon a state cause of action,[113] the great weight of authority characterizes a claim for attorney's fees as substantive and thus, in the interest of uniformity, applies the state law.[114] However, some cases have held that Federal Rule 54(d) grants the federal court such discretion with respect to the allowance of costs, including attorney's fees, that its exercise cannot be curtailed by state legislation.[115] In essence, these courts have applied the federal courts law of the Federal Rules under a rationale very similar to that used in the *Hanna* case.[116]

The policies underlying the minority view are clear, and perhaps justified. To retain some control over the taxing of fees in its courts, and thus over the conduct of the litigants, the minority has concluded that it is within federal discretion to disregard state law as to attorney's fees. In the ordinary diversity suit, however, it is submitted that the substantive law of the state in which the court is sitting should be controlling. The policy of *Erie* to avoid forum-shopping is so strong that no federal court should grant a remedy which will lead to a result different from that obtainable in the state court, unless an equally strong countervailing policy exists demanding application of federal courts law. The *Hanna* case indicates that when such a policy exists in a Federal Rule, it is to be applied to the exclusion of state law.[117] Thus, the minority will argue that such a policy is present in the direction of Federal Rule 54(d) to award costs to the prevailing party. It is submitted that such reasoning ignores the basic distinction between "costs" and "fees." The awarding of counsel fees as costs

113. This action is brought under the diversity statute, 28 U.S.C. § 1332 (1966), which states that "[t]he district courts shall have original jurisdiction . . . where the matter in controversy exceeds the sum or value of $10,000, . . . and is between citizens of different states . . . ."

114. *See, e.g.*, Stokes v. Reeves, 245 F.2d 700 (9th Cir. 1957) (Texas law applied to allow fees); Trust Co. v. National Sur. Corp., 177 F.2d 816 (7th Cir. 1949) (Illinois law applied denying attorney's fees); Phoenix Iudem. Co. v. Anderson's Groves, 176 F.2d 246 (5th Cir. 1949) (Florida statute awarding fees as costs applied); Danza v. National Bank, 222 F. Supp. 671 (D. Alas. 1963) (Alaska law applied to allow fees). *See also* 6 MOORE ¶ 54.77(2), at 1354-55, where Professor Moore concludes that state law should be followed "where the state law . . . reflects a 'substantial' policy of the state" and "does not run counter to a valid federal statute or rule of court."

115. *See, e.g.*, Harris v. Twentieth Century-Fox Film Corp., 139 F.2d 571 (2d Cir. 1943) (California statute not applied); United States v. E. J. Biggs Const. Co., 116 F.2d 768 (7th Cir. 1940) (Illinois statute as to costs superseded by Federal Rules); Kellems v. California CIO Council, 68 F. Supp. 277 (N.D. Calif. 1946) (Federal Rules control but court may adopt part of state law). *See also* 3 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1197, at 68 (1958), submitting that state law should not control on the ground that a claim for fees is not "outcome determinative" and thus should be goverued by federal rules.

116. These courts did not rely on *Hanna*, which had not yet been decided, but the reasoning that Federal Rule 54(d) controls costs to the exclusion of state law is similar to that used in *Hanna*. *See* note 110 *supra*.

117. Hanna v. Plumer, *supra* note 109, at 471.

is not part of the policy embodied in Federal Rule 54(d), for fees were intentionally not included as costs under the Federal Rules except in certain situations.[118] Furthermore, the Supreme Court has warned the federal courts not to use their discretion under Rule 54(d) to award such items as fees.[119] Thus, Federal Rule 54(d) does not provide a sound basis for the application of federal courts law; and in the absence of a substantial federal policy to the contrary, state substantive law should be followed by the federal courts.

Similar circumstances may arise with a diversity suit brought under the Federal Interpleader Act.[120] For example, suppose there is a common fund action under federal statutory law which fails to mention fees, while the applicable state law forbids the assessment of fees. Must the federal court follow state law, or may it apply its own equitable doctrine that awards fees to the party presenting the common fund to the court? The policy of an interpleader suit is to prevent the stakeholder from being subjected to the expense of multiple litigation of the rival claimants when he is a distinterested party. As this procedure has evolved in American jurisprudence, a majority of courts have deemed it just and equitable that the stakeholder be awarded reasonable fees along with other taxable costs.[121] However, when this policy conflicts with a state policy which flatly denies counsel fees to an interpleader, there is a definite split of authority. Some courts, perhaps a slight majority, hold that federal courts law is controlling and adopt reasoning similar to that used by the minority in the diversity situation; that is, in federal courts, the allowance or disallowance of costs, including attorney's fees, is discretionary under Federal Rule 54(d), and is not determined by state substantive law.[122] Under this rationale, these courts conclude that since the cases arose under federal law and were heard by a federal judge, his discretion under Federal Rule 54(d) is not to be fettered by state doctrines.

Other cases, however, have rejected this rationale and have treated the state policy forbidding the awarding of attorney's fees as "sub-

118. These situations exist where fees are awarded in the Federal Rules as sanctions for certain prohibited conduct. *See* notes 98 & 99 *supra* and accompanying text. In these limited situations it would seem that the minority's arguments are of considerable merit.

