

## CHAPTER 9 RELIEF

This chapter addresses issues related to the recovery of relief in federal litigation. Section I of this chapter discusses the general rules governing the recovery of compensatory and punitive damages; it focuses primarily on litigation under 42 U.S.C. § 1983. Because the law governing proof of damages under Section 1983 closely parallels proof of damages in common-law tort actions, no attempt is made to repeat the suggestions of many commonly available sources on how to prove damages of a particular type.

Generalizations about injunctive relief are more difficult; the scope and nature of injunctive relief typically are functions of the underlying substantive law and the scope of the violation of that law. Because many claims for injunctive relief are resolved by settlement, Section II focuses on issues that arise in the context of negotiating settlements and consent decrees and discusses in some detail the kinds of provisions that should be included in those agreements. These same factors should be considered when drafting a proposed final judgment submitted when a claim for injunctive relief proceeds to trial.

Section III discusses declaratory relief and the ways that it can be used to obtain relief that has an impact beyond the specific needs of the individual plaintiffs. This is a form of relief that is useful in a wide variety of contexts but is especially important in cases which cannot be brought as class actions.

Section IV reviews the well-developed body of law governing the award of attorney fees in federal litigation. Chapter 6 of this MANUAL discusses the ethical problems that arise when a defendant conditions settlement of a fee-shifting claim on a waiver of fees. This chapter focuses on the calculation of fee awards, the propriety of contingency fee enhancements, and fee awards under the Equal Access to Justice Act.<sup>1</sup> This chapter also suggests ways of preparing an effective fee petition.

### I. Damages

Given the reluctance of the private bar to represent poor clients, public interest lawyers surprisingly do not bring more litigation seeking compensatory and punitive damages. Chapters 5 and 8 of this MANUAL address the circumstances in which a claim for damages may lie under 42 U.S.C. § 1983 and the defenses to such a claim. This section reviews the law governing the recovery of compensatory and punitive damages. Although the focus here is on Section 1983 claims for damages, the rules applicable to those claims are typical of most compensatory and punitive damage litigation. There are, however, specific federal statutes such as

- the Truth in Lending Act,<sup>2</sup>
- the Fair Labor Standards Act,<sup>3</sup> and
- the Migrant and Seasonal Agricultural Worker Protection Act<sup>4</sup>

that authorize more limited damage claims for violation of their substantive provisions. Those statutes often limit the injuries for which compensatory damages are available or provide for the recovery of liquidated damages in lieu of or in addition to statutorily authorized compensatory damages.<sup>5</sup> The key point to remember is to check the specific act under which you are suing to see if it contains any special damage provisions.

<sup>1</sup>Equal Access to Justice Act, 28 U.S.C. § 2412.

<sup>2</sup>Truth in Lending Act, 15 U.S.C. §§ 1601–1667f.

<sup>3</sup>Fair Labor Standards Act, 29 U.S.C. § 214.

<sup>4</sup>Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1802, 1813, 1816, 1851.

<sup>5</sup>The Fair Labor Standards Act limits compensatory damages to unpaid minimum wages and overtime, excluding consequential damages; however, the Act authorizes liquidated damages equal to double the unpaid minimum wages and overtime unless an employer establishes that it acted in good faith and with a reasonable basis for believing that its conduct was lawful. *See* 29 U.S.C. §§ 216(b), 260. The Truth in Lending Act authorizes in finance charge cases damages equal to double the finance charge, with a minimum recovery of \$100 and a maximum recovery of \$1,000 and any actual damages. *See* 15 U.S.C. § 1640(a) (different standards and limits apply to other transactions or class actions). Neither statute authorizes an award of punitive damages.

## A. COMPENSATORY DAMAGES

The U.S. Supreme Court set out the law governing the recovery of compensatory damages under 42 U.S.C. § 1983 in

- *Carey v. Phipus*<sup>6</sup> and
- *Memphis Community School District v. Stachura*.<sup>7</sup>

In *Carey* a principal who observed students passing marijuana cigarettes back and forth suspended the students for twenty days without a hearing, in violation of their right to procedural due process. The students sued for damages but offered no evidence of emotional distress or other injury resulting from the suspension that would have been avoided had a hearing been granted before suspension. Rather, drawing an analogy to defamation law, they argued that they were entitled to substantial presumed general damages for the denial of the right to due process independent of any proved injury.

The Court rejected the claim for presumed general damages for deprivation of procedural due process and allowed a plaintiff to recover actual damages only if the plaintiff produced evidence of injury. As such, reasoning that the students would have been suspended even after a *Goss v. Lopez* hearing, the Court held that proof that the suspension was justified would defeat recovery of damages for loss of educational services.<sup>8</sup> However, because the right to due process is independent of the merits of the suspension, the Court allowed the students to recover nominal damages even where the suspension was justified.

Although the Court rejected presumed general damages in *Carey*, it held that mental and emotional distress were compensable injuries under Section 1983. *Carey* simply established that a plaintiff seeking recovery for mental and emotional distress must offer proof of those injuries. The Court noted as follows: “Although essentially subjective, genuine injury in this respect may be evidenced by one’s conduct and observed by others. Juries must be guided by appropriate instructions, and an award of damages must be supported by competent evidence concerning the injury.”<sup>9</sup>

*Carey v. Phipus* holds that recovery of damages for a denial of due process should be governed by principles of compensation derived from the common law of torts. *Carey* authorizes the recovery of damages for any proven injury proximately caused by the wrongful conduct of a defendant. In the absence of such proof, a plaintiff is still entitled to nominal damages and potentially an award of fees.<sup>10</sup>

In *Memphis Community School District v. Stachura* a teacher who was suspended with pay for showing seventh-grade students pictures of his pregnant wife and two films concerning human growth and sexuality sued for damages under Section 1983; he claimed that his suspension denied him both liberty and property without due process of law and violated his First Amendment right to academic freedom. The district court instructed that, if the jury found for the teacher, the jury should consider any lost earnings, loss of earning capacity out-of-pocket expenses, and any mental anguish or emotional distress that the plaintiff might have suffered as a result of the conduct by the defendants depriving him of his civil rights.<sup>11</sup>

The district court also instructed the jury to award damages based on the value or importance of the constitutional rights that were violated and to consider that the “precise value you place upon any constitutional right which you find was denied to plaintiff is within your discretion” and the “importance of the right in our system of Government, the role which this right has played in the history of our Republic and the significance of the right in the context of the activities which the plaintiff was engaged in.”<sup>12</sup> The jury found for the teacher and awarded a total of \$275,000 in compensatory damages and \$46,000 in punitive damages.

The Supreme Court, however, held in *Stachura* that the instruction authorizing the jury to award damages based upon the value of the right at issue was erroneous. The Court reiterated that Section 1983 created a “species of tort liability.”<sup>13</sup>

<sup>6</sup>*Carey v. Phipus*, 435 U.S. 247 (1977).

<sup>7</sup>*Memphis Community School District v. Stachura*, 477 U.S. 299 (1986).

<sup>8</sup>In *Goss v. Lopez*, 419 U.S. 565 (1977), the Supreme Court established the general rule that students who are subject to a short-term suspension are entitled to due process protection.

<sup>9</sup>*Carey*, 435 U.S. at 264 n.20. There are limits on a jury’s discretion in awarding damages for emotional distress. A “compensatory damages award [for emotional distress] must bear a reasonable relationship to actual injury sustained; it may not be punitive in nature.” *Cygnar v. City of Chicago*, 865 F.2d 827, 848 (7th Cir. 1989).

<sup>10</sup>In *Carey* the Court specifically cited the plaintiff’s entitlement to fees under 42 U.S.C. § 1988 as a “by no means inconsequential” deterrent to unconstitutional conduct. *Carey*, 435 U.S. at 257, n.11. However, in *Farrar v. Hobby*, 506 U.S. 103 (1992), the Court, while holding that a nominal damage award made the plaintiff a “prevailing party” for purposes of attorney fees, nonetheless allowed fees to be denied on the basis of limited success. See Section IV *infra* for a further discussion of the *Farrar* decision.

<sup>11</sup>*Stachura*, 477 U.S. at 302.

<sup>12</sup>*Id.* at 303.

<sup>13</sup>*Id.* at 305–6.

Section 1983 authorizes compensatory damages not only for “out-of-pocket loss and other monetary harms, but also such injuries as impairment of reputation . . . personal humiliation, and mental anguish and suffering.”<sup>14</sup> Nevertheless the “value of rights” instruction was flawed because it caused the jury to focus “not on compensation for provable injury, but on the jury’s subjective perception of the importance of constitutional rights as an abstract matter.”<sup>15</sup>

*Stachura* simply requires that any claim for damages under Section 1983 be supported by evidence of injury. Rather than rely on the abstract value of a constitutional right, plaintiffs must produce evidence that the loss of the right caused emotional distress, anguish, or humiliation. Thus proof of damages in Section 1983 litigation is analogous to proof of damages in a common-law tort action—to be compensated plaintiffs must prove out-of-pocket expenses, such as loss of wages or future earning capacity, medical expenses, property damages, and the like. Compensable damages may include distress, humiliation, personal indignity as well as loss of reputation or status, provided that evidence is adduced to establish the extent and duration of these injuries.

Neither *Carey* nor *Stachura* flatly rules out presumed general damages in Section 1983 litigation. However, in both cases the Supreme Court stated that presumed damages would be proper only when the nature of the right was such that proof of injury resulting from its deprivation would be unusually difficult to adduce. The only right that the Court identifies as falling within that category is the right to vote.<sup>16</sup>

The message from *Stachura* is that plaintiff’s attorney must think like a tort lawyer when proving damages under Section 1983. The attorney must allow the jury to see a case through the client’s eyes and present detailed testimony from the client, the client’s family, coworkers and friends, and any professionals whom the client may have consulted to document emotional distress, humiliation, or pain and suffering. Rather than focus on the abstract value or the historical importance of a right, plaintiff’s attorney must show the importance of the right within the client’s life by showing the injuries caused by its loss. This can be done by demonstrating the impact of the injury on family associations, on the ability to live in dignified surroundings, and on the prospect of holding a job or pursuing an education. Injury is a personal experience and must be shown through the specific effect that the violation has on the specific client.

The common-law doctrine of avoidable consequences, sometimes referred to as the duty to mitigate, applies in all damages litigation; a client may not recover for damages reasonably avoidable under the circumstances through mitigation. Thus a fired plaintiff must look with reasonable diligence for other substantially comparable work and must accept such employment pending the outcome of litigation.<sup>17</sup> The defendant bears the burden of establishing a breach of the duty to mitigate.<sup>18</sup>

Whether the collateral source rule, which precludes reduction of the plaintiff’s recovery due to receiving payments from a third party, applies in Section 1983 damage actions is not yet clearly established. Some courts hold that it does.<sup>19</sup> Others hold that its application is discretionary.<sup>20</sup> Examples of common collateral source payments are insurance proceeds, unemployment benefits, workers’ compensation awards, social security benefits, and other public assistance benefits. Defendants routinely argue that receiving such benefits without a corresponding offset in the damages awarded would result in a windfall to the plaintiff. However, the rationale for the rule is that the wrongdoer should not profit from benefits that the plaintiff receives from a third party. In any case where collateral source payments are in issue, you should argue strenuously that the rule applies, and the defendant’s liability may not be reduced because of them.

<sup>14</sup>*Id.* at 307 (internal citations omitted).

<sup>15</sup>*Id.* at 308. *See also* *Silor v. Romero*, 868 F.2d 1419 (5th Cir. 1989), which held that the giving of a similar instruction was plain error, entitling the defendant to a new trial even if no objection was made below.

<sup>16</sup>*Stachura*, 477 U.S. at 311 n.14; *Carey*, 435 U.S. at 265 n.22.

<sup>17</sup>Title VII litigation has generated much case law relating to mitigation. A victim breaches the duty to mitigate only by refusing a job substantially equal to the job from which the victim was fired or for which the victim was not hired. *See Ford Motor Co. v. Equal Employment Opportunity Commission*, 458 U.S. 219 (1982). A victim is required to seek work in another field only after the unavailability of work in the victim’s chosen field is apparent. *See Walters v. City of Atlanta*, 803 F.2d 1135 (11th Cir. 1986). Attending trade school after diligently but unsuccessfully seeking work does not breach the duty to mitigate (*Smith v. American Service Co. of Atlanta*, 796 F.2d 1430 (11th Cir. 1986)), but giving up the search for a job to enroll in law school does. *Miller v. Marsh*, 766 F.2d 490 (11th Cir. 1985).

<sup>18</sup>*Smith*, 796 F.2d at 1431.

<sup>19</sup>*Perry v. Larson*, 794 F.2d 279, 286 (7th Cir. 1986); *Starrett v. Wadley*, 876 F.2d 808, 823 (10th Cir. 1989); *Rasimas v. Michigan Department of Mental Health*, 714 F.2d 614, 627–28 & n.13 (6th Cir. 1983) (Title VII). Although rendered in a different context, *National Labor Relations Board v. Gullett Gin Co.*, 340 U.S. 361, 363–65 (1951), is strong authority in support of application of the collateral source rule to Section 1983 actions.

<sup>20</sup>*Matherne v. Wilson*, 851 F.2d 752, 762 (5th Cir. 1988); *Daniel v. Loveridge*, 32F.3d 1472, 1477 & n. 4 (10th Cir. 1994) (Title VII claim).

Because many of low-income clients receive need-based public assistance benefits, you should check the specific program rules governing the receipt of damage awards and their treatment. Many cash assistance programs continue to include a lump-sum rule patterned after the rule in the now-repealed Aid to Families with Dependent Children program.<sup>21</sup> Others have transfer-of-assets or other rules that must be considered when a client is about to receive a damage award.<sup>22</sup> You must be aware of the rules that may apply to your client's receiving a damage award well before it is received. Only by doing so can you structure your client's recovery, including the timing and manner in which the award is paid, to maximize the ultimate benefit. Failing to engage in such planning has been held to constitute malpractice.<sup>23</sup>

## B. PUNITIVE DAMAGES

In *Smith v. Wade* the Supreme Court held that Section 1983 authorizes the award of punitive damages against state or local officials in their individual capacity.<sup>24</sup> The Court refers to officials' conduct that is malicious, intentional, or recklessly or callously indifferent to protected rights.<sup>25</sup> The determination of whether to award punitive damages once a showing of malicious or recklessly indifferent conduct is made rests within the discretion of the jury or judge (in a jury-waived case).<sup>26</sup> When jury instructions properly require the plaintiff to prove reckless or callously indifferent conduct, they need not at the same time require a finding of "outrageous" or "extraordinary" conduct.<sup>27</sup>

Courts repeatedly upheld punitive damage awards against public officials for

- racially discriminatory employment practices,<sup>28</sup>
- police brutality,<sup>29</sup> and
- unlawful searches and seizures.<sup>30</sup>

They repeatedly upheld awards for prisoner mistreatment,<sup>31</sup> including

- deliberate indifference to medical needs,<sup>32</sup>
- violations of the right to procedural due process,<sup>33</sup> and
- violations of First Amendment rights.<sup>34</sup>

Punitive damages may be awarded even when the plaintiff suffers only nominal damages from a deprivation of federal rights.<sup>35</sup> However, if a punitive damage award is "grossly excessive" in relationship to the state's legitimate interest in punishing and deterring unlawful conduct, it runs afoul of substantive due process and may be reduced or reversed on appeal.<sup>36</sup>

<sup>21</sup> See *Lukhard v. Reed*, 481 U.S. 368 (1987), for a description of the Aid to Families with Dependent Children (AFDC) lump-sum rule.

<sup>22</sup> See, e.g., 42 U.S.C. § 1396p(c) (Medicaid); MASS. REGS. CODE tit. 106, § 204.135 (Transitional Aid to Families with Dependent Children).

<sup>23</sup> See *In re X*, Case No. CVCL 93000L866 (Cal. Mun. Ct., Shasta County, Sept. 2, 1993) (Clearinghouse No. 49,518) (failure to structure personal injury award to minimize impact of AFDC lump-sum rule is malpractice).

<sup>24</sup> *Smith v. Wade*, 461 U.S. 30 (1983).

<sup>25</sup> *Id.* at 36 n.5; *Newport v. Fact Concerts*, 453 U.S. 247, 269–70 (1981) (holding that punitive damages under Section 1983 are not available against a governmental entity but only the responsible officials sued in their individual capacity). See also *Kolstad v. American Dental Association*, 527 U.S. 526, 535–36 (1999).

<sup>26</sup> *Fairley v. Jones*, 824 F.2d 440 (5th Cir. 1987).

