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Iii. Attorney'S Fees

of anti-competitive restraints.[30]

Seemingly, the Fourth Circuit failed to view the provision of hospital services as a continuous flow of related components. This form of analysis, used by the Supreme Court in *Goldfarb,* would remove the historical label of "local activity" that the Fourth Circuit placed on hospital services.[31] In addition, this would allow a more realistic examination of the jurisdictional consequences of limiting or inhibiting out-of-state entry into the local hospital services market. By refusing to find jurisdiction in *Rex Hospital,* the Fourth Circuit left unanswered the question of whether the anti-competitive allegations in *Rex Hospital* are the types of abuses which Congress sought to guard against in drafting the Sherman Act.

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III. ATTORNEY'S FEES

Fourth Circuit Expansion of the Bad Faith Theory in Awarding Attorney's Fees.

Under the "American rule,"[1] prevailing parties have traditionally been unable to recover their attorney's fees absent express statutory authorization[2] or an enforceable contract.[3] Certain exceptions to this

[30] Although the case involved the Agricultural Adjustment Act, in Wickard v. Filburn, 317 U.S. 111 (1942), the Court acknowledged the importance of viewing commerce in a broad context: [The effect on commerce] "taken together, with that of many others similarly situated, is far from trivial." *Id.* at 128.

[31] A continuing service, such as the daily operation of a hospital facility, differs in concept from situations such as that in Lieberthal v. North Country Lanes, Inc., 332 F.2d 269 (2d Cir. 1964). There, the Second Circuit held that the one-time outfitting of a bowling alley did not meet the jurisdictional requirements of the Sherman Act. *Id.* at 273. In *Rex Hospital,* not only physical plant expansion was involved; there was also a restraint on a proportionate increase in supportive operations that have a daily contact with interstate commerce. *See* Note, *Portrait of the Sherman Act as a Commerce Clause Statute,* 49 N.Y.U.L. REV. 323 (1974).

[1] For a history of the "American rule" and a general treatment of attorney's fees, see Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247-59 (1975), and Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts,* 122 U. PA. L. REV. 636 (1974).

[2] Congress has specifically authorized the award of "reasonable attorney's fees" in certain statutes to encourage private litigants to help enforce federal laws. Fees have been authorized in actions brought under the Packers and Stockyards Act of 1921, 7 U.S.C. § 210(f) (1970); the Perishable Agricultural Commodities Act, 7 U.S.C. §

general rule have been allowed upon various policy theories. One theory allows courts to award attorney's fees to a litigant whose opponent has pursued a patently groundless action or defense and has done so in bad faith.[4] A second theory has been applied by courts to award fees out of a fund recovered or maintained by the plaintiff.[5] Another theory, recently invalidated by the Supreme Court,[6] allowed awards to plaintiffs who acted as private attorneys general.[7] Of the

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499g(b) (1970); antitrust law, 15 U.S.C. § 15 (1970); the Trust Indenture Act of 1939, 15 U.S.C. § 77www(a) (1970); the Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(e), 78r(a) (1970); copyright law, 17 U.S.C. § 116 (1970); the Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b) (1970); patent law, 35 U.S.C. § 285 (1970); the Servicemen's Readjustment Act of 1958, 38 U.S.C. § 1822(b) (1970); civil rights law, 42 U.S.C. § 2000a-3(b) (1970); the Railway Labor Act, 45 U.S.C. § 153(p) (1970); the Merchant Marine Act of 1936, 46 U.S.C. § 1227 (1970); the Communications Act of 1934, 47 U.S.C. § 206 (1970); and interstate commerce law, 49 U.S.C. §§ 8, 908(b) (1970).

[3] *See, e.g.,* United States v. Standard Oil Co., 156 F.2d 312, 315 (9th Cir. 1946).

[4] The bad faith theory was developed in equity to punish parties for conduct causing unnecessary delay to or additional effort by the adverse party. This theory includes conduct meant to prolong litigation, *e.g.,* Bell v. School Bd., 321 F.2d 494 (4th Cir. 1963), and conduct requiring the institution of litigation, *e.g.,* First Nat'l Bank v. Dunham, 471 F.2d 712 (8th Cir. 1973). Fee shifts have also been awarded when a party knowingly violates a clear legal duty, *e.g.,* Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974), and in cases of outright disobedience of court orders, *e.g.,* Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 426 (1923).

In Guardian Trust Co. v. Kansas City S. Ry., 28 F.2d 233 (8th Cir. 1928), *rev'd on other grounds,* 281 U.S. 1 (1930), the court noted that the equitable power to award attorney's fees had originated in early English statutes and extended both to cases involving unsustained charges of misconduct and fraud, and cases based on fabricated charges. *Id.* at 241.

[5] The reasoning behind the "common fund" theory provides that all who participate in the fund should pay the cost of its creation or protection. This is best achieved by deducting attorney's fees from the fund itself. Trustees v. Greenough, 105 U.S. 527 (1881). A second case, Central R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885), recognized the independent right of lawyers, by use of a lien, to share in the fund of the inactive members of the class represented. *See also* Hall v. Cole, 412 U.S. 1 (1973); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939); Gibbs v. Blackwelder, 346 F.2d 943 (4th Cir. 1965). For an excellent discussion of the history of the common fund theory, see Dawson, *Lawyers and Involuntary Clients: Attorney Fees From Funds,* 87 HARV. L. REV. 1597 (1974).

[6] Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).

[7] If a plaintiff sued for the enforcement of rights that benefitted a large class and vindicated congressional policy, he was entitled to a fee shift. This grant was justified not only as a reward to the prevailing plaintiff for initiating the suit but also as an incentive to encourage future plaintiffs to assert federal statutory rights. *See* Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968); Lee v. Southern Home Sites Corp., 444 F.2d 143, 147-48 (5th Cir. 1971).

In *Alyeska,* the Supreme Court rejected the private attorney general theory. In ordering Alyeska to pay half of the reasonable value of services rendered by the plain-

two theories still in effect, the bad faith concept has received the greater attention in recent Fourth Circuit cases.

