Washington and Lee Law Review

Volume 39 | Issue 2 Article 14

Spring 3-1-1982

# Iv. Civil Procedure

spouse may claim the exemption or the couple may divide the exemption between them in any proportion.[75] Alternatively, since many of the provisions of the Virginia exemption statute require the claimant be a householder,[76] the state legislature should amend the householder definition to include any wage-earner who supports himself or others.[77] Either modification of the Virginia homestead exemption statute complies with the Congressional mandate in the Federal Bankruptcy Reform Act, by granting an exemption to each debtor in a joint case,[78] and promotes the policies behind homestead exemptions.[79]

DIANE PATRICIA CAREY

## IV. CIVIL PROCEDURE

### *A. Assessing Court Costs Against Indigent Litigants*

Economic assets should have no effect on a person's right of access to the United States court system.[1] Congress has required, however, that persons bringing suit in federal court pay filing fees.[2] Realizing that this requirement effectively could close the courts to indigents, Congress enacted section 1915 of Title 28 of the United States Code.[3] Section 1915 provides that a court may waive the necessity of prepaying court costs and fees if a person is an indigent who otherwise cannot afford to obtain access to the federal courts.[4] While enacting section 1915,

[75] *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-1101(c) (Cum. Supp. 1981) (married couple may claim only one homestead exemption not exceeding $20,000 in value); TENN. CODE ANN. § 26-2-301 (1980) (exemption for jointly owned property shall not exceed $7500).

[76] *See* VA. CODE § 34-4 (Cum. Supp. 1981) (only householder may claim homestead exemption); *Id.* § 34-26 (only householder may exempt enumerated articles of personal property).

[77] Ulrich, *supra* note 2, at 153.

[78] 11 U.S.C. § 522(m) (1979); *see* text accompanying note 30 *supra*.

[79] *See* text accompanying notes 2 & 40 *supra*.

[1] *See* Boddie v. Connecticut, 401 U.S. 371, 377 (1971) (welfare recipients seeking divorce need not pay filing fee); Griffin v. Illinois, 351 U.S. 12, 19 (1956) (state required to provide transcript of criminal trial to indigent appellants).

[2] 28 U.S.C. § 1914(a) (1976 & Supp. III 1979).

[3] Section 1915(a) of Title 28 of the United States Code provides:

> Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

28 U.S.C. § 1915(a) (1976).

[4] *Id.*; *see* text accompanying notes 43-50 *infra*.

however, Congress failed to create guidelines by which courts were to implement the statute.[5] Consequently, courts have had to exercise their discretion in devising standards of indigency and in defining "court costs."[6] Generally, a court will allow a successful litigant to collect court costs from the opposing party.[7] If the unsuccessful opposing party is an indigent, however, the indigent's realization that a court may assess court costs against him could deter the indigent from bringing suit.[8] In *Flint v. Haynes*,[9] the Fourth Circuit Court of Appeals recently considered whether courts should assess costs and fees under section 1915 against unsuccessful indigent plaintiffs.[10]

*Flint* was a consolidated appeal from three separate inmate civil rights actions.[11] Charles F. Flint, Jr., instituted an action against the wardens of Huttonsville Correctional Center and the West Virginia State Penitentiary pursuant to section 1983 of Title 42 of the United States Code.[12] Flint alleged that the wardens were responsible for putting him in solitary confinement in violation of his due process rights.[13]