<sup>27</sup> *Kolstad*, 527 U.S. at 535–39. Although *Kolstad* arose under Title VII, the standard for punitive damages under Title VII (and Title I of the Americans with Disabilities Act) is, pursuant to 42 U.S.C. § 1981a(b)(1), identical to the Section 1983 standard.

<sup>28</sup> See, e.g., *Desert Palace Inc. v. Costa*, 299 F.3d 838, 865 (2002), *aff'd*, 1235 S. Ct. 2148 (2003); *Rowlett v. Anheuser-Busch*, 832 F.2d 194 (1st Cir. 1987); *Hall v. Ochs*, 817 F.2d 920 (1st Cir. 1987); *Walters*, 803 F.2d at 1147–48; *Brown v. Freedman Baking Co.*, 810 F.2d 6 (1st Cir. 1986) (awarding punitive damages for discriminatory employment practices under 42 U.S.C. § 1981).

<sup>29</sup> See, e.g., *Iacobucci v. Butler*, 193 F.3d 14 (1st Cir. 1999); *O'Neil v. Krzeminski*, 839 F.2d 9 (2d Cir. 1988); *McKinley v. Trattles*, 732 F.2d 1320 (7th Cir. 1984); *Garrick v. City and County of Denver*, 652 F.2d 959 (10th Cir. 1981).

<sup>30</sup> *Morgan v. Woessner*, 997 F.2d 1244 (9th Cir. 1993) (unlawful service); *Creamer v. Porter*, 754 F.2d 1311 (5th Cir. 1985) (unlawful search); *Clark v. Beville*, 730 F.2d 739 (11th Cir. 1984) (arrest without probable cause); *Smith v. Heath*, 691 F.2d 220 (6th Cir. 1982) (unlawful arrest).

<sup>31</sup> See, e.g., *Wade*, 461 U.S. 30; *Stokes v. Delcambre*, 710 F.2d 1120 (5th Cir. 1983); *Furtado v. Bishop*, 604 F.2d 80 (5th Cir. 1979)

<sup>32</sup> *Cooper v. Dyke*, 814 F.2d 941 (4th Cir. 1987).

<sup>33</sup> See, e.g., *Washington v. Kirksey*, 811 F.2d 561 (11th Cir. 1987); *Busche v. Burkee*, 649 F.2d 509 (7th Cir. 1981).

<sup>34</sup> See cases compiled in *Jones v. Key West*, 679 F. Supp. 1547 (S.D. Fla. 1988).

<sup>35</sup> *Cush Crawford v. Adchem Corp.*, 271 F.3d 352, 359 (2d Cir. 2001) (Title VII); *Alexander v. Riga*, 208 F.3d 419, 430–31 (3d Cir. 2000) (Fair Housing Act); *Green v. McKaskle*, 788 F.2d 1115, 1124 (5th Cir. 1986).

<sup>36</sup> *BMW of North America v. Gore*, 517 U.S. 559 (1986); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430–32 (1994). Recently, in *State Farm Mutual v. Campbell*, 123 S.Ct. 1513, 1524–25 (2003), the Court suggested that "few awards exceeding a single-digit ratio between punitive and compen-

## II. Negotiated Settlements and Injunctive Relief

A case concludes in the district court by entry of judgment on a separate document pursuant to Federal Rule of Civil Procedure 58. The judgment generally includes whatever relief is ordered by the court. It usually refers to any prior or contemporaneous decision adjudicating liability and any ruling on relief where appropriate relief is disputed.

### A. JUDGMENTS

Judgments may be entered solely on the basis of litigated decisions, by agreement, or by some mixture of the two. For example, the court commonly decides whether defendants violated a legal duty to plaintiffs and urges the parties to agree on a remedial order. In the absence of agreement, both parties may submit their preferred versions of relief. The remedial order itself may be partially agreed upon and partially litigated, with unresolved issues submitted to the court for determination.

The legal force, effect, and enforceability of litigated judgments are relatively well defined. However, dispositions by agreement, depending upon their form, content, and entry by the court, can have vastly different legal import. For this reason, this section focuses on such agreements.

### B. NEGOTIATED SETTLEMENTS

Judgments arrived at, in whole or in part, by negotiation have the potential advantage of far greater specificity of relief than a court might otherwise order.<sup>37</sup> When an effective remedy requires major changes in an agency's mode of operation, such as promulgating new rules, establishing new practices, and monitoring results, truly workable results can be often more likely obtained through negotiation than a court-fashioned decree.<sup>38</sup> Courts generally are reluctant to get involved in the details of agency processes and are likely to be excessively deferential to an agency's judgment of how best to carry out its legal duties. Furthermore, plaintiffs may have more of a practical than a legal claim to the types of detailed orders that they believe are necessary for effective relief so that a deferential court is reluctant to enter such orders over defendants' objection. Negotiating the decree—and perhaps the joint announcement of its entry—may commit the defendants to assuring compliance. Similarly, from the defendants' perspective, a negotiated settlement protects them from the uncertainty inherent in a judicially crafted remedial order. Concerns about the need for administrative flexibility to respond to new or unforeseen problems and situations can be addressed. Relief can be structured to ensure compatibility with existing agency systems and resources. For these reasons and more, resolving complex remedial orders by consent holds many potential advantages.<sup>39</sup>

As in any negotiation, the strength of your case dictates your bottom line. Institutional defendants, especially those represented by state attorneys general, have become increasingly resistant to formal consent decrees.<sup>40</sup> However, despite

satory damages, to a significant degree, will satisfy due process.<sup>37</sup> The Court did, however, recognize that where the compensatory damages were very small, a higher ratio might be necessary.

<sup>37</sup>Of course, a negotiated decree also minimizes the risk of adverse decision.

<sup>38</sup>This discussion is applicable to all defendants but is particularly focused upon government defendants.

<sup>39</sup>See, e.g., Eric Rosand, *Consent Decrees in Welfare Litigation: The Obstacles to Compliance*, 28 COLUMBIA JOURNAL OF LAW AND SOCIAL PROBLEMS 83, 100–103 (1994) (discussing the advantages of settlements over full adjudication, such as increased efficiency, reduced uncertainty, creativity in remedial approaches, and improved standards for enforcement.); Owen Fiss, *The Supreme Court, 1978 Term Foreword: The Forms of Justice*, 93 HARVARD LAW REVIEW 1, 78 (1979) (stating that “[r]esolution of complex litigation through settlement enables the judge to avoid the difficult task of distilling and articulating detailed institutional standards from highly abstract constitutional or statutory principles and minimizes his involvement in the institution's internal administrative detail”); Robert E. Buckholz Jr. et al., *Special Project, The Remedial Process in Institutional Reform Litigation*, 78 COLUMBIA LAW REVIEW 784 (1978) (stating that those responsible for implementation of the remedy will be more likely to cooperate in that process if they are included at the formulation stage); Lloyd C. Anderson, *The Approval and Interpretation of Consent Decrees in Civil Rights Class Action Litigation*, 1983 UNIVERSITY OF ILLINOIS LAW REVIEW 579, 580 (advantages to consent decrees in civil rights class actions include the prospect that “structural reform can begin immediately and the likelihood of compliance is greater than if a coercive judicial decree is entered”). See also *Armstrong v. Board of School Directors*, 616 F.2d 305, 318 (7th Cir. 1980), *overruled on other grounds*, *Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998); *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 616 F.2d 1006, 1013–15 (7th Cir. 1980); *United States v. B.P. Exploration and Oil Co.*, 167 F. Supp. 2d 1045, 1050 (N.D. Ind. 2001); *United States v. Wallace*, 893 F. Supp. 627, 630–32 (N.D. Tex. 1995).

<sup>40</sup>See John V. Cardone, *Substantive Standards and NEPA: Mitigating Environmental Consequences with Consent Decrees*, 18 BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW 159, 168 (1990) (discussing a critique of consent decrees as binding on successive administrations and thus intruding on executive discretion); Robert V. Percival, *The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making*, 1987 UNIVERSITY OF CHICAGO LEGAL FORUM 327, 337–38 (describing U.S. Department of Justice guidelines prohibiting settlement that interferes with future agency rule-making prerogatives, that commit to the expenditure of funds that have not been budgeted, or that allow for judicial enforcement except by revival of the underlying claims).

assertions that entering into consent decrees is against official policy, attorney generals and others regularly enter into complex, detailed, enforceable remedial decrees when their other options are less attractive. If you have solid claims and exude a willingness, even enthusiasm, to litigate them to judgment, the defendant is likely to agree to a detailed, enforceable consent decree. As your bargaining strength decreases, the likelihood of having to settle for something less than a consent decree increases. Common alternatives to judicially ordered and enforceable consent decrees are private settlements or conditional stipulations of dismissal. The legal ramifications of each of these forms of settlement are different and must be understood and evaluated before entering into settlement discussions.

### 1. Consent Decrees

A consent decree is an agreement of the parties and is embodied in an injunctive order of the court, signed by the judge, and entered as the judgment of the court. As such, it has “attributes of both contracts and judicial decrees, a dual character that has resulted in different treatment for different purposes.”<sup>41</sup> The decree stands as a judgment of the court for purposes of enforcement and modification.<sup>42</sup> The decree’s interpretation is governed by general principles of contract law.<sup>43</sup> Because its interpretation and scope are discerned by general contract principles, a consent decree’s preclusive effect is governed by the intent of the parties.<sup>44</sup> In most cases the parties intend the consent decree to preclude relitigation of the claims raised in the litigation. However, because settlements by definition do not involve an actual judicial adjudication of the legal issues, consent decrees and other forms of settlements do not generally support issue preclusion.<sup>45</sup> Significantly a party who obtained a formal consent decree “prevailed” for purposes of attorney-fee entitlement.<sup>46</sup>

### 2. Private Settlements

A settlement whose terms are not incorporated into a decree entered by the court stands on a very different legal footing from a consent decree. Most commonly, when cases are resolved by such an agreement, the parties terminate the litigation by a stipulation of dismissal which may or may not refer to the agreement. In *Kokkonen v. Guardian Life Insurance Co.*, the Supreme Court addressed the question of a federal court’s jurisdiction to enforce an agreement that settled a case when the dismissal order neither incorporated the terms of the settlement in the body of the order nor reserved enforcement power in the court.<sup>47</sup> Viewing dismissal of the lawsuit as essentially part of the consideration for the agreement, the *Kokkonen* Court considered the enforcement action not as a renewal or continuation of the original case but as an entirely new contract action.<sup>48</sup> As such, the alleged breach of the settlement agreement had to be brought as a new action, one that the *Kokkonen* Court observed would have to be brought in state court.<sup>49</sup>

The *Kokkonen* Court did note that if the explicit terms of the settlement agreement had been incorporated into the order of dismissal or if the order had provided for continued jurisdiction over the settlement, then the lower court would have had the authority to enforce the agreement.<sup>50</sup> For purposes of attorney fees, a case that is resolved by a settlement agreement that is not incorporated into the dismissal order does not generally qualify the plaintiff as a “prevailing party.”<sup>51</sup> Where the agreement is incorporated into the dismissal order and the court retains jurisdiction to enforce the terms of the agreement in the order of dismissal, the court’s order of dismissal is the legal equivalent of a consent decree,

<sup>41</sup> *Local 93 v. City of Cleveland*, 478 U.S. 501, 519 (1986) (quoting *United States v. ITT Continental Baking*, 420 U.S. 223, 235 (1975)).

<sup>42</sup> *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378–79 (1992); *Reynolds v. Roberts*, 207 F.3d 1288, 1298, 1300 n.22 (11th Cir. 2000).

<sup>43</sup> *United States v. Armour and Co.*, 402 U.S. 673, 681–83 (1971); *ITT Continental Baking*, 420 U.S. at 236; *Reynolds*, 207 F.3d at 1300.

<sup>44</sup> *Agrolinz Inc. v. Micro Flo Co.*, 202 F.3d 858, 861 (6th Cir. 2000); *United States v. Sherwin-Williams*, 165 F. Supp. 2d 797, 803–4 (C.D. Ill. 2001); 18A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4443 at 262–64 (2d ed. 2002); Fleming James Jr., *Consent Judgments as Collateral Estoppel*, 108 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 173 (1959).

<sup>45</sup> *Arizona v. California*, 530 U.S. 392, 414 (2000); WRIGHT ET AL., *supra* note 44, § 4443 at 265–66. See Chapter 6 of this MANUAL for a more detailed discussion of preclusion law.

<sup>46</sup> *Buckhannon v. West Virginia Department of Health and Human Resources*, 532 U.S. 578, 604 (2001).

<sup>47</sup> *Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375 (1994).

<sup>48</sup> *Id.* at 378, 380.

<sup>49</sup> *Id.* at 381.

<sup>50</sup> *Id.* at 381–82; *American Disability Association v. Chmielarz*, 289 F.3d 1315, 1319–21 (11th Cir. 2002) (observing that either by adopting the terms of the settlement in the court order or by expressly retaining jurisdiction, parties obtain the functional equivalents of consent decrees); *Board of Trustees of Hotel and Restaurant Employees Local 25 v. Madison Hotel*, 97 F.3d 1479, 1483 (D.C. Cir. 1996) (indicating that whether a mere reference to the existence of a settlement in the dismissal order is sufficient to retain jurisdiction is unclear).

<sup>51</sup> *Buckhannon*, 532 U.S. at 604 n.7. *But cf. Barrios v. California Interscholastic Federation*, 277 F.3d 1128, 1134–35 n.5 (9th Cir. 2002).

and the party should be entitled to fees.<sup>52</sup> Whether “prevailing party” status is obtained is unclear when the court does not incorporate the terms of the settlement into the dismissal order but does retain jurisdiction to enforce the settlement.<sup>53</sup> Because the law regarding the application of *Buckhannon* to various hybrid settlement arrangements is evolving, you need to research recent case law, particularly within your circuit.

### 3. Conditional Stipulations of Dismissal

Basing a settlement on the defendant’s compliance with certain conditions is not uncommon. Such conditional stipulations of dismissal can be simple, with full compliance anticipated almost immediately, or complex, involving detailed structural changes in agency practices requiring phased compliance over several years. Such stipulations often contain specific provisions for monitoring and enforcement.

Because stipulations of dismissal are governed by Federal Rule of Civil Procedure 41(a)(1)(ii) and are self-effectuating without necessity of court order, you must, when drafting such a stipulation, be very specific about when and under what conditions the dismissal becomes operative.<sup>54</sup> Failure to do so can leave the court without jurisdiction to act despite the clear intent of the parties.<sup>55</sup> Be sure to have the stipulation provide for judicial endorsement.<sup>56</sup>

The best course of action is to provide specifically that the dismissal becomes operative after all the conditions are completed and that the court retains jurisdiction in the interim to enforce compliance. Defendants, especially those represented by state attorneys general or the U.S. attorney’s office, are increasingly seeking provisions in such stipulations stating that the remedy for a breach is not specific enforcement but restoring the case to the court’s active docket for litigation on the merits. Depending upon the strength of your case, the scope of relief agreed to by the defendant, and your assessment of the likelihood that the defendant will not comply, you may or may not be willing to accept such a provision.<sup>57</sup>

Whether a conditional stipulation of dismissal establishes the plaintiff as a “prevailing party” for purposes of attorney fees depends upon how much the stipulation looks like a consent decree. Certainly, after *Buckhannon*, it must be signed by the judge.<sup>58</sup> Other factors that weigh in favor of prevailing party status include continuing court power to enforce compliance, specific monitoring requirements over an extended period of time, or an admission of liability by the defendant or all three.

## C. DRAFTING CONSENT DECREES OR OTHER REMEDIAL ORDERS

Other issues and factors need to be considered when preparing to negotiate a settlement designed to implement systemic change in the defendant’s policies or practices.<sup>59</sup> Some of the more common issues are (1) defining the class and choosing defendants, (2) statement of facts and goals, (3) declaratory relief, (4) admission of liability, (5) implementation plan, (6) regulations, (7) defining compliance, (8) monitoring compliance, (9) funding, (10) duration of the decree, (11) retention of jurisdiction, (12) specifying grounds for modification, (13) specifying noncompliance procedures and remedies, and (14) attorney fees.<sup>60</sup> Each of these topics is briefly discussed below.

<sup>52</sup>*Utility Automation 2000 Inc. v. Choctawatchee Electricity Cooperative Inc.*, 298 F.3d 1238, 1248 (11th Cir. 2002); *Chmielarz*, 289 F.3d at 1317, 1320–21.