Perhaps in response to the unavailability of the private attorney general theory, the Fourth Circuit apparently has decided to institute a liberal practice of shifting fees under the bad faith rationale. In *Wright v. Jackson,*[8] the court provided a detailed test and time limit for determining what conduct may be considered obstinate under the bad faith theory. In so providing, however, the Fourth Circuit distinguished between merit-related and general obstinacy.[9] If obstinate conduct is related to the merits of a case, the court stated that the trial court must assess attorney's fees while the merits are before it. Thus, an award could be made either prior to an appeal or on remand. Conversely, fees awarded for general obstinacy were held to be properly within a district court's authority to tax costs[10] even after an

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tiffs' attorneys, the District of Columbia Court of Appeals applied the private attorney general theory. Noting that the plaintiffs had acted to vindicate important statutory rights of all citizens and had ensured that the governmental system functioned properly, the court held they were entitled to attorney's fees lest the great cost of such litigation deter private parties desiring to see the laws protecting the environment properly enforced. Wilderness Soc'y v. Morton, 161 U.S. App. D.C. 446, 456, 495 F.2d 1026, 1036 (D.C. Cir. 1974). The Supreme Court reversed the order and concluded that Congress' statutory authorizations of fee shifting should not be construed as a grant of authority to the judiciary to disregard the "American rule." The circumstances under which attorney's fees are to be awarded and the range of judicial discretion in making the awards were held to be matters for Congress alone to determine. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 263 (1975).

[8] 522 F.2d 955 (4th Cir. 1975). The plaintiffs in this case were prisoners who sought revision of the rules and procedures for disciplinary proceedings at a federal reformatory in Virginia. The district court awarded attorney's fees against the defendants for two reasons: the obstinacy of the defendant prison officials, and the plaintiffs' conferral of a public benefit, not only upon their fellow prisoners but also upon the defendants themselves. The Fourth Circuit cited *Alyeska* as a ground for denying the award of fees on a "public benefit" basis. 522 F.2d at 957. The "public benefit" language has been interpreted as an outgrowth of both the private attorney general theory and the common fund theory. *See* Dawson, *Lawyers and Involuntary Clients: Attorney Fees From Funds,* 87 HARV. L. REV. 1597, 1612 (1974). If used in *Wright* as a reference to the private attorney general theory, the Fourth Circuit correctly held that *Alyeska* invalidated the theory as a ground for the award. If used in *Wright* as a reference to the common benefit theory, the court apparently found that imposing attorney's fees on the defendant would not operate to spread the costs of litigation proportionately among the beneficiaries. 522 F.2d at 957. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 245 n.14 (1975).

[9] General obstinacy encompasses obstinate conduct related to procedural aspects of a case, such as failure to obey court orders or to cooperate in discovery motions. *See* Wright v. Jackson, 522 F.2d 955, 958 (4th Cir. 1975).

[10] The court characterized the award of attorney's fees based on merit-related

appeal is taken. In defining general obstinacy, the Fourth Circuit included the three grounds upon which the district court had based its award: the *Wright* defendants' unwillingness to conciliate; their unsatisfactory response to the court's directions to redraft prison rules; and their recalcitrance in carrying out the final order. All of these were held proper grounds for fee awards based on general obstinacy, but only to the extent that they occasioned delay to or unnecessary effort by the adverse party.[11]

In reviewing the actual award, the Fourth Circuit found the first ground, failure to conciliate, unsupported by the facts of the case. Mere refusal to settle a legitimate controversy, which did not occasion unnecessary effort on the part of the adverse party, was not a basis for a fee award.[12] The Fourth Circuit also noted that if the

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obstinacy as "discretionary costs" which were governed by the time test it established. 522 F.2d at 957. On the other hand, a fee shift based on general obstinacy was referred to merely as a cost. 522 F.2d at 958. Both are valid characterizations of the broad equitable power of federal courts to assess litigation costs. *See* Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939); Fairmont Creamery Co. v. Minnesota, 275 U.S. 70 (1927); First Nat'l Bank v. Dunham, 471 F.2d 712 (8th Cir. 1973); City Bank v. Rivera Davila, 438 F.2d 1367 (1st Cir. 1971); Rolax v. Atlantic Coast Line R.R., 186 F.2d 473, 481 (4th Cir. 1951); *In re* Midland United Co., 141 F.2d 692 (3d Cir. 1944); *In re* Swartz, 130 F.2d 229 (7th Cir. 1942); Niday v. Graef, 279 F. 941 (9th Cir. 1922); Stacy v. Williams, 50 F.R.D. 52 (N.D. Miss. 1970), *aff'd*, 446 F.2d 1366 (5th Cir. 1971); Gold Dust Corp. v. Hoffenberg, 13 F. Supp. 794 (W.D.N.Y. 1936), *modified on other grounds*, 87 F.2d 451 (2d Cir. 1937); Gazan v. Vadsco Sales Corp., 6 F. Supp. 568 (E.D.N.Y. 1934); Krentler-Arnold Hinge Last Co. v. Leman, 24 F.2d 423 (D. Mass. 1928); Parker Rust Proof Co. v. Ford Motor Co., 23 F.2d 502 (E.D. Mich. 1928).

[11] Wright v. Jackson, 522 F.2d 955, 958 (4th Cir. 1975). Under this rationale, even a prevailing party could be held liable for fees, and the *Wright* court readily admitted this. *Id. See* McEnteggart v. Cataldo, 451 F.2d 1109 (1st Cir. 1971), *cert. denied*, 408 U.S. 943 (1972).

[12] 522 F.2d at 958. *See* Lichtenstein v. Lichtenstein, 481 F.2d 682 (3d Cir. 1973), *cert. denied*, 414 U.S. 1144 (1974) (attorney's fees not to be awarded when allegedly frivolous appeal based on ambiguous agreement and law on subject not well settled); Locklin v. Day-Glo Color Corp., 468 F.2d 1359 (9th Cir. 1972) (no fee shift merely because of contempt citation; contempt not necessarily included under bad faith heading); Diamond Shamrock Corp. v. Lumbermens Mut. Cas. Co., 466 F.2d 722 (7th Cir. 1972) (ambiguity of law and absence of well-defined standard of conduct for parties foreclosed fee shift). Other circuits have awarded attorney's fees for several reasons. *See* Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974) (award of fees proper when violation of clearly established law forces plaintiff to bring unnecessary lawsuit); Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc., 484 F.2d 905 (7th Cir. 1973) (attorney's fees awarded in patent infringement action based on delay to adverse party); Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281 (2d Cir. 1973) (fees awarded where dilatory tactic of amending exhibits resulted in great delay to plaintiffs); Stolberg v. Members of Bd. of Trustees, 474 F.2d 485 (2d Cir. 1973) (fees awarded when teacher forced to bring unnecessary action to obtain offer of reinstate-

district court had in fact based its award on this ground, the award was improper for a second reason: the issue was actually related to the merits, and under the time test the lower court had jurisdiction to award fees for merit-related obstinacy only before the appeal was taken or on remand.[13] However, the circuit court did state that if the defendants had refused to concede genuinely undisputed issues, such action would have been "classic" general obstinacy and not subject to the court's time test.[14] Refusal to comply with the final order was held to be a valid ground for the fee shift, as was the defendants' inadequate redrafting of rules to the extent that this inconvenienced the plaintiffs.[15]