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[5] Note, *Petitions to Sue In Forma Pauperis in Federal Courts: Standards and Procedures for the Exercise of Judicial Discretion*, 56 B.U. L. REV. 745, 745-46 (1976) [hereinafter cited as *Petitions to Sue*]; *see, e.g.*, Lee v. Habib, 424 F.2d 891, 904 (D.C. Cir. 1970) (United States must pay for transcripts for indigent appellants if substantial question is raised); Haymes v. Smith, 73 F.R.D. 572, 575 (W.D.N.Y. 1976) (defendant must pay for inmate-plaintiff's deposition expenses). *But see, e.g.*, McClure v. Salvation Army, 51 F.R.D. 215, 216 (N.D. Ga. 1971) (Government does not have to furnish copy of transcript at its own expense to indigent litigant); Ebenhart v. Power, 309 F. Supp. 660, 661 (S.D.N.Y. 1969) (Government not required to pay indigent's discovery costs). *See generally* Catz & Guyer, *Federal In Forma Pauperis Litigation: In Search of Judicial Standards*, 31 RUTGERS L. REV. 655, 656 (1976) [hereinafter cited as Catz & Guyer] (lack of congressional guidance responsible for diffuse and inconsistent body of case law); Note, *Litigation Costs: The Hidden Barrier to the Indigent*, 56 GEO. L.J. 516, 524-27 (1968) [hereinafter cited as *Litigation Costs*] (courts have interpreted standards for in forma pauperis status differently).

[6] Catz & Guyer, *supra* note 5, at 663-64; Note, *Indigency: What Test?*, 33 ARK. L. REV. 544, 551-52 (1979) [hereinafter cited as *Indigency*].

[7] FED. R. CIV. P. 54(d).

[8] *See* text accompanying notes 43-50 *infra*.

[9] 651 F.2d 970 (4th Cir. 1981).

[10] *Id.* at 971-72.

[11] *Id.* at 971.

[12] *Id.* at 972. Section 1983 of Title 42 of the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983 (1976 & Supp. III 1979).

[13] 651 F.2d at 972. In *Cooper v. Pate*, the Supreme Court of the United States recognized the right of state prisoners to seek relief under § 1983 because of conditions relating to confinement. 378 U.S. 546, 546 (1964) (per curiam) (discrimination based on inmate's religious beliefs). State prisoners retain certain fundamental rights despite their incarceration. Cruz v. Beto, 405 U.S. 319, 322 (1972) (per curiam) (freedom of religion); Gray v.

Rodney Allen Stover brought an assault action against two correctional officers from the Huttonsville Correctional Center under section 1983.[14] Richard Earl Marks filed a section 1983 action against two correctional officers of the West Virginia Penitentiary.[15] Marks alleged that the two officers denied him free clothing and toilet articles.[16] The United States District Court for the Northern District of West Virginia granted all three plaintiffs in forma pauperis status under section 1915.[17]

The district court heard each case separately.[18] The court first decided *Marks v. Calendine*[19] and subsequently based its decision in *Flint* and *Stover* on the earlier *Marks* decision.[20] In *Marks*, the jury resolved the substantive issues of Marks' section 1983 suit in favor of the defendant correctional officers.[21] In response to the defendants' request, the clerk of the court taxed costs against Marks pursuant to Rule 54(d) of the Federal Rules of Civil Procedure.[22] In deciding whether the taxation of

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Creamer, 465 F.2d 179, 184 (3d Cir. 1972) (fourteenth amendment rights to equal protection under the laws); Landman v. Royster, 333 F. Supp. 621, 647 (E.D. Va. 1971), *supp. op.*, 354 F. Supp. 1302 (E.D. Va. 1973) (eighth amendment right to freedom from cruel and unusual punishment); Carothers v. Follette, 314 F. Supp. 1014, 1023 (S.D.N.Y. 1970) (freedom of expression); Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 610-11 (1979) [hereinafter cited as Turner]. *See generally* Bergesen, *California Prisoners: Rights Without Remedies*, 25 STAN. L. REV. 1, 41-48 (1972).

[14] 651 F.2d at 972.

[15] *Id.* at 971.