<sup>53</sup>*Compare Barrios*, 277 F.3d at 1134–35, *Craig V. v. DeKalb County School System*, 244 F. Supp. 2d 1331, 1339–40 (N.D. Ga. 2003), *National Coalition for Students with Disabilities v. Bush*, 173 F. Supp. 2d 1272, 1278–79 (N.D. Fla. 2001), and *Reed v. Shenandoah Memorial Hospital*, 2002 WL 1964826 at \*3 (D. Neb. 2002) (holding that retention of jurisdiction to enforce settlement suffices for “prevailing party” status), with *Christina A. v. Bloomberg*, 315 F.3d 990, 992–94 (8th Cir. 2003) (neither retention of enforcement jurisdiction nor approval under Rule 23 is sufficient to confer “prevailing party” status).

<sup>54</sup>9 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2363, at 270–71 (2d ed. 1995); *Marques v. Federal Reserve Bank*, 286 F.3d 1014, 1018 (7th Cir. 2002).

<sup>55</sup>*Compare Metro-Goldwyn Mayer v. 007 Safety Products*, 187 F.3d 10, 14 (1st Cir. 1999) (where the stipulation expressly reserved jurisdiction over the terms of the settlement for sixty days), with *Hester Industries v. Tyson Foods*, 160 F.3d 911, 913, 916 (2d Cir. 1998) (despite explicit settlement agreement provision that it was subject to enforcement by specific performance by the district court, where the stipulation of dismissal was immediately operative and did not provide for continuing jurisdiction, district court lacked power to enforce).

<sup>56</sup>If the stipulation is not signed by the judge, it is unlikely to constitute a “judicially sanctioned change in the legal relationship of the parties” as required by *Buckhannon* to justify a fee award. *Buckhannon*, 532 U.S. at 605.

<sup>57</sup>Such a provision may have implications regarding your entitlement to fees. The possibility that the settlement could fall apart and the case proceed to trial makes any success that the plaintiff obtains somewhat uncertain and tentative.

<sup>58</sup>*Buckhannon*, 532 U.S. at 604–5 & n.7. If the case is brought as a class action, whether certified or not, Rule 23(f) requires that the court must approve the settlement.

<sup>59</sup>Many of these considerations would apply as well in a wholly litigated case if plaintiff submitted a proposed order on relief to the court.

<sup>60</sup>Some of the following considerations are discussed in Anderson, *supra* note 39, at 725, 729–37. See also Jim Rossi, *Bargaining in the Shadow*

## 1. Defining the Class and Choosing Defendants

If the case is brought as a class action, but the class was never certified by the court, certifying the class in the order may be helpful, particularly to minimize future disputes over any retroactive relief. However, class certification may not be that significant if the scope of declaratory or injunctive relief or both is specific and comprehensive.<sup>61</sup> Class certification can have adverse effects, barring others similarly situated from seeking other relief, and interfering with the flexible adaptation of the judgment to changed circumstances. If a class is certified, Federal Rule of Civil Procedure 23 requires the final judgment to define the class. Thus you must include in a consent decree whatever class definition the court adopts or to which the parties agree.

Concerning defendants, you must specify that the agents and successors of the defendants are bound by the terms of the decree to avoid any possible ambiguity as to whether Federal Rule of Civil Procedure 25(d) would apply.<sup>62</sup> Also, having all parties necessary for relief joined as defendants facilitates implementation. Having the defendants personally sign the decree may also promote its strict enforcement.<sup>63</sup>

## 2. Statement of Facts and Goals

As a basis of the parties' agreement and to guide resolution of any future disputes, a recitation in the decree of the critical facts, either as agreed or as seen by each side, and the goals that the parties seek to further by entering into the decree may be helpful. Such a statement is especially appropriate in a proposed decree in a class action as a predicate to a fairness hearing to establish that the decree fairly and adequately resolves class claims. This may be set forth in an introductory section or in detail. Agreed facts may not be necessary if the liability phase of the case is resolved by litigation.

## 3. Declaratory Relief

Declaring plaintiffs' rights under specified provisions of law gives plaintiffs the advantage by setting out the legal standard against which future compliance and unanticipated changes can be assessed. Even if the declaration is by agreement rather than based on a prior adjudication of liability, a stated declaration of law may have some precedential effect, at least of a persuasive nature, in subsequent related cases against the same or a similar agency.

However, specifying declaratory relief has two potential risks to plaintiffs: (1) The underlying law may change, and if the decree is clearly based on the changed law rather than on an unstated panoply of claims and considerations, defendants' future motion to vacate the decree is more likely to be granted.<sup>64</sup> (2) Federal court jurisdiction to enforce relief based on specified legal grounds may in the future be undermined. After *Pennhurst State School and Hospital v.*

*of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 DUKE LAW JOURNAL 1015, 1015–58 (2001). This list is intended to provoke counsel's thinking; it is not exclusive, nor are all of the issues relevant in every case.

<sup>61</sup>If no class has been certified or described, there is no organizational plaintiff, and the claim of the plaintiff(s) becomes moot, the plaintiff may not be able to enforce the agreement. For this reason, class certification is preferable whenever the decree provides classwide relief.

<sup>62</sup>See *Navarro-Ayala v. Hernandez-Colon*, 951 F.2d 1325, 1356 n.37 (1st Cir. 1991) (finding decree inapplicable to a mental health facility housing patients transferred from a public mental health institution, the original signatory to the decree); *Newman v. Graddick*, 740 F.2d 1513, 1517 (11th Cir. 1984) (commissioner of corrections lacked standing to challenge consent decree signed by previous commissioner and governor since he was a defendant in his official capacity pursuant to Federal Rule of Civil Procedure 25(d)); *Cornelius v. Hogan*, 663 F.2d 330, 332–33 (1st Cir. 1981) (court relied in part on "agents" language in consent decree to rule that commissioner of newly created agency taking over responsibility for some of covered services was bound by decree, where new commissioner was an agent of one of the defendants, the secretary of human services).

<sup>63</sup>See *J.G. v. Board of Education of Rochester*, 193 F.Supp. 2d 693, 699–701 (W.D.N.Y. 2002); *Rici v. Okin*, 537 F.Supp. 817, 820 (D. Mass. 1982); *cf. Rutherford v. City of Cleveland*, 137 F.3d 905, 906, 908–10 (6th Cir. 1998) (reversing district court's conclusion that nonminority applicants lacked standing to challenge consent decree that they did not sign); *Newman*, 740 F.2d at 1517–18 (attorney general who neither agreed to nor signed consent decree approved by governor and commissioner of corrections had standing to challenge it).

<sup>64</sup>Compare *Gilmore v. Housing Authority of Baltimore City*, 170 F.3d 428, 429–31 (4th Cir. 1999) (vacating consent decree requiring grievance hearings before lease terminations in light of changes in the National Housing Act), *Williams v. Atkins*, 786 F.2d 457, 461–63 (1st Cir. 1986) (ordering consent decree vacated where Food Stamp Act amendments substantially changed the legal foundation of the decree), and *Theriault v. Smith*, 523 F.2d 601, 602–3 (1st Cir. 1975) (consent decree vacated where subsequent Supreme Court decision regarding AFDC benefits constituted "fundamental change in the legal predicates of the consent decree"), with *King v. Greenblatt*, 52 F.3d 1, 6 (1st Cir. 1995) (remanding Department of Corrections violations case out of concern for crafting modification that comports with new legislation and is constitutional), *W.L. Gore and Associates v. C.R. Bard Inc.*, 977 F.2d 558, 561–63 (Fed. Cir. 1992) (refusing to vacate judgment based on changed law where no hardship exists), *Williams v. Lesiak*, 822 F.2d 1223, 1227 (1st Cir. 1987) (where new state statute led to motion to vacate consent decree that was based on broad range of federal constitutional rights, a case-specific inquiry "sensitive to the goals of the decree and the legislation, as well as to the values of federalism" must be conducted), and *Coalition of Black Leadership v. Cianci*, 570 F.2d 12, 14 (1st Cir. 1978) (motion to vacate consent decree based on recently enacted state law denied where decree's legal foundation was based on protection of the rights of citizens "to be free from 'racially discriminatory police conduct'").

*Halderman*, a federal court would probably have to decline to enforce a decree specifically grounded solely on state law.<sup>65</sup> The federal court would have to do so unless the case had been brought on federal as well as state grounds, the federal claim had not been adversely determined, and no legal basis for the decree was specified.<sup>66</sup>

#### 4. Admission of Liability

Defendants almost always balk at an admission of liability. They may agree to a declaration that plaintiffs have certain rights or that their own procedures should be improved or both, without being willing to admit that they had ever done anything illegal. If there is neither a declaration of rights nor an admission of liability, a court in a future enforcement proceeding may read the terms of the decree more narrowly than plaintiffs may wish.<sup>67</sup> While an admission of liability is preferable, even a declaration standing alone is likely to give plaintiffs reasonable protection regarding the future interpretation and application of the decree (unless the declaration itself produces negative results, as discussed above).

Although an admission of liability is helpful, it is rarely forthcoming. Insistence upon an admission may kill otherwise productive negotiations. The more comprehensive and specific the terms of the decree, the less necessary an admission becomes, for a comprehensive and specific decree leaves little room for potentially harmful judicial interpretation. Therefore, if the defendants insist on a nonadmission-of-liability clause, plaintiffs' counsel should insist in return on more specific language defining and implementing relief.

#### 5. Implementation Plan

Either the decree itself should specify the details of who will do what, and by when, to accomplish the desired changes in institutional behavior, or the decree should contain a blueprint for the process of developing such an implementation plan. For example, in a more straightforward case, where the parties are able to agree in advance on what steps are necessary to accomplish the agreed-upon performance changes, such as issuance of new procedures, and training of staff, the decree can simply specify the timetable for such actions. In a case involving more complex implementation measures, the parties may prefer to leave the details to be worked out subsequently. However, if plaintiffs wish to continue to have a role in helping ensure successful implementation, the decree should specify what part plaintiffs play in the implementation process, such as in the review of draft regulations or in the design of a monitoring plan. When developing the necessary implementation steps is thought to be beyond the expertise of the parties, the decree may provide for involving third parties, such as a panel of experts, in the design of the implementation plan.<sup>68</sup>

The parties may wish to specify when they may resort to the court (or perhaps a special master—see Federal Rule of Civil Procedure 53) if in the future they cannot agree on the nature of the implementation tasks. Resort to the court is possible anyway.<sup>69</sup> But the court may be more willing to continue to be involved in implementation details if its role is clearly specified.<sup>70</sup>

#### 6. Regulations

An appropriate remedy often requires the agency to promulgate new regulations to correct an invalid policy or practice. Incorporating the actual text of the new regulation(s) in the decree has the advantages of certainty, because the parties know exactly what they are agreeing to, and security, because the defendants cannot alter the regulation without a court-granted modification under Federal Rule of Civil Procedure 60. By contrast, the inflexibility that may result from including regulation language in a decree may be problematic for plaintiffs as well as defendants, depending on the nature of future circumstances.

If the decree does not include the regulation language, plaintiffs should consider having the decree specify the issues about which the defendants must or may promulgate regulations.<sup>71</sup> Plaintiffs should consider having the decree also

<sup>65</sup> *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984). *Pennhurst* is discussed in Chapter 8 of this MANUAL.

<sup>66</sup> *Compare Saahir v. Estelle*, 47 F.3d 758, 761 (5th Cir. 1995) (finding jurisdiction to enforce decree where no state laws are implicated), *with Lelsz v. Kavanaugh*, 807 F.2d 1243, 1251 (5th Cir. 1987) (vacating district court order enforcing portion of consent decree grounded on state law).

<sup>67</sup> *See United States v. Atlantic Refining Co.*, 360 U.S. 19, 23 (1959). A statement of goals, however, may help.

<sup>68</sup> *See New York State Association for Retarded Children v. Carey*, 596 F.2d 27, 32 (2d Cir.), *cert. denied*, 444 U.S. 836 (1979).

<sup>69</sup> But see discussion of private settlements and conditional stipulations of settlement above.

<sup>70</sup> *See, e.g., United States v. Boston Scientific Corp.*, 167 F. Supp. 2d 424, 434–35 (D. Mass. 2001) (finding that defendant violated the consent decree's express requirement to license a product within ten days after the order became final); *Ricci v. Okin*, 537 F. Supp. 817, 820, 830 (D.C. Mass. 1982) (consent decree requirement that disputes over staffing levels be brought to the court demonstrated an intention that personnel reductions be implemented only after a careful analysis by the court of the clinical, educational, and other needs of the individual clients).

<sup>71</sup> *E.g.*, defendants may wish to have procedures that plaintiffs would prefer them not to have, such as allowing extensions of timeliness standards for verification delays, but plaintiffs may be willing to agree to a compromise as long as such procedures are promulgated as regulations. Such a process at least gives plaintiffs leverage over the content of the rules and makes arbitrary, informal standards impermissible.

specify the legal standards to be used to determine the adequacy of the regulations (these standards may be implicit in a declaration, an adjudication, or an admission of liability); the role of the plaintiffs and any third parties in developing and promulgating the regulations; and the timing of the steps for issuing the regulations.

### 7. Defining Compliance

If at all possible, the decree itself should define, in objectively measurable terms, what constitutes compliance. The decree should not state merely that persons are entitled to timely services, or to treatment in the least restrictive setting, but actually define what “timely” and “least restrictive” mean, in a manner not subject to reasonable dispute. A court may refuse to enforce an overly vague decree.<sup>72</sup>

To avoid potentially frustrating and time-consuming litigation in any future enforcement action, a specific statement of what degree of compliance is required would be highly desirable. If the decree is silent on this issue, and merely requires, for example, service delivery within fifteen days, different courts may apply different standards in a contempt action to determine whether the defendant is in substantial noncompliance. In light of this problem, some decrees spell out the percentage of cases that must come within the specified time limit, perhaps increasing the percentage over the life of the decree. Furthermore, if plaintiffs want to avoid having a court give the defendants substantial leeway on compliance, they must not include in the decree any language that rejects enforcement action for de minimis noncompliance.

### 8. Monitoring Compliance

In any case where ongoing compliance is at issue, plaintiffs must ensure that they know through a formal monitoring process whether there are compliance problems. Although relying on anecdotal case information, or statistics or reports obtained through another method, such as Freedom of Information Act requests or formal discovery, is possible, ensuring in the decree that an effective monitoring system is established is most desirable.

The goal of an effective monitoring system is twofold—to ensure self-regulation by the defendant and to give the plaintiffs, as well as the defendant, accurate, usable, relevant, and timely compliance information. Thus, for a monitoring system to help achieve the desired permanent alteration in the defendant’s activities, it should be integrated into the defendant’s usual data gathering or other performance evaluation systems, not grafted on as a separate operation. The information generated should not be too voluminous to use. The parties should either pare down the required information or develop relevant, reliable measures to ensure that the information is delivered in a manner that enables plaintiffs to extract the needed information easily.<sup>73</sup>

Depending on the nature of the activity governed by the decree, different types of monitoring systems may be most appropriate. Statistical data gathering, with specified reports furnished at least to the plaintiff’s counsel, and possibly to the court or a designated third party, such as a monitor, or both is the usual method. Where the activity is too qualitative in nature for using a statistical method, such as in certain education or treatment cases, other systems, such as visiting evaluation teams of designated professionals, may be designed.<sup>74</sup> Both statistical and qualitative methods may be appropriate in some cases.

The decree or implementation plan should specify the plaintiffs’ role, if any, in assisting in the design of the monitoring system. Given the importance of the system and the weight that a court is likely to give to officially generated data, plaintiffs must ensure, in the very beginning, that the monitoring system is likely to function in the desired manner. To this end, requiring the defendants to submit more frequent reports in the initial stages of implementation, both to confirm that the monitoring system is functioning and to assist the defendants in speeding up any necessary performance improvement, may be helpful. In addition to taking a role in the design of the system, plaintiffs should be able to obtain

<sup>72</sup>See, e.g., *Equal Employment Opportunity Commission v. American Telephone and Telegraph Co.*, 419 F. Supp. 1022, 1059 (E.D. Pa. 1976). See Anderson, *supra* note 39, at 730. Additional definitions of technical terms may, of course, be helpful.

<sup>73</sup>E.g., specifying data production in a particular format or on particular software that enables plaintiffs easily to generate reports or otherwise retrieve the information that they deem relevant.