The rationale utilized by the *Wright* court in awarding attorney's fees was not altogether novel. The essential elements of unnecessary effort or delay have been employed in prior cases both within and without the Fourth Circuit.[16] However, the distinction between merit-related and general obstinacy and the corresponding time test have no precedent. The distinction may be helpful in some instances, but situations in which its application will generate confusion are foreseeable. In *Wright,* two of the grounds cited for general or procedurally-related[17] obstinacy are not difficult to understand; refusal to obey a court order or to redraft rules are at least arguably related to procedural directives. Refusal to conciliate, however, was deemed merit-related obstinacy when it involved one party's refusal to concede substantive issues on which it was clearly wrong. On the other hand,

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ment after dismissal for clearly unconstitutional reasons and trial prolonged by defendants' extensive discovery proceedings); First Nat'l Bank v. Dunham, 471 F.2d 712 (8th Cir. 1973) (fees awarded when fraudulent and dilatory conduct of debtor forced creditor to unnecessarily litigate and prolonged trial); Furbee v. Vantage Press, Inc., 150 U.S. App. D.C. 326, 464 F.2d 835 (D.C. Cir. 1972) (fees awarded when publishing company involved in unnecessary litigation in view of unambiguous state of law as set out in contract).

[13] *See* Wright v. Jackson, 522 F.2d 955, 958 (4th Cir. 1975).

[14] *Id.*

[15] *Id.* The Fourth Circuit contrasted the inconvenience to the parties with inconvenience to the court in its discussion of contempt. It stated that the obduracy of the defendants in refusing to obey a court order, which led to a finding of contempt, would not justify an assessment of attorney's fees for an earlier stage of the case in which no obstinacy occurred. *Id.* Thus, the court recognized that acts of contempt should not necessarily result in fee shifting. Contemptuous conduct carries its own penalties, and the court, in establishing its test, apparently determined that an award of attorney's fees was not a proper penalty for such behavior.

[16] *See* Brewer v. School Bd., 456 F.2d 943, 949 (4th Cir.), *cert. denied,* 409 U.S. 892 (1972); Bell v. School Bd., 321 F.2d 494, 500 (4th Cir. 1963); Woolfolk v. Brown, 358 F. Supp. 524, 535 (E.D. Va. 1973). For cases from other circuits, *see* note 12 *supra.*

[17] *See* note 9 *supra.*

the court considered the conduct general obstinacy when one party refused to concede matters about which "there can be no legitimate dispute."[18] Because there is often no clear division between instances in which one party is in error and those in which there can be no legitimate dispute, the court's distinction may prove too difficult to employ. Courts will have to decide how clearly erroneous one party must be in his interpretation of the law before refusal to conciliate becomes a refusal to concede matters about which there can be no legitimate dispute, and thus general obstinacy.

Because of the inevitable confusion regarding the distinction between general and merit-related obstinacy, the *Wright* time test may be rendered invalid. Courts may hesitate to hold that obstinacy is merit-related if they can foresee a necessity to award attorney's fees after an appeal is taken, especially if they have reason to doubt that the case will come before them again on remand.[19] Furthermore, a court may be unable to separate its assessments of attorney's fees accurately under general and merit-related obstinacy headings. Thus, it would probably classify all obstinacy as procedure-related and thereby retain its power to assess fees after an appeal as a means of taxing costs.

Another recent Fourth Circuit case addressing the bad faith theory was *McCrary v. Runyon.*[20] *McCrary* involved an action for deprivation of civil rights[21] brought by parents of black children who were allegedly denied admission to private schools solely on the basis of their race. The Fourth Circuit reversed the award of attorney's fees against the two private school defendants, holding that no federal statute authorized the award[22] and that the bad faith theory did not apply. In discussing the bad faith theory, the court noted that because the lawsuit involved the application of a recently revived statute,[23] the standard of conduct expected of the schools was unclear.

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[18] 522 F.2d at 958.

[19] *Wright* held that insofar as a court's measure of a party's obstinacy depends upon the merits, the court must make the assessment while the merits are before it. *Id. See* text accompanying notes 8-9 *supra.*

[20] 515 F.2d 1082 (4th Cir.), *cert. granted,* 44 U.S.L.W. 3271 (U.S. November 11, 1975) (No. 75-306), *aff'g in part and rev'g in part* Gonzales v. Fairfax-Brewster School, Inc., 363 F. Supp. 1200 (E.D. Va. 1973).

[21] The action was brought under 42 U.S.C. § 1981 (1970).

[22] 515 F.2d at 1090. Although the Emergency School Aid Act expressly allows fees, 20 U.S.C. § 1617 (Supp. III, 1973), the court held that law inapplicable because the schools involved had not received state or federal aid. 515 F.2d at 1090.

[23] 42 U.S.C. § 1981 (1970) originated in the 1866 and 1870 Civil Rights Act. In Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), this act was revived and given an expansive reading.

Moreover, although the schools' conduct was held improper, it did not reflect the willful and persistent defiance of the law contemplated by the Fourth Circuit in its previous decisions.[24] Mere faults in perception or memory which resulted in different versions of the facts were held insufficient grounds to shift the expense of litigation,[25] and the court found no other basis for a bad faith award.[26]

The distinction between merit-related and general obstinacy, and the corresponding time test utilized in *Wright,* would be inapplicable in *McCrary* because no finding of obdurate obstinacy was made.[27] The *McCrary* decision, however, does refine one of the grounds for a finding of obstinacy discussed in *Wright*—the refusal to conciliate. Since the effect of the civil rights statutes on private discrimination was unsettled,[28] there was no well-defined standard of conduct for the schools to follow either in their admission policies or in the ensuing litigation. Thus, the defendants had a legitimate reason to believe that their conduct was within the law, and under the circumstances a finding of bad faith was considered inappropriate.[29] *McCrary,* then,

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[24] *See, e.g.,* Bell v. School Bd., 321 F.2d 494, 497-98 (4th Cir. 1963) (chronic use of patently evasive and obstructive tactics by public school officials to prevent school desegregation resulted in award of attorney's fees).

[25] 515 F.2d at 1090. The plaintiffs testified that they were told over the telephone by one of the defendants that the Fairfax-Brewster School was not integrated. The defendant denied that the telephone conversation took place and claimed that the plaintiff's application was rejected for "insufficient preparation for the first grade" at Fairfax-Brewster. Similarly, the superintendent of Bobbe's School denied ever telling the plaintiffs that the school accepted only whites. *Id.* at 1084-85.