[16] *Id.* Marks' supplemental complaint alleged that the defendants also confiscated clothing purchased with plaintiff's personal funds. *Id.*

[17] *Id.* at 971-72. When Flint filed his claim for in forma pauperis status, he had no assets. *Id.* at 972 n.3. Stover had $7.29 when he filed suit. *Id.* at 972 n.4. When Marks filed suit, he had a disposable income of $20.00 a month. *Id.* at 971 n.2. All three plaintiffs successfully applied for in forma pauperis status. *Id.* at 971-72.

In forma pauperis designates a proceeding "in the manner of a pauper" in which the court allows the litigant to pursue his claim or defense without a prepayment of fees. Note, *Indigent Access to Civil Courts: The Tiger Is at the Gates*, 26 VAND. L. REV. 25, 26 n.2 (1973) [hereinafter cited as *Indigent Access*]. The statutory benefit of § 1915 enabling a party to proceed in forma pauperis is a privilege, not a right. Williams v. Field, 394 F.2d 329, 332 (9th Cir.) (prisoner civil rights claim), *cert. denied*, 393 U.S. 891 (1968); Carter v. Telectron, Inc., 452 F. Supp. 939, 943 (S.D. Tex. 1976) (pauper status denied when plaintiff had outstanding judgment of over $5,000 against United States). *But see* Adkins v. E.I. DuPont de Nemours & Co., 335 U.S. 331, 337 (1948) (Court referred to in forma pauperis status in dicta as right, not privilege); Smith v. Firestone Tire and Rubber Co., 255 F. Supp. 905, 907 (E.D. Pa. 1966), *aff'd per curiam*, 374 F.2d 892 (3d Cir. 1967) (court stated in forma pauperis is statutory right).

[18] 651 F.2d at 971-72.

[19] 80 F.R.D. 24 (N.D. W. Va. 1978).

[20] 651 F.2d at 972.

[21] *Id.* at 971.

[22] *Id.* Rule 54(d) of the Federal Rules of Civil Procedure provides for an allowance of costs to the prevailing party. FED. R. CIV. P. 54(d). Such an allowance, however, will yield to a countervailing United States statute or federal rule of civil procedure or a contrary court ruling. *Id.*

costs was proper, the district court emphasized the lack of merit in Marks' claim.[23] The court noted that the scarcity of decisions considering the propriety of assessing costs against indigents indicated a general court practice of treating the grant of in forma pauperis status as a complete waiver of the costs of litigation.[24] The district court recognized, however, that courts commonly do assess costs when a claim completely lacks merit and the litigant has used the court as a vehicle of harassment.[25] Consequently, the district court in *Marks* allowed the taxation of costs against Marks because of the lack of merit in his claim.[26] The district court then entered judgment and assessed costs against both Stover and Flint on the basis of the *Marks* decision.[27]

On appeal to the Fourth Circuit, the indigent appellants argued that section 1915 allows an assessment of costs only in exceptional circumstances.[28] The appellants contended that courts should tax costs against an indigent in a section 1915(d) situation only when the court has dismissed the claim as frivolous and without merit.[29] The appellants claimed that an assessment of costs against indigent litigants would limit access to the courts for indigents.[30] The appellants contended that the standard for taxing filing fees and costs should resemble the standards for awarding attorney's fees under federal statutes.[31] The State argued that section 1915 explicitly authorizes an assessment of costs against unsuccessful indigent litigants.[32]

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[23] 80 F.R.D. 24, 25 (N.D. W. Va. 1978).

[24] *Id.* at 31.