<sup>74</sup>See, e.g., *Hook v. Arizona*, 120 F.3d 921, 926 (9th Cir. 1997); *New York State Association for Retarded Children v. Carey*, 631 F.2d 162 (2d Cir. 1980); *Allen v. Board of Education*, 190 F.R.D. 601, 609–20 (M.D. Ala. 2000); *Goldskey v. Carnes*, 429 F. Supp. 370, 374 (W.D. Mo. 1977); *United States v. Wood, Wire and Metal Lathers International Union, Local Union 46*, 328 F. Supp. 429, 433 (S.D.N.Y. 1971). See Anderson, *supra* note 39, at 735–36. Monitoring reports concluding that defendants are not in compliance with the decree can be used by plaintiffs in obtaining an enforcement order from the court. See, e.g., *Duran v. Elrod*, 713 F.2d 292, 293 (7th Cir. 1983); *Lynch v. Rowland*, 2000 WL 33119474, at \*1-4 (D. Conn. Dec. 22, 2000); *Suthrie v. Evans*, 93 F.R.D. 390, 392 (S.D. Ga. 1981).

the court's intervention if they believe that the monitoring system is seriously deficient. In the design and review of the monitoring system, having their own expert consultants may be helpful to plaintiffs.<sup>75</sup>

In some cases, having a designated decree monitor with authority to oversee the monitoring system and compliance with the decree may be appropriate. This may be a staff member of the agency or an outsider appointed by the court pursuant to its power under Federal Rule of Civil Procedure 53 to appoint masters.<sup>76</sup> Such an outside force may appear as an attractive means to achieve compliance from a recalcitrant or inept defendant without enormous expenditure of resources by plaintiffs' counsel.<sup>77</sup> However, using outside monitors or masters (as opposed to designated agency staff) also has drawbacks. By definition, they are outside of the defendant's ordinary processes and not likely to further the goal of self regulation; they may interfere with, rather than facilitate, the plaintiffs' access to information and to the court since they are technically agents of the court; and they can be effective only if they have adequate funding to do their job.<sup>78</sup> Given the extraordinary nature of an outside monitor, a court may be unwilling to impose such an outside monitor on a defendant in the initial stage of compliance and may wait until plaintiffs can show that such an intrusive remedy is justified.

## 9. Funding

In virtually all cases, the defendant's ability to comply with the mandates of an institutional reform decree—speedier service, better special education, less crowded jails—depends on having adequate funds. Executive officials alone do not

<sup>75</sup>Time spent by plaintiff's counsel in negotiating and implementing consent decrees is reimbursable by defendants if the plaintiffs are otherwise entitled to fees in the action under 42 U.S.C. § 1988. See *Maher v. Gagne*, 448 U.S. 122 (1980) (plaintiffs who prevail through settlement rather than litigation may be awarded attorney fees under Section 1988, subject to *Buckhammon* constraints). With regard to postjudgment efforts, plaintiffs need only show that the time was reasonably spent, not that the time necessarily achieved specified results. *Pennsylvania v. Delaware Valley Citizens Council*, 478 U.S. 546, 558–60 (1986); see also *Beard v. Teska*, 31 F.3d 942, 945 (10th Cir. 1994) (awarding attorney fees to plaintiffs for efforts spent securing postjudgment compliance); *Turner v. Orr*, 785 F.2d 1498 (11th Cir. 1986) (counsel for plaintiffs' monitoring committee established under a Title VII consent judgment was entitled to attorney fees for postjudgment efforts and monitoring and enforcement); *Garrity v. Sumnu*, 752 F.2d 727, 738 (1st Cir. 1984); *Bond v. Stanton*, 630 F.2d 1231, 1233–34 (7th Cir. 1980) (awarding fees for postjudgment time spent on discovery, filing comments, and objections to defendant's proposed remedial plan, as well as other implementation issues); *Northcross v. Board of Education*, 611 F.2d 624, 637 (6th Cir. 1979) (“Services devoted to reasonable monitoring of the court's decrees, both to insure full compliance and to ensure that the plan is indeed working . . . are compensable services”); *Wilder v. Bernstein*, 975 F. Supp. 276, 280–81 (S.D.N.Y. 1997); *Alliance to End Repression v. City of Chicago*, No. 74 C 3268, 1994 WL 86690, \*5–8 (N.D. Ill. Mar. 15, 1994); *Rolland v. Cellucci*, 151 F. Supp. 2d 145, 151–56 (D. Mass. 2001) (awarding attorney fees for monitoring but denying fees for enforcement where the latter was not incorporated into the settlement agreement). Expert consulting could be paid from such fees if they are not available on a voluntary basis.

<sup>76</sup>See, e.g., *Labor/Community Strategy Center v. Los Angeles County Metropolitan Transportation Authority*, 263 F.3d 1041, 1049–50 (9th Cir. 2001) (upholding special master's authority under consent decree to require the purchase of new buses under remedial plan); *In re Pearson*, 990 F.2d 653, 659 (1st Cir. 1993) (affirming district court's appointment of special master to monitor a treatment center for sex offenders consistent with consent decree); *Cronin v. Browner*, 90 F. Supp. 2d 364, 377–78 (S.D.N.Y. 2000) (appointing special master to regulate cooling water intake structures pursuant to Federal Rule of Civil Procedure 53(b)); *New York State Association for Retarded Children v. Carey*, 551 F. Supp. 1165, 1178–81 (E.D.N.Y. 1982), *aff'd*, 706 F.2d 956 (2d Cir. 1983) (appointing special master after defendants refused to fund review panel of experts provided for in consent decree); *Armstrong v. Board of School Directors of Milwaukee*, 471 F. Supp. 800, 809–10 (1980) (approving appointment of a five-member citizen monitoring board to ensure compliance), *aff'd*, 616 F.2d 305 (7th Cir. 1980); *Aspira of New York v. Board of Education*, 423 F. Supp. 647, 658 (S.D.N.Y. 1976). See generally Ellen E. Deason, *Managing the Managerial Expert*, 1998 UNIVERSITY OF ILLINOIS LAW REVIEW 341 (1998). For case studies on the use of special masters in developing remedial programs in the school desegregation context, see David Kirp & Gary Babcock, *Judge and Company: Court Appointed Masters, School Desegregation, and Institutional Reform*, 32 ALABAMA LAW REVIEW 313 (1981); *But cf. Brewster v. Dukakis*, 687 F.2d 495 (1st Cir. 1982) (holding that the decree did not provide the monitor with the authority to resolve disagreement over the establishment of a broad legal services program for community-based mental patients).

<sup>77</sup>Defendants usually have to pay for Rule 53 appointments. See *Reed v. Cleveland Board of Education*, 607 F.2d 737, 743 (6th Cir. 1979); *Newman v. Alabama*, 559 F.2d 282, 290 (5th Cir. 1977); *St. Martin v. Mobil Exploration and Producing U.S.*, 2002 WL 1933720, \*1 (E.D. La. Aug. 21, 2002); *Woodson v. Sully*, 801 F. Supp. 466, 471 (D. Kan. 1992); *Toussaint v. McCarthy*, 597 F. Supp. 1388, 1419 (N.D. Cal. 1984), *reversed in part* by 801 F.2d 1080 (9th Cir. 1986); *Halderman v. Pennhurst State School and Hospital*, 533 F. Supp. 631 (E.D. Pa. 1981), *aff'd*, 673 F.2d 620 (3d Cir. 1982), *cert. denied*, 465 U.S. 1038 (1984); *Valentine v. Englehardt*, 474 F. Supp. 294, 304 (D.N.J. 1979). *But see Atlantic Richfield Co. v. American Airlines Inc.*, 98 F.3d 564, 571–72 (10th Cir. 1996) (affirming the equal division of costs of special master to assist in settlement negotiation because both sides benefitted from his services).

<sup>78</sup>See Anderson, *supra* note 39, at 732–35; Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARVARD LAW REVIEW 428, at 440–45, 450 (1978); Buckholz Jr. et al., *supra* note 39, at 828–30. Defendants may refuse to pay the cost. If the legislature absolutely refuses to appropriate the necessary funds, the court's hands may be tied. See *New York State Association for Retarded Children*, 631 F.2d at 163–66.

control appropriations, and legislators are extremely unlikely to be parties to a decree.<sup>79</sup> Thus you must consider whether specifying what steps or types of actions the defendants must take to obtain sufficient appropriations is helpful. (Private parties may, of course, be required to provide the necessary funds.) For example, decree provisions requiring the defendant to seek appropriations for adequate staff may give a concrete handle against a recalcitrant defendant; however, a specification that the executive use “best efforts” to obtain funding may be used as a defense by the executive if the legislature refuses to appropriate the funds and may be viewed by a court as a limit on the court’s power to order any further relief.<sup>80</sup> However, regardless of what the decree specifies, a court may be able only to order executive officials to use their best efforts to obtain necessary funds.<sup>81</sup>

### 10. Duration of the Decree

The parties can determine, through negotiations, whether an injunction is intended to be permanent. For example, a defendant may agree to be subject to court order only for a specified period or until the vestiges of the illegal action are remedied. At the expiration of such a period, the decree may be vacated and the action dismissed. Obviously, it is preferable, if possible, to obtain a permanent injunction concerning the defendant’s overall legal obligations, such as to provide timely service or maintain a nonsegregated staff, even if other provisions in the decree, such as reporting to plaintiffs, expire after a designated time or achievement of specified events. As long as the decree specifies that it is a permanent order, the defendant has a very heavy burden to meet before the order may be vacated.

### 11. Retention of Jurisdiction

If the order is designated as a permanent injunction and signed by the court, a party to the original action (including a class member) may bring an enforcement action by filing an appropriate motion in the “old” case rather than by instituting a new action. Nonetheless specifying that the court retains jurisdiction—to ensure the court’s power to hear the enforcement action—is advantageous.<sup>82</sup> The period during which the court retains jurisdiction should at least be commensurate with any required reporting.<sup>83</sup>

### 12. Specifying Grounds for Modification

Not uncommonly, when settling institutional reform litigation, one or both of the parties are concerned about the impact of a possible change in facts or law upon the efficacy or viability of the agreement. For example, in a due process notice case, plaintiffs may be willing to agree to a notice containing a certain level of factual detail based upon the defendant’s current computer system capabilities but may want to incorporate the right to a modification if future technological advances make it possible for the defendant to add information without undue financial or administrative burden. Similarly defendants in a case based upon certain federal statutory or regulatory provisions may want to include language giving them the ability to modify the decree if those legal requirements change. Also, if there is uncertainty as to how a particular monitoring methodology may work, a helpful statement may be that modification be made in the system under certain circumstances.

<sup>79</sup> State and federal legislators are generally absolutely immune from suit concerning their official duties, although this immunity does not apply to the same extent to lesser legislative-type officials such as county commissioners. See Chapter 8 of this MANUAL. Courts may seek to obtain the cooperation of key legislators by having them attend certain court hearings. See *Ricci*, 537 F. Supp. at 820–21.

<sup>80</sup> See, e.g., *San Francisco National Association for the Advancement of Colored People v. San Francisco Unified School District*, 896 F.2d 412, 413–16 (9th Cir. 1990) (declining to extend consent decree to require state to reimburse costs incurred in carrying out desegregation plan where state legislature reduced reimbursement funds after the decree was entered into); *Brewster v. Dukakis*, 675 F.2d 1 (1st Cir. 1982); *New York State Association for Retarded Children*, 631 F.2d at 164.

<sup>81</sup> See Jason M. Hirschhorn, *Where the Money Is: Remedies to Finance Compliance with Strict Structural Injunctions*, 82 MICHIGAN LAW REVIEW 1815 (1984), for an excellent, thorough discussion of the situations in which a federal court may be able to require executive official defendants to do more than just use best efforts to fund remedial decrees. In *Missouri v. Jenkins*, 495 U.S. 33, 51, 55–56 (1990), the Supreme Court, while holding that the trial court exceeded its equitable powers in imposing a tax increase on a locality to fund a school desegregation decree, did uphold an order requiring the local officials to levy a tax increase sufficient to fund the decree. See also *Rawlins v. Sawyer*, 105 F. Supp. 2d 1234, 1248 (M.D. Ala. 2000) (validating governor’s duty to use “best efforts” to secure funding to fulfill consent decree provisions).

<sup>82</sup> Especially if the settlement does not constitute a formal consent decree, retention of enforcement jurisdiction may be critical. *Kokkonen*, 511 U.S. at 381. See discussion in Section II.B *supra*.

<sup>83</sup> See Anderson, *supra* note 39, at 736 (agrees court has inherent power to enforce a consent decree regardless of retention of jurisdiction, but argues retention may be viewed otherwise by some courts, and is symbolically helpful). See also *Brown v. Neeb*, 644 F.2d 551, 558–59 (6th Cir. 1981) (court relied upon retention clause for authority to modify decree to achieve the decree’s goals even absent violation of its terms by defendants).

Language in a consent decree (or similar agreement over which the court retains ongoing enforcement jurisdiction) regarding modification may be absent.<sup>84</sup> If so, the criteria set forth in Federal Rule of Civil Procedure 60(b) controls.<sup>85</sup> In *Rufo v. Inmates of Suffolk County Jail*, the Court retreated from the previously strict standard of *U.S. v. Swift and Co.*, which provided that “[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen circumstances should lead us to change what was decreed after years of litigation with the consent of all concerned.”<sup>86</sup> As for consent decrees in institutional reform litigation, the *Rufo* Court held that the “grievous wrong” standard was too strict and adopted a “more flexible” approach.<sup>87</sup> Emphasizing that the public interest was a critical component in such litigation, the Court held that the “no longer equitable that the judgment should have prospective effect” standard of Rule 60(b)(5) permitted modification upon a showing of a significant change in the factual or legal circumstances that gave rise to the decree and a showing that the proposed modification was suitably tailored to the change of circumstances.<sup>88</sup> *Rufo* did provide that anticipated changes in fact or law when the decree was entered would not generally satisfy the “significant change in circumstances test.”<sup>89</sup> Nevertheless *Rufo* gives defendants, especially governmental defendants, some leeway.<sup>90</sup> Defendants have substantially greater ability to modify or vacate consent decrees than they previously possessed.<sup>91</sup>

### 13. Specifying Noncompliance Procedures and Remedies

While the absence of any specification of the consequences of noncompliance may not hurt in the case of a formal consent decree since plaintiffs retain the full panoply of enforcement remedies, such a specification may be critical in other contexts. Regardless of the form of settlement, such a specification is often helpful in facilitating compliance. For example, when individual problems in the application of the decree are anticipated, particularly where they may involve lengthy factual disputes, such as in special education cases, specifying a hearing mechanism may be helpful. This could be a court-appointed magistrate or a Rule 53 master.<sup>92</sup> Or this could be a person or group designated by the parties.

A decree may specify that certain penalties, such as fines, will be imposed on the defendant in certain circumstances of noncompliance. The certainty of consequences for noncompliance before any contempt action should help achieve compliance. Such a provision could be the *quid pro quo* for the defendant’s obtaining a grace period to seek to achieve compliance. In many cases, only the actual imposition of a penalty, or the real prospect of it, in contrast to the speculative prospect of time-consuming contempt litigation, will bring about the marshaling of effort necessary to achieve compliance.

### 14. Attorney Fees

In order to avoid any problems of alleged waiver of the right to attorney fees in appropriate cases, the ideal is, if fees have not been agreed upon, to make clear in the consent decree or settlement that the issue of fees is outstanding. While obtaining a consent decree should be sufficient in itself to justify plaintiffs’ entitlement to fees, other forms of settlement may be more problematic after *Buckhannon*.<sup>93</sup> Obtaining an agreement that plaintiffs are the prevailing party and are entitled to fees should often be possible. Such an agreement will likely avoid litigation over the issue and establish the

<sup>84</sup>In the event of a settlement agreement over which the court has no enforcement authority after *Kokommen*, traditional contract law regarding modifications apparently would control, and the party seeking such a modification would have to file an independent action, most likely in state court to seek such relief.

<sup>85</sup>*Rufo*, 502 U.S. at 378.

<sup>86</sup>*United States v. Swift and Co.*, 286 U.S. 106, 119 (1932).

<sup>87</sup>*Rufo*, 502 U.S. at 381, 393.

<sup>88</sup>*Id.* at 383, 393.

<sup>89</sup>*Id.* U.S. at 385, 388.

<sup>90</sup>*Rufo* was specifically limited to institutional reform litigation. Whether the more liberalized standard that it announced applies in other contexts is not definitively established. Jed Goldfarb, *Keeping Rufo in Its Cell: The Modification of Antitrust Consent Decrees After Rufo v. Inmates of Suffolk County Jail*, 72 NEW YORK UNIVERSITY LAW REVIEW 625, 640–44 (1997) (collecting cases demonstrating split among the circuits on this issue); *In re Midlands Utility*, 253 B.R. 683, 689–90 (Bankr. D.S.C. 2000) (collecting cases on both sides of issue and applying *Rufo* in the noninstitutional context).