[26] *Id.* at 1089 n.6. The Fourth Circuit refused to apply the private attorney general theory to this case because the action was based on the older civil rights statutes, 42 U.S.C. §§ 1981, 1982 (1970). The court required more recent congressional determination that the policy underlying these statutes was so important, or public enforcement mechanisms so ineffective, that attorney's fees were necessary to promote private enforcement. Mere provision for a private cause of action was held insufficient to justify awarding attorney's fees. The court stated that the least it would require was a statutory grant of such fees in suits covering the same subject matter. 515 F.2d at 1090. Thus, the Fourth Circuit was unwilling to allow utilization of the private attorney general theory on reasoning similar to the Supreme Court's later decision in *Alyeska. See* note 7 *supra* for discussion of *Alyeska.*

[27] Gonzales v. Fairfax-Brewster School, Inc., 363 F. Supp. 1200 (E.D. Va. 1973). The district court found that the defendants had not "acted recklessly or wilfully in disregard of clear existing law." *Id.* at 1205 n.5.

[28] *See* Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments,* 74 COLUM. L. REV. 449 (1974); Note, *Desegregation of Private Schools: Section 1981 as an Alternative to State Action,* 62 GEO. L.J. 1363 (1974); Note, *Section 1981 and Private Groups: The Right to Discriminate Versus Freedom from Discrimination,* 84 YALE L.J. 1441 (1975).

[29] 515 F.2d at 1089 & n.6.

limits a party's refusal to conciliate as a basis for a fee award to those situations in which the law may be considered well settled. A reasonable effort to interpret a statute of uncertain effect, although erroneous and instigating prolonged litigation, will apparently not result in a finding of bad faith in the Fourth Circuit.

The *Wright* distinction and time test are also inapplicable to another recent Fourth Circuit decision, *Hallmark Clinic v. North Carolina Department of Human Resources.*[30] In *Hallmark,* an abortion clinic and its proprietor successfully sought an injunction[31] restraining the enforcement of a state regulation requiring non-hospital-affiliated abortion clinics to arrange for emergency transfers with the nearest hospital. The plaintiffs appealed the district court's refusal to grant attorney's fees,[32] contending that the defendants had acted in bad faith in interpreting *Roe v. Wade*[33] and *Doe v. Bolton*[34] as

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[30] 519 F.2d 1315 (4th Cir. 1975).

[31] The injunction was sought pursuant to 42 U.S.C. § 1983 (1970).

[32] Hallmark Clinic v. North Carolina Dep't of Human Resources, 380 F. Supp. 1153, 1159-60 (E.D.N.C. 1974).

[33] 410 U.S. 113 (1973). *Roe* held that state criminal abortion laws that excepted from criminality only a life-saving procedure on the mother's behalf without regard to the stage of her pregnancy violated the Due Process Clause of the fourteenth amendment. The state was held to have legitimate interests in protecting both the pregnant woman's health and the potentiality of human life beyond the first trimester of pregnancy, but during the first trimester, the abortion decision was to be left up to the mother and her physician. *Id.* at 163-64.

[34] 410 U.S. 179 (1973). In *Doe,* the Supreme Court held that the state's interest in health protection and the existence of a potential human life justified regulation of the manner of performing the abortion. The Court also held, however, that a state law requiring the performance of abortions only in accredited hospitals was unconstitutional because the state had not shown that only hospitals satisfied the interest in fully protecting the patient. *Id.* at 195.

The North Carolina legislature responded to *Roe* and *Doe* by enacting a new abortion statute. While it retained criminal penalties for the performance or procurement of abortions, the statute provided for legal abortions during the first trimester of pregnancy if performed by physicians licensed to practice in North Carolina and in hospitals or clinics certified by the Department of Human Resources. Hallmark Clinic v. North Carolina Dep't of Human Resources, 380 F. Supp. 1153, 1155 (E.D.N.C. 1974). The plaintiffs in *Hallmark* claimed that the regulation enacted pursuant to the new statute requiring that the doctor running an abortion clinic be on the active staff at a hospital within 15 minutes travel time from the clinic constituted unreasonable bad faith conduct. By conditioning the clinic certification on a transfer agreement and the status of a doctor in a hospital, the state had violated fundamental due process. The hospital could decide to sign transfer agreements and grant staff privileges completely arbitrarily. The plaintiffs argued that the state's refusal to comply with *Roe* and *Doe* was bad faith conduct which required them to force compliance through litigation. *Id.* at 1159.

mandates for the enacted regulation.[35] Further, the plaintiffs requested attorney's fees because they believed that they had been unnecessarily compelled to instigate litigation in order to force compliance with the law as set forth in *Roe*. The Fourth Circuit held the bad faith rationale inapplicable because the state officials had made a reasonable, realistic effort to implement state laws responsive to new constitutional doctrine.[36] The court considered a fee award in such a situation unfair and an abuse of its equitable discretion. Although the *Hallmark* court admitted that the defendants were unsophisticated in their interpretation of the right of privacy, it found neither malicious intent nor willful and persistent defiance of the law in the enactment of the regulation.[37]

As in *McCrary*, the *Wright* test is inapplicable here because of the court's failure to find obstinate conduct on the part of the defendants. *Hallmark* is significant, however, because the Fourth Circuit introduced an additional ground which may sustain an award of attorney's fees under the bad faith theory. Although unavailable in *Hallmark*, a state's bad faith conduct in enacting an improper and unconstitutional regulation may support a fee shift. As in *McCrary*, the enactment must be irrational and unreasonable with regard to well-established law. The bad faith theory would apply under such circumstances because the plaintiff is forced to institute otherwise unnecessary litigation to rectify the state's patently illegal act.

The final Fourth Circuit case dealing with the bad faith theory was *Thonen v. Jenkins*,[38] a suit alleging deprivation of first amendment rights under color of state law.[39] The issue in *Thonen* was the propriety of the district court's grant of attorney's fees for the defendants' "unreasonable" conduct.[40] The lower court had based its award in part[41] on the bad faith theory, holding that the conduct of

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[35] The plaintiffs also sought an award of attorney's fees under the private attorney general theory, claiming that they had vindicated the rights of North Carolina women to obtain first-trimester abortions free from state interference. Relying on *Alyeska*, the Fourth Circuit rejected the claim because no congressional statute supported a fee shift under the circumstances of this case. 519 F.2d at 1317.

[36] *Id.* at 1316, 1317.

[37] *Id.* at 1317.

[38] 517 F.2d 3 (4th Cir. 1975).

[39] The suit was brought under 42 U.S.C. § 1983 (1970). The plaintiffs were two state university students who had been disciplined by the defendant university officials for a letter they had published in the school newspaper. 517 F.2d at 5.