119. *See* note 95 *supra* and accompanying text.

120. 28 U.S.C. § 1335 (1964). The Act states that "[t]he district courts shall have original jurisdiction of any civil action of interpleader . . . if [t]wo or more adverse claimants, of diverse citizenship . . . ." *See* note 111 *supra.*

121. *See* note 54 *supra* and accompanying text.

122. Bank of China v. Wells Fargo Bank & Union Trust Co., *supra* note 112; Palomas Land & Cattle Co. v. Baldwin, *supra* note 112; Equitable Life Assurance Soc'y of United States v. Miller, 229 F. Supp. 1018 (D. Minn. 1964); Hennessey v. Fein, 176 F. Supp. 228 (S.D.N.Y. 1959). *See* 6 MOORE ¶ 54.77(2), at 1352, suggesting that state law should not control. For Professor Moore's comments, see note 125 *infra* and accompanying text.

stantive;" thus, uniformity of result requires that these courts apply state policy.[123] The reasoning of this line of authority is well stated by the following passage from *Aetna Life Insurance Co. v. Johnson*:[124]

> I firmly reiterate my opinion that it comports and is consonant with fundamental legal principles to hold that the denying or granting of attorney's fees relates to the substantive rights of an interpleader action. This being so, a fortiori, the *Erie* doctrine precludes any discretion on behalf of the federal courts; they must follow the law of the state.

Looking strictly at the policy underlying *Erie*, the latter cases appear to have the better argument, since to avoid forum-shopping among federal and state courts no federal court should grant a remedy which would lead to a result substantially different from that obtainable in the state court. Moreover, the rationale of the cases applying the federal courts law of Federal Rule 54(d) to award fees is subject to the same criticisms which were made with respect to the use of that reasoning in the ordinary diversity suit. However, a strong federal policy is present with respect to the interpleader suit, as indicated by the following passage from Professor Moore's treatise on federal courts:

> With deference, we suggest that state law should not control. The federal statutes on interpleader were designed to protect a party against rival claims in situations where formerly he had no effective remedy; and the federal courts should be able to effectuate this protection by awarding him reasonable counsel fees pursuant to traditional and long established equitable principles.[125]

In other words, Professor Moore contends that the Federal Interpleader Act created a new remedy for the person who interpleads, and its availability or efficiency cannot, or should not, be restricted by state law. Thus, Congress, in creating a new remedy for the stakeholder, has indicated that a substantial federal policy exists insuring the stakeholder relief from the burden of all expenses of his turning the fund over to the court. Moreover, the equitable power of federal courts, as will be remembered, has traditionally been used to award attorney's fees in suits involving common funds. In this situation, it is submitted that the policy of *Erie* should not control but should yield to the countervailing federal policy, with the federal court awarding fees to the stakeholder. The basis of applying federal policy must lie in the Federal Rules and the *Hanna* case; but as has been noted, the

123. Aetna Life Ins. Co. v. Johnson, 206 F. Supp. 63 (N.D. Ill. 1962); Republic of China v. Central Scientific Co., 120 F. Supp. 924 (N.D. Ill. 1954); American Cas. Co. v. Harrison, 96 F. Supp. 537 (W.D. Ark. 1951). *See also* 3 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1197, at 68 (1958), where it is urged that state law should control.

124. 206 F. Supp. 63, 66 (N.D. Ill. 1962).

125. 6 MOORE ¶ 54.77(2), at 1352.

present Federal Rule 54(d) does not provide a sound basis for awarding counsel fees as costs. It is suggested, therefore, that to provide for the application of valid federal policy with respect to attorney's fees, Federal Rule 54(d) should be amended to include attorney's fees in costs. The amended Rule 54(d) should read: "The federal court shall award costs, *including attorney's fees,* to the prevailing party, unless the court directs otherwise . . . ." This amendment would not pervert the policy of uniformity espoused by *Erie,* since in the absence of a demanding federal policy, the court would remain free to direct in its discretion that fees be taxed as they are under state law. Thus, by so amending Federal Rule 54(d), the Court would provide for the enforcement of a substantial state policy, while at the same time preserving federal policies.[126] Additionally, the amended rule is similar to the proposed legislation of Part II, and thus would be helpful in the reform of our system of fees. With the awarding of attorney's fees clearly within the discretion of the judge, the courts would be able to operate toward effectuating those social policies demanded by our society today.

IV. Conclusion

The failure of American courts to allow a general recovery of attorney's fees is an anachronism that should not be continued. The social conditions present at the time of the development of our general rule have long since disappeared in the mobile and complex society of today. What is needed is a rule which encourages settlement and compromise while being truly fair and compensatory to the parties involved. The legislation proposed in Part II and the suggested amendment to Federal Rule 54(d) in Part III are designed to alleviate the problems which have arisen from the application of a rule designed initially to stimulate litigation in our frontier society. It is hoped that the merits, as well as the inevitable inadequacies, of these suggestions will at least focus attention upon a problem long in need of reform.

James H. Cheek III

126. For the view that all Federal Rules should be amended to provide for the enforcement of substantial state policy, while at the same time preserving federal policies, see Hill, *Erie Doctrine and the Constitution,* 53 Nw. U.L. Rev. 427 (1958).