<sup>91</sup>See *Board of Education v. Dowell*, 498 U.S. 237, 246–47 (1991) (rejecting *Swift*’s “grievous wrong” test in case seeking to vacate a desegregation consent decree and holding that decree could be vacated by showing that its purposes had been fully achieved). *Dowell* was applied outside the school desegregation context. See, e.g., *Gonzales v. Galvin*, 151 F.3d 526, 531 (4th Cir. 1998); *Patterson v. Newspaper and Mail Deliverer’s Union*, 13 F.3d 33, 37–38 (2d Cir. 1983).

<sup>92</sup>See, e.g., *Halderman v. Pennhurst State School and Hospital*, 526 F. Supp. 428 (E.D. Pa. 1981) (special master authorized to review and approve treatment plan for each child).

<sup>93</sup>See Section IV *infra*.

right to a fee award. In order to avoid mixing the negotiation of the merits with negotiation of fees, the parties simply agree on the fee amount or, if that is impossible, submit the issue to the court. Counsel should be careful about timing limits established by local rules.

#### D. CONSTRUCTION OF CONSENT DECREES

Despite the care taken in negotiating a consent decree, disputes may arise between the parties over its meaning in light of unanticipated circumstances. If the parties cannot resolve their differences by using a motion for clarification, they can request the court to construe the decree. In construing consent decrees, courts are guided by their dual nature as contracts and as judgments.<sup>94</sup> Thus, if the court finds no ambiguity on the face of the decree, the court will not look beyond the “four corners” of the decree itself.<sup>95</sup>

To interpret the parties’ intent if there is ambiguity, the court may refer to extrinsic aids, such as

- the negotiating history of the decree,<sup>96</sup>
- any writings associated with the decree,<sup>97</sup>
- events surrounding approval and entry of the decree,<sup>98</sup> and
- the conduct of the parties subsequent to entry of the decree.<sup>99</sup>

If no relevant extrinsic aids exist, the court may be guided by the spirit or purpose of the decree in construing ambiguous provisions.<sup>100</sup> While a court must be mindful that the legal violations that plaintiffs alleged have ordinarily not been adjudicated, the court may nonetheless look to the decree’s purpose in construing its terms.<sup>101</sup> Of course, the court’s job is easier, and the court may be more willing to take a broad view

- if the parties agree explicitly in the decree as to its purposes<sup>102</sup> or
- if the decree follows a litigated determination of liability.<sup>103</sup>

#### E. CHALLENGES TO CONSENT DECREES

In *Martin v. Wilks* the Supreme Court held that a consent decree adjudicated only the rights of the parties to the decree.<sup>104</sup> The Court therefore allowed those persons who were adversely affected by the operation of the decree to challenge actions taken pursuant to the decree even though they failed to intervene in the litigation from which the decree arose. *Wilks* was an employment discrimination case in which white employees, bringing a collateral attack on the consent decree, asserted that it discriminated against them in violation of Title VII. The white employees were aware of the original case and did not intervene. Nevertheless, the Supreme Court held that they were under no obligation to do so and

<sup>94</sup> See *Local No. 93, International Association of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986); *Bragg v. Robertson*, 83 F. Supp. 2d 713, 717 (S.D. W.Va. 2000). On the construction of consent decrees generally, see Anderson, *supra* note 39, at 579.

<sup>95</sup> See *United States v. Armour and Co.*, 402 U.S. 673 (1971); *Langton v. Hogan*, 71 F.3d 930, 937–38 (1st Cir. 1995); *San Francisco NAACP*, 896 F.2d at 413; *Roberts v. St. Regis Paper Co.*, 653 F.2d 166, 171 (5th Cir. 1981). Even where the decree appears clear on its face, a court may find it ambiguous in light of changed circumstances. *Cornelius*, 663 F.2d at 333; *Escalera v. New York Housing Authority*, 924 F. Supp. 1323, 1339–41 (S.D.N.Y. 1996) (relaxing procedural eviction safeguards under twenty-five year old consent decree due to increased drug trafficking in building). *But see Marlowe v. Botarelli*, 938 F.2d 807, 812–13 (7th Cir. 1991); *White v. Roughton*, 689 F.2d 118, 120 (7th Cir. 1982) (disregarding unambiguous language when it clearly contradicts the intent of the parties).

<sup>96</sup> See, e.g., *Sportmart Inc. v. Wolverine World Wide Inc.*, 601 F.2d 313, 318 (7th Cir. 1979).

<sup>97</sup> See, e.g., *United States v. I.T.T. Continental Baking Co.*, 420 U.S. 223, 237 (1975) (appendix to decree); *New York State Association for Retarded Children*, 631 F.2d at 163 (same).

<sup>98</sup> See, e.g., *Armstrong v. Board of School Directors*, 616 F.2d 305, 310 (7th Cir. 1980) (parties’ statements at settlement hearing).

<sup>99</sup> See, e.g., *Sanchez v. Maher*, 560 F.2d 1105, 1107–9 (2d Cir. 1977) (letter of defendant welfare official).

<sup>100</sup> See *I.T.T. Continental Baking Co.*, 420 U.S. at 223. While the Court paid lip service to the “four corners” rule of *Armour*, it was clearly moving to a broader standard of construction in light of the nature of a consent decree as both a negotiated “contract” and a judicial order.

<sup>101</sup> Numerous courts come to this conclusion, regardless of the words they use to formulate the contract versus judgment tension. See, e.g., *New York State Association for Retarded Children*, 596 F.2d at 37–38; *Sanchez*, 560 F.2d at 1108–9; *Massachusetts Association for Retarded Citizens v. King*, 668 F.2d 602, 607–8 (1st Cir. 1981); *Sarabia v. Toledo Police Patrolman’s Association*, 601 F.2d 914, 918 (6th Cir. 1979). See also Anderson, *supra* note 39.

<sup>102</sup> See, e.g., *Equal Employment Opportunity Commission v. Local Union No. 3*, 416 F. Supp. 728, 732–33 (N.D. Cal. 1975).

<sup>103</sup> See, e.g., *Cornelius*, 633 F.2d at 330.

<sup>104</sup> *Martin v. Wilks*, 490 U.S. 755, 761–62 (1989).

were allowed collaterally to attack the decree.<sup>105</sup> The *Wilks* decision relies heavily upon Federal Rules of Civil Procedure 19 and 24, which address joinder and intervention, respectively. While *Wilks* was legislatively overruled by the Civil Rights Act of 1991 with respect to Title VII actions, its analysis continues to be applicable in other contexts.<sup>106</sup>

The lesson to be learned from *Wilks* is that if a remedial decree will have a direct adverse effect on an identifiable group of individuals, counsel for plaintiffs should seriously consider joining those individuals or else risk a collateral attack. Because anticipating and joining as parties every individual potentially adversely affected by the operation of a proposed consent decree is not always possible, such decrees will sometimes be at risk of collateral attack.<sup>107</sup> Nevertheless, a properly conducted Rule 23 fairness hearing establishing the evidentiary foundation for the claims may constitute some ammunition to fend off such a potential attack.

### III. Declaratory Judgment Act

The Declaratory Judgment Act offers a unique mechanism by which advocates may seek to remedy ongoing violations of statutory or constitutional law.<sup>108</sup> The Act may authorize broad, classwide declaratory and injunctive relief without resort to class action procedures.<sup>109</sup> Distinctive features of the Act are

- to allow prospective defendants to sue to establish their nonliability<sup>110</sup> and
- to afford a party threatened with liability an opportunity for adjudication before its adversary commences litigation.<sup>111</sup>

However, the statute on its face makes no express reference to, and creates no special preference for, the resolution of such “anticipatory” disputes. A party need not be a prospective defendant in order to bring an action under the Act.<sup>112</sup> Clearly, however, the unique declaratory form of relief created by the statute was intended to resolve pending or threatened controversies before the need for more coercive intervention was required.<sup>113</sup> Section 1 of the Act provides, in relevant part:

In a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment and shall be reviewable as such.<sup>114</sup>

The availability of this “declaratory” relief was intended to offer a milder alternative to the general injunction remedy.<sup>115</sup> Yet Section 2 of the Act specifies that “[f]urther or necessary or proper relief based upon a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been deter-

<sup>105</sup> *Id.* at 762–65.

<sup>106</sup> Civil Rights Act of 1991, 42 U.S.C. § 2000e–2(n).

<sup>107</sup> See *Wilson v. Minor*, 220 F.3d 1297, 1302 n.10 (11th Cir. 2000) (explaining that the Civil Rights Act of 1991 did not curtail the applicability of *Wilks* to Voting Rights Act violations); *United States v. City of New York*, 198 F.3d 360, 366 (2d Cir. 1999) (noting that the Civil Rights Act of 1991 eroded *Wilks* only in the narrow context of employment discrimination claims and did not affect environmental claims). The reasoning of *Wilks* applies equally to a fully litigated judgment entered by the court.

<sup>108</sup> Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202.

<sup>109</sup> See Gary Smith & Nu Usaha, *Dusting Off the Declaratory Judgment Act: A Broad Remedy for Classwide Violations of Federal Law*, 32 CLEARINGHOUSE REVIEW 112 (July–Aug. 1998).

<sup>110</sup> *Beacon Theatres Inc. v. Westover*, 359 U.S. 500, 504 (1959).

<sup>111</sup> 10B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2751, at 457 (3d ed. 1998).

<sup>112</sup> Nevertheless, clearly a major purpose behind the legislation was to help eliminate various uncertainties in legal and business relationships, and the Act has been heavily utilized by insurance companies to obtain declarations resolving disputed issues of coverage or liability before being subject to litigation by their insureds. See, e.g., *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 239 (1937); Smith & Usaha, *supra* note 109, at 114.

<sup>113</sup> WRIGHT ET AL., *supra* note 111, at 568. See generally *United States v. Doherty*, 786 F.2d 491, 498–99 (2d Cir. 1986) (Friendly, J.) (collecting cases describing the various purposes behind the statute).

<sup>114</sup> 28 U.S.C. § 2201(a).

<sup>115</sup> *Steffel v. Thompson*, 415 U.S. 452, 466–67 (1974); *Pratt v. Wilson*, 770 F. Supp. 539, 545 (E.D. Cal. 1991).

mined by such judgment.”<sup>116</sup> Such relief may include broad equitable or injunctive remedies, which are considered ancillary to the enforcement of the declaratory judgment.<sup>117</sup>

### A. “CASE OR CONTROVERSY” AND JURISDICTIONAL REQUIREMENTS

A party seeking declaratory relief under the statute must present an “actual controversy” in order to satisfy the “case or controversy” requirement of Article III.<sup>118</sup> The Declaratory Judgment Act was not intended as a device for rendering mere advisory opinions. The case must involve a controversy that is substantial and concrete, must touch the legal relations of parties with adverse interests, and must be subject to specific relief through a decree of conclusive character.<sup>119</sup> Like any other federal court plaintiff, a claimant seeking relief under the Act also must satisfy the three requirements for constitutional standing.<sup>120</sup>

While the Act enlarges the range of remedies available to federal court litigants, it does not confer an independent basis for federal jurisdiction.<sup>121</sup> The Supreme Court describes the Act as “procedural” in its operation and as intending simply to place another remedial arrow in the district court’s quiver.<sup>122</sup> Accordingly any complaint seeking relief under the Act must invoke an independent basis for federal jurisdiction.

### B. DISCRETIONARY NATURE OF THE REMEDIES

The Declaratory Judgment Act confers on the federal courts unusual and substantial discretion in determining whether to “declare” the rights of litigants. The Supreme Court emphasizes that the statute permits, but does not require, a federal court to issue a declaratory judgment.<sup>123</sup> Accordingly, “[i]n the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration.”<sup>124</sup>

Not surprisingly, a substantial body of case law has developed in conjunction with disputes over whether the district court properly exercised its discretion in proceeding (or declining to proceed) upon a claim for relief brought under the Act.<sup>125</sup> Now well settled is that the district court’s exercise of discretion should be informed by a number of prudential factors, including: (1) considerations of practicality and efficient judicial administration; (2) the functions and limitations of the federal judicial power; (3) traditional principles of equity, comity, and federalism; (4) Eleventh Amendment and other constitutional concerns; and (5) the public interest.<sup>126</sup> Notwithstanding these general principles, most disputes over the proper exercise of statutory discretion arise in cases where jurisdiction is founded upon diversity of citizenship, where the claims of the plaintiff (typically an insurance company) arise under state law, and where parallel or related state court proceedings are either pending, contemplated, or available.<sup>127</sup> In such circumstances the district court’s discretion is guided by the Supreme Court’s decision in *Brillhart v. Excess Insurance Co. of America* and its considerable progeny.<sup>128</sup> *Brillhart* evaluated whether the federal court should refrain from exercising its discretion under the Act in favor of actual or potential state court litigation involving the same parties and issues.<sup>129</sup> In contrast to the situation presented in

<sup>116</sup>28 U.S.C. § 2202. Federal Rule of Civil Procedure 57, which was adopted pursuant to the Act, provides that (1) a jury trial is authorized if otherwise available for the claims presented and (2) an applicant for a declaratory judgment may seek a speedy hearing on the court’s calendar.

<sup>117</sup>*Calderon v. Ashmus*, 123 F.3d 1199, 1206 (9th Cir. 1997), *rev’d on other grounds*, 523 U.S. 740 (1998). See Section IV.D.2 *infra*.

<sup>118</sup>28 U.S.C. § 2201(a); *Government Employees Insurance Co. v. Dizon*, 133 F.3d 1220, 1222 (9th Cir. 1998) (en banc); see *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 325 (1936) (upholding constitutionality of the Act under Article III).

<sup>119</sup>*Aetna Life Insurance Co.*, 300 U.S. at 240–41.

<sup>120</sup>Regarding standing, see Chapter 3, Section I, of this MANUAL.

<sup>121</sup>*Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 672 (1950).

<sup>122</sup>*Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995); *Aetna Life Insurance Co.*, 300 U.S. at 247.

<sup>123</sup>*Wilton*, 515 U.S. at 286–87; *Public Affairs Associates v. Rickover*, 369 U.S. 111, 112 (1962).

<sup>124</sup>*Wilton*, 515 U.S. at 286, 288; compare *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813, 818–20 (1976) (federal courts generally have a “virtually unflagging obligation” to entertain and resolve disputes within their jurisdiction and may abstain from exercising that jurisdiction only under “exceptional circumstances”).

<sup>125</sup>*Smith & Usaha*, *supra* note 109, at 116; see *Wilton*, 515 U.S. at 289–90 (holding that the Act’s discretion is vested in the district courts, not the courts of appeal, and that the district court’s exercise of discretion is itself reviewable under the deferential abuse-of-discretion standard).

<sup>126</sup>*Smith & Usaha*, *supra* note 109, at 116 (collecting cases).

<sup>127</sup>*Id.* at 116–17.

<sup>128</sup>*Brillhart v. Excess Insurance Company of America*, 316 U.S. 491 (1942).

<sup>129</sup>*Smith & Usaha*, *supra* note 109, at 117.

cases like *Brillhart*, a district court should not hesitate to entertain a declaratory judgment action brought by legal aid advocates seeking to remedy ongoing violations of federal law.<sup>130</sup>

### C. REMEDIES

The unique feature of the Declaratory Judgment Act is its authorization to “declare” the rights and legal relations of the parties to the controversy; such declarations have the force and effect of a final judgment.<sup>131</sup> Congress plainly intended declaratory relief to substitute, in appropriate cases, for the “strong medicine” of an injunction.<sup>132</sup> The Supreme Court repeatedly observed that the issuance of declaratory relief should have a strong deterrent effect rendering more coercive remedies unnecessary.<sup>133</sup> However, if a declaration of rights alone does not deter parties or officials from proceeding (or continuing) to violate federal law, the Act specifically authorizes the party in whose favor the declaration is rendered to seek “further necessary or proper relief” to aid enforcement of the judgment.<sup>134</sup>

The basis for any injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies.<sup>135</sup> Issuance of an injunction is an inherently equitable, and therefore discretionary, exercise of power by the district court.<sup>136</sup> Historically a federal court injunction, particularly when directed at state or local officials, was considered to be a harsh and abrasive remedy.<sup>137</sup> However, as already noted, Congress specifically authorized courts to grant affirmative relief under the Act, including equitable and injunctive remedies, for purposes of enforcing or effectuating a declaratory judgment.<sup>138</sup>

Generally the potential reach of an injunctive remedy implicates the jurisdictional power of the court to bind parties and enforce judgments.<sup>139</sup> Arguably an injunctive order may not run affirmatively *in favor* of persons (or class of persons), other than the named plaintiffs, absent a certified class.<sup>140</sup> However, a number of courts upheld the issuance, under the Declaratory Judgment Act, of broad injunctive relief that is directed against a defendant government agency or official in order to remedy an ongoing violation of federal law even in the absence of a certified class.<sup>141</sup> Under the reasoning of these decisions, an injunction issued to correct a defendant’s policy or practice which is unlawful not only as to the named plaintiff but also as to others is not overbroad, notwithstanding the absence of a certified plaintiff class.<sup>142</sup>

Over the years legal aid advocates successfully obtained broad relief under the Declaratory Judgment Act for their clients in cases involving civil rights, public benefits, social security, health care, housing, and labor issues.<sup>143</sup> The remedies afforded by the Act are particularly suited for attacking and correcting illegal policies, practices, and rules that harm large numbers of persons.