[40] 517 F.2d at 6.

[41] The district court also based the fee shift on the private attorney general theory, holding that the plaintiffs had acted to secure the first amendment rights of all university students against similar infringement and thereby vindicated the congressional

the defendant state university officials and their counsel, before and during the litigation, constituted obdurate obstinacy.[42] Specifically, the defendants had punished the plaintiffs for language which others had used without reprimand, and had disciplined the plaintiffs although their language did not cause a disruptive effect on campus. The Fourth Circuit considered this conduct unreasonable and therefore in bad faith.[43] The court additionally found that the defendants had continually refused to compromise and had thereby delayed the action and required unnecessary effort by the plaintiffs. The *Thonen* court cited two specific instances of unreasonable litigation tactics: appeal of a consent order defendants themselves had suggested, and insistence on a clearly untenable procedural position causing plaintiffs an unnecessary trip to the judge's chambers.[44]

The three examples of obstinate conduct cited in *Thonen* illustrate both of the categories of obstinacy established by the Fourth Circuit in *Wright.* The two examples of defendants' unreasonable litigation tactics may be classified as general obstinacy because they are related to court procedure.[45] The defendants' unreasonableness in disciplining the students, however, must be considered a bad faith award in the category of merit-related obstinacy[46] because it goes to the very essence of the lawsuit. Unlike *Hallmark,* the *Thonen* defendant state officials had violated a clear legal duty not to infringe the plaintiffs' fundamental constitutional rights. Thus, this part of the court's measure of obstinacy depended upon the merits of the case and must be characterized as merit-related obstinacy under the *Wright* test. In this sense, *Thonen* is noteworthy as the only case of the four recognizing a violation of well settled law as a ground for bad

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policy against denial of § 1983 rights. *See* 517 F.2d at 6. The Fourth Circuit did not discuss the private attorney general claim. Since no statute authorized an award of attorney's fees, the *Alyeska* ruling rendered the claim invalid. *See* note 7 *supra.*

[42] 517 F.2d at 6. Although the court did not define this term, it has been understood to mean willful and persistent defiance of the law. *See* Brewer v. School Bd., 456 F.2d 943, 949 (4th Cir.), *cert. denied,* 409 U.S. 892 (1972).

[43] 517 F.2d at 6. As a result of this finding, the court held the defendants liable in their individual capacities. The court did not find, however, that the defendants' actions were malicious. *Id.* at 6. The Fourth Circuit appears to be expanding the concept of obdurate obstinacy as defined in Brewer v. School Bd., 456 F.2d 943, 948-52 (4th Cir.), *cert. denied,* 409 U.S. 892 (1972), to include conduct lacking the element of willfulness or malice. Seemingly, courts in the Fourth Circuit may now award attorney's fees for non-willful, non-malicious conduct that is merely found to be unreasonable.

[44] 517 F.2d at 7.

[45] *See* note 9 *supra.*

[46] *See* note 10 *supra.*

faith. However, the proper classification of the defendants' obstinate conduct as general or merit-related made no difference in *Thonen* because the district court assessed the fee award while the case was before it, a procedure acceptable under both of the categories established in *Wright*. Thus, the obstinacy categories and corresponding time test of the *Wright* decision remain of uncertain value in the Fourth Circuit.[47]

However, the bad faith theory was not the Fourth Circuit's only concern in *Thonen*. The court was also required to determine the equally important issue of whether the defendants could be assessed attorney's fees consistently with the eleventh amendment.[48] Since

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[47] The *Thonen* decision also resembles *Hallmark* in that the bad faith of the defendants was the sole reason that the plaintiffs had to instigate suit. It is this act of forcing unnecessary litigation that activates the *Wright* keystone of unnecessary effort as a ground for a fee award under bad faith. The reason that the Fourth Circuit found bad faith in *Thonen* but not in *Hallmark* appears to depend upon how well settled the law was in each case. Because the constitutional doctrine to be followed in *Hallmark* had only recently been expounded by the Supreme Court and there were few subsequent cases interpreting that doctrine, the Fourth Circuit indicated that a finding of bad faith would be unjust. 519 F.2d at 1317. There was no clear duty for the defendants to follow in that case. However, the plaintiffs in *Thonen* were unquestionably denied their well-established first amendment rights of freedom of speech as protected under § 1983. *See* 517 F.2d at 6.

[48] U.S. CONST. amend. XI provides in pertinent part:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . . .

Id.

States are also accorded immunity from suits brought by their own citizens. Hans v. Louisiana, 134 U.S. 1 (1890). In *Ex parte* Young, 209 U.S. 123 (1908), the Supreme Court provided that state officials could be sued as individuals by holding that such officers might be enjoined as individuals from enforcing unconstitutional state law. *Id.* at 159-60. Operating under the fiction that the state was not being sued, the Court avoided the eleventh amendment prohibition. *See* Note, *Attorneys' Fees and the Eleventh Amendment*, 88 HARV. L. REV. 1875, 1879 (1975). The Court has refused, however, to extend this fiction to damage awards against state officials, recognizing instead that the state is the real party in interest and that an award would have to be paid from state funds. Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573 (1946); Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945); Great N. Life Ins. Co. v. Read, 322 U.S. 47 (1944).

A number of cases have discussed the permissibility of awards of attorney's fees directly against state governments rather than against state officials in light of judicial interpretation of the eleventh amendment as set forth in Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945). *See* Souza v. Travisono, 512 F.2d 1137 (1st Cir. 1975); Class v. Norton, 505 F.2d 123 (2d Cir. 1974); Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974); Gates v. Collier, 489 F.2d 298 (5th Cir. 1973), *aff'd on rehearing*, 501 F.2d 1291 (1974).

Edelman v. Jordan,[49] fee awards against state officials have been characterized as damages and have been closely examined under the eleventh amendment prohibition of damage awards against a state.[50] Nevertheless, the Fourth Circuit held that *Edelman* did not overrule *Sims v. Amos*,[51] in which the Supreme Court summarily affirmed an award of attorney's fees in a civil rights action against state executives and legislators in their official capacities.[52] Thus, the *Thonen*

Since *Alyeska*, *see* note 6 *supra*, the Supreme Court has disposed of several of these cases without considering the effect of the eleventh amendment on fee awards. Taylor v. Perini, 503 F.2d 899 (6th Cir. 1974), *vacated on other grounds*, 421 U.S. 982 (1975); Skehan v. Board of Trustees, 501 F.2d 31 (3d Cir. 1974), *vacated on other grounds*, 421 U.S. 983 (1975); Jordon v. Gilligan, 500 F.2d 701 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975); Named Individual Members v. Texas Highway Dep't, 496 F.2d 1017 (5th Cir. 1974), *cert. denied*, 420 U.S. 926 (1975); Sims v. Amos, 340 F. Supp. 691 (M.D. Ala.) (per curiam), *aff'd mem.*, 409 U.S. 942 (1972). *Cf.* Boston Chapter, NAACP v. Beecher, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975), in which the award of costs of appeal against a state was held permissible notwithstanding the eleventh amendment. *Id.* at 1029. *See* Note, *Attorneys' Fees and the Eleventh Amendment*, 88 HARV. L. REV. 1875 (1975); Comment, *Federal Powers and the Eleventh Amendment: Attorneys' Fees in Private Suits Against the State*, 63 CALIF. L. REV. 1167 (1975).