[25] *Id.* The court may dismiss the action and adjudge costs against the indigent if the court concludes that the action is frivolous or malicious. Duhart v. Carlson, 469 F.2d 471, 478 (10th Cir. 1972) (prisoner's meritless complaint alleged discrimination based on race and religion), *cert. denied*, 410 U.S. 958 (1973); Caviness v. Somers, 235 F.2d 455, 456 (4th Cir. 1956) (per curiam) (prisoner alleged mistreatment by United States marshal). Federal district courts exercise broad discretion to deny state prisoners the privilege of proceeding in forma pauperis in civil actions against prison officials to prevent the filing of frivolous suits to harass the officials. *See, e.g.*, Daye v. Bounds, 509 F.2d 66, 68 (4th Cir.) (prisoner § 1983 action against prison officials), *cert. denied*, 421 U.S. 1002 (1975); Shobe v. California, 362 F.2d 545, 546 (9th Cir.) (prisoner alleged prison officials withheld plaintiff's money and property), *cert. denied*, 385 U.S. 887 (1966); Hawkins v. Elliott, 385 F. Supp. 354, 357 (D.S.C. 1974) (prisoners brought suit against prison officials alleging cruel and unusual punishment).

[26] 80 F.R.D. 24, 31 (N.D. W. Va. 1978).

[27] 651 F.2d at 972.

[28] *Id.* at 973. Marks and Stover only appealed the assessment of court costs. *Id.* at 971 n.1. In addition to his appeal of the assessment of costs, Flint was unsuccessful in appealing the jury's decision on the substantive issues of his claim. *Id.*

[29] *Id.* at 973. Although the district court eventually found Marks' claim meritless, the *Marks* court did not dismiss the suit. 80 F.R.D. 24, 32 (N.D. W. Va. 1978).

[30] 651 F.2d at 973.

[31] *Id.* In *Christiansburg Garment Co. v. EEOC*, the Supreme Court held that a district court may award attorney's fees to a prevailing defendant under Title VII of the Civil Rights Act of 1964. 434 U.S. 412, 421 (1978). The district court may award attorney's fees upon a finding that the action was frivolous, unreasonable, or unfounded even in the absence of subjective bad faith. *Id.* at 421.

[32] *See* 651 F.2d at 972; text accompanying notes 34-36 *infra*.

The Fourth Circuit rejected the appellants' interpretation of section 1915.[33] In affirming the rulings of the district court, the Fourth Circuit held that section 1915 requires indigents to pay court costs at the court's discretion.[34] The Fourth Circuit did not accept the appellants' argument that federal courts should tax costs according to the standards for awarding attorney's fees that the United States Supreme Court favored in *Hughes v. Rowe*.[35] The Fourth Circuit stated that awarding costs only in situations in which the claim was meritless would ignore the specific language of section 1915(a) and 1915(e).[36] The Fourth Circuit reasoned that by using the word "prepayment" in subsection (a), Congress did not intend to waive the payment of litigation costs permanently.[37] Furthermore, the Fourth Circuit noted that by permitting an assessment of costs "as in other cases," subsection (e) evinced a congressional intent to impose eventual liability for costs on indigents.[38]

The Fourth Circuit correctly recognized the danger of granting complete immunity from costs to indigent litigants.[39] If federal courts do not

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[33] 651 F.2d at 972.

[34] *Id.* Reversal of a judge's decision to refuse permission for an indigent to proceed in forma pauperis requires a clear abuse of discretion. *Litigation Costs, supra* note 5, at 525 n.62; *see, e.g.*, Smart v. Heinze, 347 F.2d 114, 116 (9th Cir.) (grant of in forma pauperis status left to sound discretion of court), *cert. denied*, 382 U.S. 896 (1965); Seltzer v. Warden, Bushnell & Glesner Co., 109 Ill. App. 137, 138 (1902) (trial court committed prejudicial error in refusing application for pauper status).

[35] 651 F.2d at 973. The Supreme Court extended the *Christiansburg* standard of awarding attorney's fees to civil rights actions under § 1983 in *Hughes v. Rowe*. 449 U.S. 5, 14-15 (1980) (per curiam); *see* note 31 *supra*.

[36] 651 F.2d at 972-73. Section 1915(e) of Title 28 of the United States Code provides:

> Judgment may be rendered for costs at the conclusion of the suit or action as in other cases, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

28 U.S.C. § 1915(e) (1976); *see* note 3 *supra*.

[37] 651 F.2d at 972; *see* note 3 *supra*.