### IV. Attorney Fees

Court-awarded attorney fees are critical in preserving access to the courts for poor people. Recipients of Legal Services Corporation funds are prohibited from seeking attorney fees in most cases.<sup>144</sup> Other programs, however, depend on fees

<sup>130</sup>In such cases, the claims arise under federal law, no parallel state court proceedings typically exist, and the prudential, comity, and efficiency concerns of *Brillhart* are inapplicable.

<sup>131</sup>28 U.S.C. § 2201(a). Declaratory judgments are accorded res judicata effect. Restatement (Second) of Judgments § 33 (1982).

<sup>132</sup>*Steffel*, 415 U.S. at 466–67.

<sup>133</sup>See, e.g., *Doran v. Salem Inn Inc.*, 422 U.S. 922, 931 (1975); *Perez v. Ledesma*, 401 U.S. 82, 124–26 (Brennan, J., concurring); *Samuels v. Mackell*, 401 U.S. 66, 73 (1971).

<sup>134</sup>28 U.S.C. § 2202.

<sup>135</sup>See *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982); *Natural Resources Defense Council Inc. v. Texaco Refining and Marketing Inc.*, 2 E.3d 493, 506 (3d Cir. 1993). See also Chapter 6, Section III, of this MANUAL.

<sup>136</sup>*Amoco Products Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987); *Center for Biological Diversity v. Pirie*, 201 F. Supp. 2d 113, 116 (D.D.C. 2002).

<sup>137</sup>*Steffel*, 415 U.S. at 436.

<sup>138</sup>See, e.g., *Powell v. McCormack*, 395 U.S. 486, 499 (1969); *Calderon*, 123 F.3d at 1206; *Doe v. Gallinot*, 657 F.2d 1017, 1025 (9th Cir. 1981).

<sup>139</sup>*Smith & Usaha*, *supra* note 109, at 119; see Fed. R. Civ. P. 65(d).

<sup>140</sup>*Smith & Usaha*, *supra* note 109, at 119–21.

<sup>141</sup>See, e.g., *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501–2 (9th Cir. 1996); *Bresgal v. Brock*, 843 F.2d 1163, 1770 (9th Cir. 1988); *Soto-Lopez v. New York City Civil Service Commission*, 840 F.2d 161, 168 (2d Cir. 1988); *Gallinot*, 657 F.2d at 1025; *Galvin v. Levine*, 490 F.2d 1255, 1261 (2d Cir.), *cert. denied*, 417 U.S. 936 (1974).

<sup>142</sup>*Smith & Usaha*, *supra* note 109, at 120–23 & n.106 (collecting cases).

<sup>143</sup>*Id.* at 125 & n.118 (citing numerous examples).

<sup>144</sup>45 C.F.R. § 1642.3.

for their very survival. Without attorney fees, numerous federal laws protecting rights to housing, health care, and other necessities would remain unenforced. The risk of having to pay plaintiffs' attorney fees frequently induces settlement and deters illegal governmental and corporate conduct. Thus legal aid advocates need a working knowledge of fee issues.

The subject of court-awarded attorney fees has inspired books, even multivolume treatises.<sup>145</sup> This section instead focuses briefly on the major issues presented in fee litigation: how a plaintiff qualifies as a prevailing party; entitlement to fees; how to calculate a reasonable fee; and timing of fee motions.

### A. PREVAILING PARTY STANDARD AFTER *BUCKHANNON*

To qualify for a fee award under most federal fee-shifting statutes, a litigant must be a "prevailing party." Two issues that often arise are (1) how much the litigant has to win and (2) what form the victory must take.

As for the first question, the Supreme Court holds that a plaintiff need not win every single issue or even the "central issue" in order to obtain prevailing party status. A prevailing party is "one who has succeeded on any significant claim affording it some of the relief sought . . ." <sup>146</sup> Losing on some issues may or may not result in a reduced fee-award amount.<sup>147</sup> It does not affect "the availability of a fee award *vel non*."<sup>148</sup>

The second question—what form the victory must take—became problematic after *Buckhannon Board v. West Virginia Department of Health and Human Resources*.<sup>149</sup> In *Buckhannon* the Supreme Court holds that voluntary change in behavior by a defendant caused by a pending lawsuit does not qualify the plaintiff as a prevailing party for fee purposes. As of this writing, the post-*Buckhannon* dust has not fully cleared.<sup>150</sup> But we can make certain educated guesses on the form a victory must take for fees to be awarded.

At one end of the spectrum, winning a judgment obviously qualifies a plaintiff as a prevailing party in most cases. The major qualification is that the judgment must require "some action (or cessation of action) by the defendant."<sup>151</sup> A judicial declaration alone does not suffice. The judgment may be for nominal relief, although in such cases a court may deny fees altogether to the prevailing plaintiff.<sup>152</sup>

At the other end of the spectrum, under *Buckhannon* filing a lawsuit that prompts defendants to change illegal behavior voluntarily (i.e., acting as a "catalyst") does not qualify the plaintiffs as prevailing parties. The *Buckhannon* Court disapproved the catalyst theory of recovery because it permitted an award "where there is no judicially sanctioned change in the legal relationship of the parties."<sup>153</sup> Even in such situations, however, plaintiffs' counsel may still seek a final judgment if the interests and desires of the clients permit. Defendants are likely to claim that their voluntary changes in policy render the case moot. However, as the *Buckhannon* Court noted, mootness is to be found only when "it is clear that the allegedly wrongful behavior could not reasonably be expected to recur."<sup>154</sup>

Somewhere in the middle of the spectrum are victories achieved either by interlocutory orders or by settlement. Even in pre-*Buckhannon* jurisprudence, the Supreme Court held that winning an interlocutory order that merely kept a suit alive did not transform litigants into prevailing parties.<sup>155</sup> Preliminary injunctions, however, are a different matter because, as in final judgments, they order defendants to act or to refrain from acting. After *Buckhannon*, the circuits are split on whether securing a preliminary injunction suffices to achieve prevailing party status.<sup>156</sup>

<sup>145</sup> See, e.g., MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, 2 SECTION 1983 LITIGATION, "STATUTORY ATTORNEY'S FEES" (3d ed. 1997); JOEL P. BENNETT, WINNING ATTORNEYS' FEES FROM THE U.S. GOVERNMENT (19th ed. 2003).

<sup>146</sup> *Texas Teachers Association v. Garland School District*, 489 U.S. 782, 791 (1989).

<sup>147</sup> See Section IV.C.1 *infra*.

<sup>148</sup> *Texas Teachers Association*, 489 U.S. at 793.

<sup>149</sup> *Buckhannon Board v. West Virginia Department of Health and Human Resources*, 532 U.S. 603 (2001).

<sup>150</sup> For a comprehensive discussion of post-*Buckhannon* lower-court cases through June 1992, see Gill Deford, *The Prevailing Winds After Buckhannon*, 36 CLEARINGHOUSE REVIEW 313 (Sept.–Oct. 2002).

<sup>151</sup> *Hewitt v. Helms*, 482 U.S. 755, 761 (1987).

<sup>152</sup> *Farrar v. Hobby*, 506 U.S. 103, 115 (1992).

<sup>153</sup> *Buckhammon*, 532 U.S. at 605.

<sup>154</sup> *Id.* at 609 (quoting *Friends of Earth Inc. v. Laidlaw Environmental Services*, 528 U.S. 167, 189 (2000)).

<sup>155</sup> *Hanrahan v. Hampton*, 446 U.S. 754 (1980).

<sup>156</sup> Compare *Richard S. v. Department of Developmental Services*, 317 F.3d 1080, 1089 (9th Cir. 2003) (preliminary injunction can be a sufficient judicial victory to qualify for prevailing party status), with *Smyth v. Rivero*, 282 F.3d 268, 276–77 (4th Cir. 2002) (preliminary injunction insufficient). While holding that a preliminary injunction which merely safeguarded rights during an administrative process without addressing the merits was insufficient, the First Circuit suggested that a preliminary injunction based on the merits could warrant prevailing party status. *Race v. Toledo-Avila*, 291 F.3d 857, 858–59 (1st Cir. 2002).

There is also disagreement in the circuits on how much “judicial *imprimatur*” is needed for a settlement agreement to qualify a plaintiff as a prevailing party.<sup>157</sup> On the one hand, *Buckhannon* states, a plaintiff who secures a court-ordered consent decree is a prevailing party.<sup>158</sup> On the other hand, a litigant who achieves success through a “private settlement” is not.<sup>159</sup> Private settlements lack the “judicial approval and oversight involved in consent decrees” and often cannot be enforced in federal court.<sup>160</sup> The Ninth Circuit dismissed this portion of *Buckhannon* as “dictum” and refused to follow it.<sup>161</sup> However, we predict that most courts will follow *Buckhannon* in its entirety.<sup>162</sup> Most courts will have to determine whether a particular agreement is closer to a consent decree or to a private settlement.<sup>163</sup> The major factors that the courts have looked at are the extent to which the settlement terms are incorporated into the district court order, and whether the district court retains jurisdiction to enforce the agreement.<sup>164</sup>

## B. ENTITLEMENT TO FEES UNDER MAJOR FEE-SHIFTING STATUTES

Once a plaintiff demonstrates that she is a prevailing party, showing entitlement to fees is usually not difficult.

### 1. Civil Rights Attorney’s Fees Awards Act and Other Statutes: Double Standard for Plaintiffs and Defendants

Some statutes, such as the Fair Labor Standards Act, provide that a prevailing plaintiff “shall” be entitled to fees.<sup>165</sup> Other statutes, such as the Civil Rights Attorney’s Fees Awards Act of 1976, also known as Section 1988, specify that a court “may” award fees to the prevailing party.<sup>166</sup> Recognizing, however, that statutes such as Section 1988 are general measures intended to encourage litigation enforcing important rights, the courts employ a double standard. A “prevailing plaintiff ‘should ordinarily recover an attorney’s fee unless special circumstances would render such an award unjust.’”<sup>167</sup> By contrast, a “prevailing defendant may recover an attorney’s fee only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant.”<sup>168</sup>

Section 1988, the most widely used fee-shifting statute, authorizes fee awards in actions to enforce civil rights laws, including 42 U.S.C. § 1983. A lawsuit that redresses a state or local government violation of rights guaranteed by federal statute is a Section 1983 action within the meaning of Section 1988 and may thus qualify for a fee award.<sup>169</sup> State governments do not enjoy Eleventh Amendment immunity against Section 1988 fee awards.<sup>170</sup>

### 2. Equal Access to Justice Act—Substantial Justification Standard

The Equal Access to Justice Act (EAJA) presents different entitlement questions.<sup>171</sup> Under the EAJA a party who prevails in litigation against the federal government “shall” be awarded fees “unless the court finds that the position of the United States was substantially justified . . . .”<sup>172</sup> The federal government has the burden of demonstrating substantial justifica-

<sup>157</sup> *Buckhannon*, 532 U.S. at 605.

<sup>158</sup> *Id.* at 604.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 604 n.7.

<sup>161</sup> *Barrios v. California Interscholastic Federation*, 277 F.3d 1128, 1134–35 n.5 (9th Cir. 2002).

<sup>162</sup> See, e.g., *John T. v. Delaware County Intermediate Unit*, 318 F.3d 545, 560 (3d Cir. 2003) (disagreeing with *Barrios*).

<sup>163</sup> For a discussion on how to structure settlements in light of *Buckhamon*, see Section I *supra*.

<sup>164</sup> See, e.g., *Roberson v. Giuliani*, 346 F.3d 75 (2d Cir. 2003); *American Disability Association v. Chmielarz*, 289 F.3d 1315, 1320 (11th Cir. 2002); *Smyth v. Rivero*, 282 F.3d 268, 278–81 (4th Cir. 2002); *Barrios*, 277 F.3d at 1135 n.5; *Truesdell v. Philadelphia Housing Authority*, 290 F.3d 159, 165 (3d Cir. 2002). But see *Oil, Chemical and Atomic Workers International Union v. Department of Energy*, 288 F.3d 452, 456–57 (D.C. Cir. 2002), where a divided court held that only a judgment or a consent decree would be sufficient to confer prevailing party status.

<sup>165</sup> 29 U.S.C. § 216(b). For a list of other federal attorney-fee provisions, see Gary F. Smith, *Federal Statutory Attorney Fees: Common Issues and Recent Cases*, 28 CLEARINGHOUSE REVIEW 744, 746 (Nov. 1994).

<sup>166</sup> 42 U.S.C. § 1988.

<sup>167</sup> *Hensley v. Eckerhart*, 461 U.S. 424, 428 (1983).

<sup>168</sup> *Id.* at 428 n.2, citing *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 421 (1978).

<sup>169</sup> *Maine v. Thiboutot*, 448 U.S. 1, 9 (1980).

<sup>170</sup> *Maher v. Gagne*, 448 U.S. 122, 130–33 (1980); *Hutto v. Finney*, 437 U.S. 678, 693–700 (1978).

<sup>171</sup> Equal Access to Justice Act, 28 U.S.C. § 2412.

<sup>172</sup> *Id.* 2412(d)(1)(A).

tion in both law and fact.<sup>173</sup> If either the government’s prelitigation position or its litigation position lacks substantial justification, the court shall award fees.<sup>174</sup>

While the government is not automatically assessed fees merely because it loses a case, neither does it escape a fee award just because its position is not frivolous. To meet the substantial justification test, the government’s position must be “justified to a degree that could satisfy a reasonable person,” and this requires the government to demonstrate “a reasonable basis both in law and fact.”<sup>175</sup>

Although parties often argue that EAJA motions should be controlled by “objective factors” such as the number of times the issue on the merits was litigated previously, the Supreme Court states that none of these factors is dispositive in itself.<sup>176</sup> Most district courts decide substantial justification questions on an “I know it when I see it” basis. Once the district court grants or denies a motion, the court of appeals is required to use a deferential abuse-of-discretion standard on appeal.<sup>177</sup>

### C. CALCULATION OF REASONABLE FEES: THE LODESTAR CALCULATION

Under the leading case of *Hensley v. Eckerhart*, the amount of a statutory fee award is determined by the lodestar method: “the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.”<sup>178</sup>

#### 1. Reasonable Number of Hours

What constitutes “hours reasonably expended” is the most frequently debated question in fee litigation.

**Documentation Requirements.** Courts and opposing counsel examine whether the hours are well documented. Some courts permit attorneys to reconstruct hours.<sup>179</sup> However, inadequate documentation may result in a reduced fee award.<sup>180</sup> Attorneys, paralegals, and law clerks should begin keeping contemporaneous time records as soon as they realize, erring on the side of overinclusiveness, that a matter may possibly become a case. They should record the date, the time spent to complete a task broken down into six-minute increments, and, most important, a sufficiently detailed description of what was done. As one court stated, records should give “enough information as to what hours were devoted to various activities and by whom for the district court to determine if the claimed fees are reasonable.”<sup>181</sup> For example, “telephone call” or “research” are inadequate entries, but a court approves “telephone call with Smith re failure to produce administrative record” or “research re summary judgment motion.”<sup>182</sup> Ideally there should be a separate entry for each telephone call, research project, or other activity. In the real world, as most courts recognize, attorneys in the heat of litigation “bundle” several activities into one entry and are rarely penalized for such block billing.<sup>183</sup>

**Overall Billing Judgment Decisions.** *Hensley* states that, “[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation . . . .”<sup>184</sup> However, attorneys seeking court-awarded fees are expected to exercise voluntary “billing judgment,” excluding from a fee request “hours that are excessive, redundant, or otherwise unnecessary . . . .”<sup>185</sup> In lengthy, multicounsel litigation, where justifying every time entry or use of personnel would be difficult, some plaintiffs’ attorneys propose a voluntary across-the-board billing judgment reduction, which courts often appreciate.<sup>186</sup> In other instances, where particular recorded activity seems vulnerable, plaintiffs’ counsel should consider making discrete reductions.