Hallmark also dealt with the eleventh amendment, and the Fourth Circuit held that a fee award against the Department of Human Resources, a major executive branch of the state government would violate the eleventh amendment prohibition of awards against a state. Hallmark Clinic v. North Carolina Dep't of Human Resources, 519 F.2d 1315, 1317 (4th Cir. 1975). The district court had suggested that awards of fees against officials as individuals would violate the eleventh amendment if the state was expected to reimburse the officials or to pay the judgement for them. Hallmark Clinic v. North Carolina Dep't of Human Resources, 380 F. Supp. 1153, 1159-60 & n.12 (E.D.N.C. 1974).

[49] 415 U.S. 651 (1974). The Supreme Court held that an award of retroactive welfare payments to be paid from state funds was equivalent to a legal recovery of damages and thus was conclusively barred by the eleventh amendment. *Id.* at 668.

[50] *See, e.g.*, Taylor v. Perini, 503 F.2d 899 (6th Cir. 1974), *vacated on other grounds*, 421 U.S. 982 (1975); Jordon v. Gilligan, 500 F.2d 701 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975).

[51] 409 U.S. 942 (1972). The Supreme Court in *Alyeska* noted that its summary affirmance of *Sims* was not to be taken as an acceptance of the judicially-created private attorney general rule. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 270-71 n.46 (1975). Yet the district court in *Sims* had also based its award of fees on the bad faith of the defendants. Sims v. Amos, 340 F. Supp. 691, 693-94 (M.D. Ala.) (per curiam), *aff'd*, 409 U.S. 942 (1972). Thus, the language in *Alyeska* could be interpreted as an approval by the Supreme Court of awards for obstinate conduct against state officials in their official capacities. However, the Court specifically reserved the question of the propriety of fee awards directly against states elsewhere in the opinion. 421 U.S. at 269 n.44.

[52] The *Sims* district court noted that a reapportionment action would have been unnecessary had it not been for the legislature's recalcitrance in responding to a consti-

court read *Edelman* to proscribe only damages and retroactive benefit awards against a state in a private suit. Consequently, the court determined that it had sufficient authority to make the award against the defendants in their official capacities under its equitable power to tax costs of litigation.[53]

By characterizing attorney's fees as costs of litigation, the Fourth Circuit seemingly avoided the eleventh amendment issue. However, the Supreme Court has not yet directly decided whether the eleventh amendment would bar an award of attorney's fees from state funds.[54] Therefore, it may be possible to justify fee awards against state officials by analogizing attorney's fees to costs. Fee awards may be considered a necessary cost of obtaining prospective relief and therefore constitutional under *Edelman*.[55] Such an approach was taken recently by the Second Circuit in *Class v. Norton*.[56] In *Class*, the court approved the award of attorney's fees from state funds to reimburse plaintiffs for their effort and expense in enforcing compliance with a court order from a previous trial which the state officials in bad faith had not obeyed.[57] The Second Circuit analogized the financial burden

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tutional mandate. Furthermore, the other state officials could be held liable under the bad faith exception for submitting patently unacceptable plans which added to the expense of litigation. Sims v. Amos, 340 F. Supp. 691, 694 (M.D. Ala.) (per curiam), *aff'd mem.*, 409 U.S. 942 (1972).

[53] 517 F.2d at 7.

[54] It appears, however, that the Court may directly address this issue in the near future. In Fitzpatrick v. Bitzer, 519 F.2d 559 (2d Cir.), *cert. granted*, 44 U.S.L.W. 3354 (U.S. Dec. 16, 1975) (No. 75-283), the Second Circuit held that an award of attorney's fees against a state was a permissible ancillary effect of plaintiffs' efforts to achieve future state compliance with federal law. 519 F.2d at 571. The court distinguished between claims for retroactive damages against a state, which were held barred by the eleventh amendment, and attorney's fees, which were a necessary part of the permissible claim for prospective, injunctive relief. *Id.* At the trial level, the plaintiffs had successfully enjoined enforcement of a Connecticut retirement plan for state employees which was sexually discriminatory. Fitzpatrick v. Bitzer, 390 F. Supp. 278, 290 (D. Conn. 1974). The district court had refused to grant attorney's fees against the state, likening such action to an award of monetary damages forbidden by the eleventh amendment. 390 F. Supp. at 289. The holding on attorney's fees was reversed on appeal. 519 F.2d at 563.

[55] *See* Edelman v. Jordan, 415 U.S. 651, 668 (1974); *Ex parte* Young, 209 U.S. 123 (1908).

[56] 505 F.2d 123 (2d Cir. 1974).

[57] *Id.* at 124-25. At the trial level, the district court decreed that the state's welfare commissioner must comply with federal regulations concerning the processing of welfare applications. The state welfare department did not comply with this decree, and plaintiffs requested that the district court issue a contempt citation. Although the district court did not hold the welfare commissioner in contempt, it did award plaintiffs $1,000 in attorney's fees to cover the expenses incurred in seeking compliance with the initial decree.

created by the fee shift to one arising from compliance with a prospective court decree. Court-ordered prospective expenditures had been permitted by the *Edelman* Court as inevitable consequences of compliance with valid decrees.[58] The *Class* court concluded that the fee award was similarly permissible as a necessary result of attempts to gain compliance with a decree which by its terms was prospective in nature.[59]

The focus in *Class* on attorney's fees as a means of achieving future compliance with federal law seems compatible with the *Edelman* holding. *Edelman* implicitly recognized the importance of the power of federal courts to insure future compliance by the states.[60] It would seem consistent with this emphasis on future compliance to impose on the state not only the cost of that compliance, but also the costs of achieving it.[61] Such analysis would be applicable to the award in *Thonen.* The relief accorded in *Thonen* was prospective in nature because it required the future readmission of the plaintiffs to the university and the clearing of their academic records.[62] Awarding attorney's fees in conjunction with such relief appears justifiable as a means of securing both present and future compliance with federal constitutional law. Under this rationale, the merit-related obstinacy of the defendant state officials, which forced the plaintiffs to bring an unnecessary lawsuit, should be a valid ground for shifting fees.