[38] 651 F.2d at 972.

[39] *Id.* at 974. A court assessment of costs against indigents to preclude groundless suits, however, may violate the equal protection clause of the fourteenth amendment to the United States Constitution. *Litigation Costs, supra* note 5, at 534-43; *see* U.S. CONST. amend. XIV. When a class does not include all persons that a problem affects, the classification is underinclusive and violates the equal protection clause of the fourteenth amendment. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (statute requiring sterilization of habitual criminals violates equal protection clause). *See generally* Tussman and ten-Broek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 351 (1949). Assessing costs against indigents to prevent frivolous suits is underinclusive because frivolous suits are not peculiar to the poor, yet the poor are the only ones that a court assessment of costs effectively deters. *Litigation Costs, supra* note 5, at 534-43.

Another commentator has noted that the right to access to the courts is a fundamental first amendment right. Note, *A First Amendment Right of Access to the Courts for Indigents*, 82 YALE L.J. 1055, 1059-63 (1973); *see* U.S. CONST. amend. I. The author argues that the right to judicial access for indigents rests on the first amendment right to petition. 82

require indigents to make a cost-benefit analysis, the danger exists that litigants will abuse the section 1915 privilege by bringing meritless claims either for harassment purposes or on a misguided *pro se* basis.[40] In either event, indigent litigants might unnecessarily burden an already overcrowded court calendar.[41] The Fourth Circuit explicitly has recognized the need to prevent frivolous suits and has adjudged costs against a party to prevent the pursuit of a meritless action.[42]

The Fourth Circuit erred in *Flint* by applying a literal interpretation to section 1915.[43] The Fourth Circuit's holding is unsound because it is inconsistent with the purpose of section 1915.[44] Congress enacted section 1915 and its predecessors to provide persons who could not afford to pay the costs of litigation with access to the courts of the United States.[45] By requiring the unsuccessful indigent litigants in *Flint* to pay the assessment of full court costs and fees, the Fourth Circuit imposed a prohibitively high price on the indigents' right to court access.[46] A court assessment of costs against an indigent litigant has little practical effect

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YALE L.J., *supra* at 1059-63. The Supreme Court cursorily dismissed a first amendment claim to court access on the appellate level. Ortwein v. Schwab, 410 U.S. 656, 660 n.5 (1973) (per curiam) (Court required filing fee for indigent's appeal of administrative hearing on welfare matter). The *Ortwein* Court's examination, however, might support an inference that the first amendment secures a right of access to an initial hearing without governmentally-imposed costs. *See id.* at 660.

[40] *See, e.g.*, Daye v. Bounds, 509 F.2d 66, 68 (4th Cir.) (prisoner § 1983 action against prison officials), *cert. denied*, 421 U.S. 1002 (1975); Shobe v. California, 362 F.2d 545, 546 (9th Cir.) (court has especially broad discretion to dismiss prisoner civil actions against wardens), *cert. denied*, 385 U.S. 887 (1966); Turner, *supra* note 13, at 646-47.

[41] Turner, *supra* note 13, at 647.

[42] Perkins v. Cingliano, 296 F.2d 567, 568 (4th Cir. 1961) (court may assess costs against indigents holding in forma pauperis status).

[43] 651 F.2d at 973. The Fourth Circuit was correct, however, in not extending the standard used to assess costs to include attorney's fees. *Id.* The "English Rule" regularly allows an assessment of counsel fees to the prevailing party. Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 247 n.18 (1975). The "American Rule," however, forbids a prevailing party to recover attorney's fees from the opposing party subject to certain exceptions. *Id.* at 269. A court may award attorney's fees against a party who acted in bad faith or under the "common benefit" exception. *Id.* at 270 n.46. Contrastingly, a court may assess court costs as a matter of course. FED. R. CIV. P. 54(d).

[44] *See* text accompanying notes 45-50 *infra*.