<sup>173</sup> *Sampson v. Chater*, 103 F.3d 918, 921 (9th Cir. 1996); *Gutierrez v. Sullivan*, 953 F.2d 579, 584–85 (10th Cir. 1992).

<sup>174</sup> 28 U.S.C. § 2412(d)(2)(D).

<sup>175</sup> *Pierce v. Underwood*, 487 U.S. 552, 565 (1988).

<sup>176</sup> *Id.* at 568–69. In *Pierce* itself, e.g., the Court did not find it dispositive that the government had lost eleven straight times on the same issue.

*Id.* at 569. Neither did the Court agree with the government that a Supreme Court grant of certiorari and a stay on the same issue compelled a conclusion that the government’s position must have been substantially justified. *Id.*

<sup>177</sup> *Id.* at 559–63.

<sup>178</sup> *Hensley*, 461 U.S. at 433.

<sup>179</sup> See, e.g., *Davis v. City and County of San Francisco*, 976 F.2d 1536, 1542 (9th Cir. 1992), *vacated in part on other grounds*, 984 F.2d 345 (9th Cir. 1993).

<sup>180</sup> *Hensley*, 461 U.S. at 433.

<sup>181</sup> *Rode v. Dellarciprete*, 892 F.2d 1177, 1191 (3d Cir. 1990).

<sup>182</sup> For a comparison of good and bad time records, see *Chrapliwy v. Uniroyal Inc.*, 583 F. Supp. 40, 47 (N.D. Ind. 1983).

<sup>183</sup> *Rode*, 892 F.2d at 1191; *Marbled Murrelet v. Pacific Lumber Co.*, 63 F.R.D. 308, 321–22 (N.D. Cal. 1995).

<sup>184</sup> *Hensley*, 461 U.S. at 435.

<sup>185</sup> *Id.* at 434.

<sup>186</sup> See, e.g., *Davis*, 976 F.2d at 1543.

**Compensable Phases of Litigation.** A court may award fees for work on all phases of a lawsuit

- from prelitigation work<sup>187</sup>
- through postjudgment monitoring,<sup>188</sup>
- including time spent on the fee issue itself.<sup>189</sup>

There are some limits on awards for prelitigation services, however. Time spent “years before the complaint was filed” is unlikely to be compensated.<sup>190</sup> And time spent in administrative proceedings must be “both useful and of a type ordinarily necessary to advance the . . . litigation . . .”<sup>191</sup> When a plaintiff can make that showing, however, a court may award fees for administrative advocacy even when that advocacy was directed at third parties.<sup>192</sup>

**Compensable Activities.** Space does not permit a discussion of which litigation activities are compensable and which are not. When a fee opponent challenges a particular activity, such as attorney travel time, a good place to start researching is one of the fee treatises.<sup>193</sup>

Perhaps the most frequently occurring challenge is to time spent by cocounsel communicating with each other. The Supreme Court holds that district courts have discretion to include conferencing time in a fee award.<sup>194</sup> No courts, to our knowledge, have denied compensation altogether for conferences.<sup>195</sup>

A subsidiary issue in some cases is the number of hours spent on counsel communications. Plaintiffs may need to demonstrate to a district court, through copies of agendas or through lead counsel’s declarations, why the number of meetings held was necessary and how that actually contributed to the efficiency of the litigation. When counsel do so, some courts award fully compensatory fees even when large numbers of conferencing hours are at issue.<sup>196</sup>

**Compensation for Less than Complete Success.** Fee opponents often seek reductions based on the argument that the plaintiffs were only partly successful. Plaintiffs’ counsel rarely win all conceivable relief while prevailing along the way at every stage on all legal theories advanced. Courts do not, however, require that level of success to award fully compensatory fees.

*Less than Complete Relief.* Frequently plaintiffs win some, but not all, of the equitable relief prayed for, or relatively small amounts of money in damage cases. In neither event is a reduction in fees necessarily warranted. The *Hensley* Court deemed it insignificant that a prevailing plaintiff did not receive all the relief requested. For example, a plaintiff who failed to recover damages but obtained injunctive relief, or vice versa, may recover a fee award based on all hours reasonably expended if the relief obtained justified that expenditure of attorney time.<sup>197</sup>

<sup>187</sup> *Webb v. County Board of Education*, 471 U.S. 234, 243 (1985).

<sup>188</sup> *Pennsylvania v. Delaware Valley Citizens’ Council*, 478 U.S. 546, 559 (1986).

<sup>189</sup> *See, e.g., Gagne v. Maher*, 594 F.2d 336, 344 (1979), *aff’d on other grounds*, 448 U.S. 122 (1980), *cited with approval, Immigration and Naturalization Service v. Jean*, 496 U.S. 154, 162 (1990). In *Jean* the Court held that, under the Equal Access to Justice Act (EAJA), fees for time spent on the fee issue should be awarded without a separate inquiry over whether the government’s position on the fee issue was substantially justified.

<sup>190</sup> *Webb*, 471 U.S. at 242.

<sup>191</sup> *Id.* at 243.

<sup>192</sup> *Delaware Valley Citizens’ Council*, 478 U.S. at 558–59.

<sup>193</sup> *See, e.g., Schwartz & Kirklín, supra* note 145, § 4.6 at 197–98 n. 95–96 (collecting cases dealing with compensability of travel time).

<sup>194</sup> *Riverside v. Rivera*, 477 U.S. 561, 573 n.6 (1986).

<sup>195</sup> *See, e.g., Continental Securities Litigation v. Continental Security Corp. (In re Continental Securities Litigation)*, 962 F.2d 566, 570 (7th Cir. 1992) (holding that unjustified across-the-board cuts in attorney fees for time spent in conference was an abuse of discretion); *Berberena v. Coler*, 753 F.2d 629, 633 (7th Cir. 1985) (in “a difficult case with significant social effects . . . the participation of [four] attorneys . . . in . . . strategy conferences and negotiations ‘may indeed have been crucial . . .’”); *Scelta v. Delicatessen Support Services Inc.*, 203 F. Supp. 2d 1328, 1333 (M.D. Fla. 2002); *McKenzie v. Kennickell*, 645 F. Supp. 437, 450 (D.D.C. 1986) (“conferences between attorneys to discuss strategy and prepare for oral argument are an essential part of effective litigation . . . there is no reason or authority for allowing only one lawyer to charge for time that more than one lawyer justifiably spent”).

<sup>196</sup> *See, e.g., United States v. City and County of San Francisco*, 748 F. Supp. 1416, 1421 (N.D. Cal. 1990), *aff’d in relevant part, Davis v. City and County of San Francisco*, 976 F.2d 1536 (counsel compensated for 3,500 hours in conferences with cocounsel and clients); *Riverside*, 477 U.S. at 573 n.6 (affirming compensation for 197 hours of conversation between two attorneys); *Palmigiano v. Garrahy*, 466 F. Supp. 732, 743 (D.R.I. 1979), *aff’d*, 616 F.2d 598 (1st Cir. 1980) (attorneys fully compensated for 208 hours spent in conference). *Compare In re Olson*, 884 F.2d 1415, 1429 (D.C. Cir. 1989) (limiting compensation for conferencing hours to 10 percent of total fee request).

<sup>197</sup> *Hensley*, 461 U.S. at 436 n.11.

Lawsuits seeking only damages present different issues. The Supreme Court in *Farrar v. Hobby* held that if a plaintiff wins only nominal damages, a court “usually” denies fees altogether.<sup>198</sup> Even in nominal damage cases, however, as suggested by Justice O’Connor’s concurring opinion, a court may award higher fees. Whether it does depends on factors such as the difference between the damage amounts sought and awarded; the significance of the legal issue on which the plaintiff prevailed; and whether the litigation vindicated a public purpose.<sup>199</sup>

The Court rejected limiting the amount of fees in a civil rights damages suit to the same percentage that a personal injury lawyer would receive and affirmed a fee award that was nearly eight times the damages recovery.<sup>200</sup> Limiting fees to a percentage of the damages recovery would be inconsistent with the purpose of Section 1988, which “was enacted because existing fee arrangements were thought not to provide an adequate incentive to lawyers particularly to represent plaintiffs in unpopular civil rights cases.”<sup>201</sup>

*Unsuccessful Proceedings.* A prevailing plaintiff need not prevail at every stage in a suit to receive fully compensatory fees. As the Ninth Circuit recognized in *Cabrales v. County of Los Angeles* in refusing to reduce fees for time spent unsuccessfully defending against a writ of certiorari: “Rare, indeed, is the litigant who doesn’t lose some skirmishes on the way to winning the war.”<sup>202</sup> Relying on *Hensley*, the *Cabrales* court analogized unsuccessful claims to unsuccessful proceedings where the plaintiff ultimately prevailed.<sup>203</sup>

*Unsuccessful Issues.* Neither does a plaintiff need to win every issue raised in the complaint. Rather, fees for time spent litigating an unsuccessful claim is denied only where that claim “is distinct in all respects from . . . successful claims . . .”<sup>204</sup> By contrast, where “a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney’s fee reduced simply because the district court did not adopt each contention raised.”<sup>205</sup> Claims are “related” under this analysis when they arise from the same facts or related legal theories.<sup>206</sup>

## 2. Reasonable Hourly Rates

In *Blum v. Stenson* the Supreme Court held that Section 1988 fees awarded to legal aid programs that do not charge their clients fees should be calculated at rates comparable to those charged by private attorneys in the community with comparable experience.<sup>207</sup> The Court rejected as inconsistent with the legislative history of Section 1988 the argument that fees should be limited to the internal costs of the relatively low salaries paid by legal aid programs.

**Market Rates and How to Prove Them.** The *Blum* Court noted Congress’ direction that “the amount of fees awarded under [Section 1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases . . .”<sup>208</sup>

The fee applicant has the burden of proving relevant market rates through evidence “in addition to the attorney’s own affidavits . . .”<sup>209</sup> This evidence often includes

- declarations from attorneys in a range of private law firms in the relevant community reporting hourly rates charged by those firms for attorneys with the same law school graduation date as the fee applicant;<sup>210</sup>

<sup>198</sup> *Farrar v. Hobby*, 506 U.S. 103, 115 (1992).

<sup>199</sup> *Id.* at 121–22 (O’Connor, J., concurring). See, e.g., *O’Connor v. Huard*, 117 F.3d 12, 17–18 (1st Cir. 1997) (affirming a lodestar fee award, where nominal damages award achieved individual plaintiff’s goal and served as a deterrent).

<sup>200</sup> *Riverside*, 477 U.S. at 564–65, 581 (plurality opinion); *id.* at 581–86 (Powell, J., concurring in judgment and rejecting argument to limit fees to one-third of damages).

<sup>201</sup> *Id.* at 586 (Powell, J., concurring).

<sup>202</sup> *Cabrales v. County of Los Angeles*, 935 F.2d 1050, 1053 (9th Cir. 1991).

<sup>203</sup> *Id.* (“Just as time spent on losing claims can contribute to the success of other claims, time spent on a losing stage of litigation contributes to success because it constitutes a step toward victory”).

<sup>204</sup> *Hensley*, 461 U.S. at 440.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 435.

<sup>207</sup> *Blum v. Stenson*, 465 U.S. 886, 892–96 (1984).

<sup>208</sup> *Id.* at 893, citing S. Rep. No. 94-1011, at 6 (1976).

<sup>209</sup> *Id.* at 896 n.11.

<sup>210</sup> Specific hourly rate information is more persuasive than a declaration of a private attorney that merely says the attorney has looked over the rates sought and thinks they are “reasonable.” The latter type of declaration “might properly be characterized by a reviewing court as one given out of courtesy, but it provides little or no evidentiary support for an award.” *Norman v. Housing Authority of Montgomery*, 836 F.2d 1292, 1304 (11th Cir. 1988).

- excerpts from hourly rate surveys;<sup>211</sup>
- fee award orders specifying past hourly rates awarded for the work of attorneys in the case; and
- other fee award orders in the jurisdiction stating hourly rates for attorneys of comparable experience.

**Frequently Occurring Hourly Rate Issues.** Five frequently recurring issues concerning reasonable hourly rates follow:

First, the parties disagree on which city's prevailing rates apply when plaintiff's counsel practices outside the forum jurisdiction. While this issue can cut both ways, it appears to occur most frequently when an out-of-town big-city lawyer wins in a jurisdiction where prevailing rates are relatively low. Generally the forum community's rates are applicable unless the plaintiff can show that "local counsel was unavailable, either because they are unwilling or unable to perform because they lack the degree of experience, expertise, or specialization required to handle properly the case."<sup>212</sup> A declaration from the director of the legal services program serving the forum community sometimes can help prove this point.

Second, in suits lasting many years, the defendants may argue that compensation must be limited to "historical rates": the market rates prevailing for each of the years the suit was litigated. The Supreme Court held, however, that "an appropriate adjustment for delay in payment—whether by the application of current rather than historic hourly rates or otherwise—is within the contemplation of [Section 1988]."<sup>213</sup> Thus, in multiyear litigation against a defendant other than the federal government, a court should either award current rates for the entire case—the easiest solution—or award historical rates augmented by a multiplier to compensate for delay in payment.<sup>214</sup>

Third, if the defendants are represented by law firms charging relatively low hourly rates, they may argue that plaintiffs' counsel should be limited to those same rates. Noting that firms representing large institutional defendants such as governments and insurance companies charged low rates to keep repeat business, the courts rejected these arguments. They are "not in the same legal market as private plaintiff's attorneys who litigate civil rights cases."<sup>215</sup>

Fourth, defendants often seek reduction in hourly rates or an overall fee reduction by contending that too much of the work on behalf of the plaintiffs was done by experienced attorneys at the high end of the hourly rate scale. Fee opponents often argue that plaintiffs' counsel should not be awarded "big firm rates" because a large firm would have litigated the case differently, assigning most of the work to associates. One or two courts accepted this argument.<sup>216</sup> Most rejected it for two reasons. First, small firms and legal aid programs, some courts recognized, do not have the same luxury as do big firms in choosing to throw armies of associates into the fray.<sup>217</sup> More important, the reason experienced attorneys command higher hourly rates, the courts realized, is that they are often much more efficient: "Presumably, the skill and experience of the partners places them further along the learning curve and enhances their ability to operate efficiently so that the higher partner rate is likely to be offset, at least in part, by a reduction in the number of hours multiplying that rate."<sup>218</sup>

<sup>211</sup> See, e.g., *Salazar v. District of Columbia*, 123 F. Supp. 2d 8, 14 (D.D.C. 2000) (relying upon National Survey Center and *National Law Journal* surveys to determine reasonable hourly rates in the District of Columbia). *But see Davis*, 976 F.2d at 1547 (rejecting reliance on a different survey because, among other reasons, the survey reported only statewide average rates rather than rates specific to San Francisco, where case was litigated).

<sup>212</sup> *Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir. 1997) (quoting *Gates v. Deukmejian*, 987 F.2d 1392, 1405 (9th Cir. 1992)).

<sup>213</sup> *Missouri v. Jenkins*, 491 U.S. 274, 284 (1989).

<sup>214</sup> Because waivers of sovereign immunity are strictly construed, fee awards against the federal government after multiyear litigation may not include a multiplier for delay or be based on current hourly rates. *Library of Congress v. Shaw*, 478 U.S. 310, 317–20 (1986).

<sup>215</sup> *Trevino v. Gates*, 99 F.3d 911, 925 (9th Cir. 1996). *Accord Malloy v. Monahan*, 73 F.3d 1012 (10th Cir. 1996); *Brooks v. Georgia Board of Elections*, 997 F.2d 857, 869–70 (11th Cir. 1993).

<sup>216</sup> See, e.g., *Finkelstein v. Bergna*, 804 F. Supp. 1235, 1237–38 (N.D. Cal. 1992) (awarding \$300 per hour for some of the work by plaintiffs' lead counsel, and \$250 per hour (still a high rate for 1992) for less complex work).

<sup>217</sup> See, e.g., *Hutchison v. Amateur Electrical Supply Inc.*, 42 F.3d 1037, 1048 (7th Cir. 1994) ("plaintiff asserts that her counsel was essentially a sole practitioner with only part-time associates and law clerks during much of this litigation. If true, the district court's reduction for what it saw as top-heavy staffing cannot be sustained.")