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[58] 415 U.S. 651, 668 (1974).

[59] 505 F.2d at 127, *quoting* Rodriguez v. Swank, 496 F.2d 1110, 1113 (7th Cir.), *cert. denied,* 419 U.S. 885 (1974). The district court in *Rodriguez* had issued an injunction requiring the state to pay $100 to each applicant to the Aid to Families with Dependent Children Program whose application was not properly processed in the future. This order was made in response to problems in securing the compliance of state welfare officials with a prior order requiring processing of applications within 30 days. The Seventh Circuit affirmed, noting that in cases of noncompliance, the second order may have greater fiscal impact on the state than the original order alone. However, this was held not to render the second order invalid. The eleventh amendment was declared not to bar payment of state funds as a necessary consequence of future compliance with a substantive federal question determination. *Id.* at 1112.

[60] *See* 415 U.S. at 668.

[61] It may even be possible to define present compliance with federal law, which courts undoubtedly have the power to compel, to include an obligation to make reparation for past violations. *See* Burrell v. Norton, 381 F. Supp. 339, 345 n.15 (D. Conn. 1974). *But see* Edelman v. Jordan, 415 U.S. 651 (1974).

[62] The similarity of the injunctive order in *Class* and the relief requested in *Thonen* should be noted. Both required the commission of some positive act in the future. *See* Class v. Norton, 505 F.2d 123, 126 (2d Cir. 1974). Thus it would seem that if the order in *Class* is deemed "prospective in nature" and therefore immune from eleventh amendment prohibitions, the relief issued in *Thonen* should be considered prospective as well.

Moreover, such an award would not appear to be the kind of retroactive relief prohibited by the *Edelman* Court. The majority in *Edelman* recognized the similarity of retroactive relief and damages;[63] the award was a form of compensation measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.[64] Awards of attorney's fees arguably do not come within this definition. Although they do reimburse litigants for past expenses incurred as a result of officials' prior actions, they are unlike damages in certain respects. They do not compensate for injuries sustained by the plaintiff, but reimburse him for expenses incurred in the process of obtaining a remedy.[65] Also, even if attorney's fees are regarded as compensation for prior losses, these losses arise in the course of obtaining prospective relief and thus, unlike damages, may be considered an unavoidable financial burden created by the process of adjusting future state policy to the demands of federal law.[66]

In further support of its conclusion, the *Thonen* court cited *Fairmont Creamery Co. v. Minnesota,*[67] in which the Supreme Court awarded costs of litigation directly against the State of Minnesota in a criminal appeal.[68] *Fairmont,* however, may not be strong precedent here. The eleventh amendment was not discussed in *Fairmont,* and the case involved conventional court costs rather than attorney's fees.[69] Therefore, the Fourth Circuit's intimation that attorney's fees

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[63] 415 U.S. at 668.

[64] *Id.*

[65] Indeed, attorney's fees may be awarded in cases in which injury has merely been threatened. *See, e.g.,* La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972), *aff'd,* 488 F.2d 559 (9th Cir. 1973), *cert. denied,* 417 U.S. 968 (1974).

[66] Note, *Attorneys' Fees and the Eleventh Amendment,* 88 HARV. L. REV. 1875, 1896 (1975); *see* Boston Chapter, NAACP v. Beecher, 504 F.2d 1017, 1029 (1st Cir. 1974), *cert. denied,* 421 U.S. 910 (1975).

[67] 275 U.S. 70 (1927).

[68] The Supreme Court reasoned that the state "lost" its sovereignty when it initiated litigation before the Court. 275 U.S. 70, 74 (1927). Citing *Fairmont Creamery,* federal courts have also asserted a power to tax costs against state officials in their official capacity, even in litigation not initiated by the state. *See* Boston Chapter, NAACP v. Beecher, 504 F.2d 1017, 1028-29 (1st Cir. 1974), *cert. denied,* 421 U.S. 910 (1975); Jordon v. Gilligan, 500 F.2d 701, 709 (6th Cir. 1974) (dictum), *cert. denied,* 421 U.S. 991 (1975). The Supreme Court, however, has never ruled on the question of the lower courts' power to tax costs or on the propriety of taxing costs against the state when it is a defendant.

[69] 28 U.S.C. § 1920 (1970) defines court costs as including the fees of the clerk or marshal, the fees of the court reporter for the stenographic transcript used in the case, fees and disbursements for printing and witnesses, fees for copying papers used in the case, and docket fees as set forth in 28 U.S.C. § 1923 (1970). 28 U.S.C. § 1920 (1970).

are "incidents of the hearing"[70] is a novel approach,[71] especially since the *Fairmont* Court failed to state specifically what items constituted such incidents.[72]

Fairmont nonetheless may be considered as supporting the power to award attorney's fees against the states. By imposing a monetary liability on an unconsenting state, the Supreme Court appeared to reject a claim of sovereign immunity, which is the basis for the eleventh amendment.[73] This suggests that the eleventh amendment immunity of states appearing in federal court may be limited by the inherent authority of the court to make orders to insure the orderly administration of justice.[74] Under this rationale, attorney's fees may be viewed as judicial costs of insuring such orderly administration. A federal court should have enough control over the behavior of the parties to insure that litigation will proceed in an orderly manner. Consequently, the courts have broad powers to achieve this objective.[75] The bad faith theory would support a characterization of fees as costs under the rationale of a court having power over its proce-

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[70] 275 U.S. at 77. *See* 517 F.2d at 7.

[71] *See* Souza v. Travisono, 512 F.2d 1137 (1st Cir. 1975), in which the First Circuit noted in dictum that an award of attorney's fees to be paid with state funds was permissible because such awards were comparable to court costs incidental to litigation properly before federal courts. *Id.* at 1140. The award of attorney's fees was based on the private attorney general theory, but the First Circuit also discussed the similarities of attorney's fees to costs, which had been held taxable against a state in Boston Chapter, NAACP v. Beecher, 504 F.2d 1017 (1st Cir. 1974), *cert. denied,* 421 U.S. 910 (1975). Like costs, attorney's fees were part of the litigation expense deemed recoverable by the successful party or attorney. Both costs and attorney's fees were found to be in the same incidental relationship to the main litigation and thus, the court held that both should be considered together. The First Circuit accordingly concluded that attorney's fees, like costs, were not barred by the eleventh amendment. 512 F.2d at 1140. To the extent state officials are amenable to suits in the federal courts, they should be responsible for costs and fees incidental to the main litigation to the same degree as other litigants. *Id.*

[72] The *Fairmont* Court reasoned that if it had jurisdiction to hear the case, the incidents of the hearing would be those which attached to the regular jurisdiction of the Court. 275 U.S. at 77. Such incidents would therefore include the power to tax costs. *See* Note, *Attorneys' Fees and the Eleventh Amendment,* 88 HARV. L. REV. 1875, 1890 (1975).