<sup>218</sup> *American Petroleum Institute v. Environmental Protection Agency*, 72 F.3d 907, 916 (D.C. Cir. 1996). *Accord Daggett v. Kimmelman*, 811 F.2d 793 (3d Cir. 1987); *Muehler v. Land O'Lakes Inc.*, 617 F. Supp. 1370, 1379 (D. Minn. 1985); *Laffey v. Northwest Airlines Inc.*, 572 F. Supp. 354, 366 (D.D.C. 1983), *reversed on other grounds*, 746 F.2d 4 (D.C. Cir. 1985). See also Gary Greenfield, *Efficient Litigation: An Ethical Imperative?* 20 AMERICAN LAWYER 38 (Apr. 1994) ("often, as audits reveal, there is so much senior time billed for reviewing, revising, and discussing the document that it usually would be cheaper to have the senior lawyer simply sit down and draft it").

Fifth, defendants may argue that compensation for the work of paralegals and law clerks should be limited to the hourly rates that plaintiffs' counsel paid them rather than market rates. The Supreme Court, however, held that courts should compensate paralegal and law clerk time at market rates if the prevailing practice in the relevant community was to bill that time separately.<sup>219</sup>

**EAJA Hourly Rate Issues—Statutory Cap and Exceptions.** The EAJA presents an entirely different framework for computing hourly rates. Under the EAJA attorney fees are limited to \$125 per hour, subject to certain exceptions.<sup>220</sup>

*Inflation Adjustment.* Hourly rates may be adjusted to account for increases in the cost of living since March 1996, when Congress set the EAJA hourly rate limit at \$125.<sup>221</sup> Although an inflation increase is not automatic, in practice most courts award it, usually unopposed.<sup>222</sup> The adjusted hourly rate equals \$125 per hour increased by the percentage increase in the consumer price index for urban consumers (CPI-U).<sup>223</sup> Unlike with other fee statutes, courts must use historical rather than current rates in awarding EAJA fees because of sovereign immunity concerns.<sup>224</sup> Thus in multiyear litigation the rate for each year is \$125 increased by the percentage CPI-U hike from March 1996 through that year.<sup>225</sup>

*Market Rates for Special Expertise and in Other Situations.* An EAJA fee applicant may be awarded higher market rates if “the court determines that . . . a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.”<sup>226</sup> This requires an extensive showing that (1) the prevailing attorneys possessed specialized expertise; (2) the expertise was needed in the litigation; and (3) the skills needed could not have been obtained at the normal EAJA rates.<sup>227</sup>

As for the first factor, the Supreme Court holds that possessing exceptional litigation skills is not good enough. The prevailing attorney must have “distinctive knowledge or specialized skill . . .”<sup>228</sup> The circuit courts took different approaches in construing the *Underwood* requirements. The Seventh, Ninth, and Eleventh Circuits interpreted *Underwood* to allow an enhancement in situations where the attorneys had specialized expertise in a particular area of law.<sup>229</sup> By contrast, the D.C., Fourth, and Fifth Circuits construed *Underwood* quite narrowly.<sup>230</sup> Most other circuit courts have not squarely addressed this issue.

Even when the prevailing attorney possesses specialized expertise, the attorney must make a strong factual showing that the case could not have been brought by a smart generalist. Lead counsel should demonstrate to the court how the suit could only have been litigated by attorneys with existing contacts in the field or knowledge of hard-to-access rules and authorities. Plaintiffs also need to submit a declaration from a knowledgeable attorney showing the absence of other qualified counsel to litigate such a case.

In addition to authorizing fees generally against the government when no substantial justification can be shown for the government's position, the EAJA subjects the federal government to fees “to the extent that any other party would be liable under the common law or under the terms of any statute which specially provides for such an award.”<sup>231</sup> Under this

<sup>219</sup>*Jenkins*, 491 U.S. at 284–89.

<sup>220</sup>28 U.S.C. § 2412(d)(2)(A).

<sup>221</sup>*Id.*; *Sorenson v. Mink*, 239 F.3d 1140, 1148 (9th Cir. 2001). Before 1996, the limit was \$75 per hour, subject to the same statutory exceptions. *Id.*

<sup>222</sup>*May v. Sullivan*, 936 F.2d 176 (4th Cir. 1991) (per curiam) (affirming denial of adjustment).

<sup>223</sup>*Sorenson*, 239 F.3d at 1148.

<sup>224</sup>*Kerin v. United States Postal Service*, 218 F.3d 185, 194 (2d Cir. 2000); *Masonry Masters Inc. v. Nelson*, 105 F.3d 708, 711–13 (D.C. Cir. 1997).

<sup>225</sup>*Sorenson*, 239 F.3d at 1148.

<sup>226</sup>28 U.S.C. § 2412(d)(2)(B).

<sup>227</sup>*Rueda-Menicucci v. Immigration and Naturalization Service*, 132 F.3d 493, 496 (9th Cir. 1997) (denying rate increase where special expertise was unnecessary to successful result); *Raines v. Shalala*, 44 F.3d 1355, 1360–61 (7th Cir. 1995); *Pirus v. Bowen*, 869 F.2d 536, 541–42 (9th Cir. 1989).

<sup>228</sup>*Underwood*, 487 U.S. at 572.

<sup>229</sup>See *Raines*, 44 F.3d at 1361 (“an identifiable practice specialty not easily acquired by a reasonably competent attorney” can be considered a special factor warranting fee enhancement); *Pirus*, 869 F.2d at 541–42 (fee enhancement available for specialized expertise in social security class actions); *Jean v. Nelson*, 863 F.2d 759, 774 (11th Cir. 1988), *aff'd*, 496 U.S. 154 (1990) (immigration law expertise may qualify).

<sup>230</sup>*F. J. Vollmer Co. v. Magaw*, 102 F.3d 591, 598 (D.C. Cir. 1996) (market rate fees “available only for lawyers whose speciality ‘requir[es] technical or other education outside the field of American law’”); *Estate of Cervin v. Commissioner*, 200 F.3d 351, 354 (5th Cir. 2000); *Hyatt v. Commissioner*, 315 F.3d 239, 253 (4th Cir. 2002).

<sup>231</sup>28 U.S.C. § 2412(b).

provision, market rates are awarded under equitable fee doctrines such as when the government acts in bad faith.<sup>232</sup> Or market rates are awarded under statutes other than the EAJA that both apply to the federal government and have fee-shifting provisions.<sup>233</sup>

### 3. Multipliers

Although earlier Supreme Court cases such as *Hensley* contemplated that the lodestar could be augmented by a multiplier in appropriate circumstances, later cases rendered the multiplier virtually extinct in federal court.<sup>234</sup> Most prominently, the Court in *City of Burlington v. Dague* held, courts may not award contingency multipliers to account for either the exceptional riskiness of a particular case or the riskiness of certain kinds of litigation.<sup>235</sup> Previously the Court had discouraged the use of multipliers based on such factors as the novelty and difficulty of the litigation or the exceptional quality of the representation; the Court's reasoning is that these factors are generally subsumed within the lodestar.<sup>236</sup>

The only basis for a multiplier that the Supreme Court approves is for delay in payment. In lengthy litigation a district court may compensate counsel for delay by a multiplier or by using current rather than historical rates.<sup>237</sup> Post-*Dague* multipliers are rare as well in the lower courts. Two courts approved multipliers based on the exceptional unpopularity of a case.<sup>238</sup> Where a federal court exercises supplemental jurisdiction over state claims and *state* law permits multipliers, federal courts are free to augment the lodestar.<sup>239</sup>

## D. TIMING OF FEE PETITIONS

Neither Section 1988 nor most federal fee-shifting statutes specify when the fee motion must be filed.

### 1. Civil Rights Act and Most Other Cases—Governed by Rule 54 and Local Rules

Rule 54(d)(2)(B) of the Federal Rules of Civil Procedure requires fee motions to be filed no later than fourteen days after entry of judgment “[u]nless otherwise provided by statute or order of the court . . .” For purposes of this rule, a local rule setting a different fee motion deadline is an “order of the court,” and the local rule governs.<sup>240</sup>

Some local rules, however, also impose short deadlines for fee motions, which may require counsel to seek an order postponing the deadline or to postpone having a judgment entered until fee papers are prepared. Rule 54 requires only that the fee applicant state the basis for an award and either the amount or “fair estimate” of the amount; thus the rule appears to permit counsel to file placeholder motions with details to be filled in later.

### 2. EAJA Timing Issues

The EAJA requires fee motions to be filed within thirty days of “final judgment.”<sup>241</sup> This in turn is defined as “a judgment that is final and not appealable, and includes an order of settlement.”<sup>242</sup>

Fee petitions may also be filed pending appeal; the EAJA merely precludes fee petitions after the thirty-day limit.<sup>243</sup> Fee claimants and the government argued for years over what starts the EAJA clock running in Social Security Act cases

<sup>232</sup> *Hyatt v. Shalala*, 6 F.3d 250 (4th Cir. 1993) (refusal of federal government to follow binding circuit precedent in social security cases amounted to bad faith warranting market rate fees); *D & M Watch Corp. v. United States*, 795 F. Supp. 1172, 1177 (Ct. Int'l Trade 1992) (market rate fees when Customs Service acted in bad faith).

<sup>233</sup> See, e.g., *Library of Congress v. Shaw*, 478 U.S. 310, 319 (1986) (noting that Congress waived sovereign immunity to permit Title VII lawsuits and attorney-fee awards against the United States).

<sup>234</sup> *Hensley*, 461 U.S. at 434.

<sup>235</sup> *City of Burlington v. Dague*, 505 U.S. 557 (1992).

<sup>236</sup> See, e.g., *Blum*, 465 U.S. at 898–99. Counsel may wish to use this discussion to support relatively high hourly rates.

<sup>237</sup> *Jenkins*, 491 U.S. at 284. But see *Shaw*, 478 U.S. at 321–23 (no compensation for delay in suits against the federal government).

<sup>238</sup> *Guam Society of Obstetricians and Gynecologists v. Ada*, 100 F.3d 691, 697 (9th Cir. 1996); *Brotherton v. Cleveland*, 141 F. Supp. 2d 907 (S.D. Ohio 2001).

<sup>239</sup> *Mangold v. California Public Utilities Commission*, 67 F.3d 1470, 1478–79 (9th Cir. 1995) (affirming 2.0 multiplier under California state law in discrimination case).

<sup>240</sup> *Tire Kingdom Inc. v. Morgan Tire and Auto Inc.*, 253 F.3d 1332, 1335 (11th Cir. 2001).

<sup>241</sup> 28 U.S.C. § 2412(d)(1)(B).

<sup>242</sup> *Id.* § 2412(d)(2)(G).

<sup>243</sup> *McDonald v. Schweiker*, 726 F.2d 311, 314 (7th Cir. 1983); accord *Cervantez v. Sullivan*, 739 F. Supp. 517, 519 (E.D. Cal. 1990), *rev'd on other grounds*, 963 F.2d 229 (9th Cir. 1992). See also *Adams v. Securities and Exchange Commission*, 287 F.3d 183, 187–88 (D.C. Cir. 2002) (noting that Congress, in amending the EAJA, adopted the *McDonald* approach).

until the Supreme Court decided the issue in *Shalala v. Schaeffer*.<sup>244</sup> A plaintiff is a prevailing party, the Court held, when she obtains a “sentence four remand” under the Social Security Act: “a judgment modifying or reversing the decision of the Secretary . . . .”<sup>245</sup> By contrast, a “sentence six remand,” which merely contemplates that new evidence will be introduced is not a judgment for attorney-fee purposes.<sup>246</sup> Thus a sentence four remand has the potential to start the clock running for an EAJA fee motion.

However, a sentence four remand order, the *Schaeffer* Court also held, merely triggers the duty to enter judgment and is not a judgment itself. For the thirty-day clock to begin running, the district court, pursuant to Rule 58, must enter a judgment “on a separate document.”<sup>247</sup>

## V. Costs and Interest

Under Federal Rule of Civil Procedure 54(d), a prevailing party is ordinarily entitled to recover costs. The costs recoverable in federal litigation are set forth in 28 U.S.C. § 1920. Deposition costs are recoverable only when reasonably necessary to the litigation. For a time, federal courts tended to exclude deposition costs except when the deposition was used at trial. However, recent cases frequently award deposition costs upon a showing that the deposition materially advanced the development of the litigation, even if it was not used at trial.<sup>248</sup>

Although 28 U.S.C. § 1920 authorizes the inclusion of witness fees in an award of costs, its counterpart, 28 U.S.C. § 1821, limits witness fees to \$40 per day.<sup>249</sup> In an effort to recover expert witness fees in excess of \$40 per day, counsel frequently look to fee-shifting statutes as an authorization to award costs in excess of those allowed under 28 U.S.C. § 1920.<sup>250</sup>

Before the Civil Rights Act of 1991, the continued availability of costs beyond statutory costs in civil rights litigation looked doubtful. An example is *West Virginia University Hospital v. Casey*.<sup>251</sup> There the Supreme Court held that “[Section] 1988 conveys no authority to shift expert fees. When experts appear at trial, they are of course eligible for the fee provided by § 1920 and § 1821.”<sup>252</sup> Moreover, 42 U.S.C. § 1988(c) permits a court to award expert witness fees only in a Section 1981 action.

Interest is always available on a judgment from the date of its entry through payment. However, the question of whether prejudgment interest is available is more complex. Prejudgment interest is generally favored by federal policy.<sup>253</sup> But prejudgment interest may be unavailable when the plaintiff recovers statutorily authorized liquidated damages. Claims under the Age Discrimination in Employment Act are illustrative.<sup>254</sup> The Act authorizes back pay and, in the case of a willful violation, an equivalent amount as liquidated damages.<sup>255</sup> All circuits to consider the question agree that a plaintiff who sues under the Act and does not recover liquidated damages is entitled to prejudgment interest.<sup>256</sup> However, most circuits prohibit the award to plaintiffs who recover liquidated damages.

<sup>244</sup>*Shalala v. Schaeffer*, 509 U.S. 292 (1993).

<sup>245</sup>*Id.* at 300, citing 42 U.S.C. § 405(g), fourth sentence.

<sup>246</sup>*Id.* at 298.

<sup>247</sup>*Id.* at 302.

<sup>248</sup>*See, e.g., Stearns Airport Equipment Co. v. FMC Corp.*, 170 F.3d 518 (5th Cir. 1999); *Cengr v. Fusibond Piping System*, 135 F.3d 445 (7th Cir. 1998); *Callicrate v. Farmland Industries*, 139 F.3d 1336 (10th Cir. 1998); *Soler v. Waite*, 989 F.2d 251 (7th Cir. 1993). *But see Washington State Department of Transportation v. Washington Natural Gas Co., PacifiCorp*, 59 F.3d 793 (9th Cir. 1995).

<sup>249</sup>*See, e.g., Pinkham v. Camex Inc.*, 84 F.3d 292, 295 (8th Cir. 1996) (per curiam) (“[E]xpert fees in excess of the 28 U.S.C. § 1821(b) \$40 limit are not recoverable.”); *Morrison v. Reichhold Chemicals Inc.*, 97 F.3d 460, 463 (11th Cir. 1996); *Bankston v. Illinois*, 60 F.3d 1249, 1257 (7th Cir. 1995).

<sup>250</sup>*See, e.g., Harris v. Marhoefer*, 24 F.3d 16, 20 (9th Cir. 1994) (“[T]he ‘expert witness fees’ awarded by the district court are not witness fees as contemplated under 28 U.S.C. § 1821, limiting expert witness fees to \$40.00 per day. Rather, these are expenses related to discovery that Harris incurred in deposing Alvarez’s expert and thus are recoverable expenses as part of the reasonable ‘attorney’s fees’ award.”).

<sup>251</sup>*West Virginia University Hospital v. Casey*, 499 U.S. 83, 102 (1991).

<sup>252</sup>*See also Crawford Fitting Co. v. J.T. Gibbons Inc.*, 482 U.S. 437 (1987) (holding that the authority to award expert witness fees as costs under Rule 54(d) was limited by 28 U.S.C. §§ 1828 and 1920).

<sup>253</sup>*See Kansas v. Colorado*, 533 U.S. 1 (2001); *Burnett v. Grattan*, 468 U.S. 42 (1984); *Wilson v. Garcia*, 471 U.S. 261, (1985); *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969).

<sup>254</sup>Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634.

<sup>255</sup>*Id.* § 626(b).

<sup>256</sup>*Sharkey v. Lasmo (AUL Ltd.)*, 214 F.3d 371 (2d Cir. 2000); *Simpson v. Ernst & Young*, 100 F.3d 436 (6th Cir. 1996); *Downes v. Volkswagen of America Inc.*, 41 F.3d 1132 (7th Cir. 1994). *But see Rhodes v. Guiberson Oil Tools*, 82 F.3d 615 (5th Cir. 1996) (holding that the decision whether to award prejudgment interest is within the sound discretion of the district court).