[73] *See* Jordan v. Weaver, 472 F.2d 985, 990 (7th Cir. 1973), *rev'd on other grounds sub nom.* Edelman v. Jordan, 415 U.S. 651 (1974).

[74] Fairmont Creamery Co. v. Minnesota, 275 U.S. 70, 74 (1927). *See* Note, *Attorneys' Fees and the Eleventh Amendment,* 88 HARV. L. REV. 1875, 1891-93 (1975).

[75] Note, *Attorneys' Fees and the Eleventh Amendment,* 88 HARV. L. REV. 1875, 1892 (1975). For example, 18 U.S.C. § 401 (1970) provides courts with summary contempt power against parties and the power to punish officers of the court by fines or imprisonment. *Id.*

dures. The power to shift fees from a party who encounters bad faith in his opponent's conduct of the litigation is an important means of controlling the trial process.[76] Parties who prolong litigation and increase its costs in a deliberate attempt to drain the financial resources of their opponents threaten the court's very effectiveness as a forum. Regardless of the limits the eleventh amendment may place on the substantive relief to be granted against states, it seems that courts should be allowed to retain control over the litigation even when states or their officials are parties. Furthermore, the likelihood of obtaining a fee award serves both to encourage the plaintiffs to continue despite bad faith opposition and to discourage defendants from acting obstinately. As the prospective relief rationale supports a characterization of attorney's fees for merit-related obstinacy as costs, the theory of preserving order within the judicial system supports a characterization of fees for general obstinacy as costs. The theory of preserving judicial order concerns procedural rules and directives which are the subjects of general obstinacy.[77]

Aptly characterized as costs, fee awards against state officials should not be subject to eleventh amendment prohibitions as the Fourth Circuit indicated in *Thonen.*[78] The court could have found further support for this holding by focusing on the "ancillary effect"[79] on state funds as a means of avoiding *Edelman.* The Court in

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[76] *See* Goodhart, *Costs,* 38 YALE L.J. 849, 872 (1929). This theory finds support in Sims v. Amos, 340 F. Supp. 691 (M.D. Ala.) (per curiam), *aff'd mem.,* 409 U.S. 942 (1972), in which the district court awarded attorney's fees against state officials in their official capacities. The court based its award in part on the procedurally-related bad faith of the defendant officials in submitting "obviously unacceptable" reapportionment plans which contributed to the expense and delay of the litigation. *Id.* at 694. *See* notes 51 and 52 *supra.*

[77] Regardless of whether one characterizes the obstinacy as merit-related or general, there are cases inexplicably ignored by the Fourth Circuit which seem to dispose of any doubt about the validity of the fee shift in *Thonen.* In Stolberg v. Members of Bd. of Trustees, 474 F.2d 485 (2d Cir. 1973), the Second Circuit noted that attorney's fees could properly be awarded to assure that the plaintiff would not be forced to great expense to vindicate clearly-held first amendment rights and thereby be deterred from obtaining such vindication by the prospect of costly, protracted proceedings necessary only because of the defendants' obstinate conduct. *Id.* at 490. Further support for the holding in *Thonen* exists in Bradley v. School Bd., 345 F.2d 310 (4th Cir.), *vacated on other grounds,* 382 U.S. 103 (1965). In *Bradley,* the Fourth Circuit held that attorney's fees could be awarded in cases in which litigation was unnecessary and was compelled solely by obdurate obstinacy. *Id.* at 321.

[78] *See* Fairmont Creamery Co. v. Minnesota, 275 U.S. 70, 77 (1927); Sims v. Amos, 340 F. Supp. 691 (M.D. Ala.) (per curiam), *aff'd mem.,* 409 U.S. 942 (1972); notes 68 and 71 *supra.*

[79] *See* Edelman v. Jordan, 415 U.S. 651, 668 (1974).

Edelman noted that ancillary drains on state treasuries were not prohibited by the eleventh amendment. It held that such effects resulted when state officials would more likely have to spend money from the state treasury to shape their official conduct to a court order than if they were left free to pursue their previous course of conduct.[80] The fiscal consequences arising from state officials' efforts to conform to a court's prospective decrees would be deemed ancillary and permissible.[81] In *Class,* the Second Circuit followed this principle in awarding attorney's fees. The court stated that the fees were analytically indistinguishable from a cost award and had an ancillary effect on the state treasury because they were incident to an order granting prospective, injunctive relief.[82] Thus, the award in *Thonen* may justifiably be considered incident to an order granting prospective relief. Consequently, the effect on the state treasury may be considered ancillary. In addition, the amount of the award, approximately $3,500, would not be impermissible for creating fiscal disruption in the state's budget.[83]

In summary, *Wright* indicates that future litigants in the Fourth Circuit may expect to receive awards of attorney's fees under the bad faith theory if their opponent's obstinate conduct causes them unnecessary effort or undue delay. Under the time test established in *Wright,* litigants may also expect possible fee awards from district courts even after appeals have been taken, if the obstinate conduct can be characterized as general. The time test and grounds for obstinacy established in *Wright* will no doubt be valuable in determining future assessments for attorney's fees under the bad faith theory. However, there will be many cases, like *Hallmark* and *McCrary,* in which the *Wright* principles have no relevance because of the absence of obstinate conduct. The Fourth Circuit will probably continue to use *Wright* for the specific grounds it utilized in granting attorney's fees: causing delay to or unnecessary effort on the part of adverse parties. Beyond this, however, *Wright* will have little applicability

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[80] *Id.*

[81] *Id.* at 667-68.

[82] Class v. Norton, 505 F.2d 123, 126 (2d Cir. 1974). *See* Jordan v. Fusari, 496 F.2d 646, 651 (2d Cir. 1974); Rodriguez v. Swank, 496 F.2d 1110, 1113 (7th Cir.), *cert. denied,* 419 U.S. 885 (1974).

[83] The *Edelman* opinion implied that the extent of an award's impact on the fiscal planning of a state would go to determining its constitutionality, although the Court suggested no standards for evaluating the varying degrees of impact. *See* Edelman v. Jordan, 415 U.S. 651, 666 n.11 (1974); Jordan v. Weaver, 472 F.2d 985, 993-94 (7th Cir. 1973), *rev'd on other grounds sub nom.* Edelman v. Jordan, 415 U.S. 651 (1974).