[45] H.R. REP. No. 1079, 52d Cong., 1st Sess. 1 (1892). In 1892, Congress enacted the first federal in forma pauperis statute, which opened United States courts to citizens who were unable to bear the costs of civil litigation. Act of July 20, 1892, ch. 209, § 1, 27 Stat. 252. Courts gave a restricted construction to the Act of 1892, which compelled Congress to amend the Act substantially in 1910, 1922, 1949, 1951, and 1959. Catz & Guyer, *supra* note 5, at 657-58. The 1910 amendment applied the statute to both civil and criminal actions and to indigent defendants as well as plaintiffs. Act of June 25, 1910, ch. 435, § 1, 36 Stat. 866; *see* Duniway, *The Poor Man in the Federal Courts*, 18 STAN. L. REV. 1270, 1272-73 (1966). In 1951, Congress expressly disclaimed any liability for costs that an opponent of an unsuccessful pauper incurred. Act of 1951, ch. 655, § 51(e), 65 Stat. 727. In 1959, Congress expanded the benefitting class from "citizens" to any "person." Act of September 21, 1959, Pub. L. No. 86-320, § 1, 73 Stat. 590.

[46] *See* text accompanying notes 47-50 *infra*.

as long as the indigent remains penniless.[47] Therefore, if an indigent has no income and expects no income, a retrospective assessment of costs will have little detrimental effect on the indigent's decision to file a claim.[48] The threat to equal access to the courts exists when the indigent litigant has some assets or reasonably expects future income.[49] If an indigent has minimal assets, a court assessment of costs will have a greater effect on indigents than on non-indigents. The disproportionate impact on the indigent's assets may deter the indigent from filing suit.[50] Thus, the Fourth Circuit's interpretation of section 1915 in *Flint* threatens equal access.

The Fourth Circuit applied the plain meaning rule of statutory interpretation in *Flint*.[51] The Fourth Circuit's use of the plain meaning rule in interpreting section 1915 was erroneous.[52] The two most widely recognized theories of statutory interpretation are literalism, of which the plain meaning rule is a part, and the "purpose" theory.[53] Literalism precludes court construction of a statute that is plain and unambiguous on its face.[54] The "purpose" theory encourages court consideration of a statute's legislative history to determine the statute's purpose.[55] Employing the purpose theory, a court will interpret a statute to fulfill the statute's purpose.[56] The Supreme Court upheld the use of the "pur-

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[47] Catz & Guyer, *supra* note 5, at 668. If the indigent litigant remains penniless, a court essentially waives payment of court costs by granting a litigant in forma pauperis status. Jones v. Bales, 58 F.R.D. 453, 463 (N.D. Ga. 1972) (indigent proceeding in forma pauperis immune from court imposition of costs), *aff'd per curiam*, 480 F.2d 805 (5th Cir. 1973).

[48] Catz & Guyer, *supra* note 5, at 668.

[49] *See* Willging, *Financial Barriers and the Access of Indigents to the Courts*, 57 GEO. L.J. 253, 257 (1968). A court assessment of costs under § 1915 perpetuates an indigent's poverty. *Id.* Defendants periodically have seized Marks' income of $20.00 a month to execute their judgment. 651 F.2d at 972 n.2.

[50] *See* Houseman, *Equal Protection and the Poor*, 30 RUTGERS L. REV. 887, 894 (1977). Commentators have suggested that Congress broaden the scope of § 1915 to cover all litigation expenses. *Id.*; *see* Willging, *Financial Barriers and the Access of Indigents to the Courts*, 57 GEO. L.J. 253, 257 (1968) (court assessment of costs under § 1915 perpetuates litigants' poverty). An extension of § 1915, however, might encourage indigents to institute frivolous claims because of the lack of a cost-benefit analysis. *See* text accompanying notes 40-42 *supra*.

[51] *See* text accompanying notes 53-55 *infra*. When the words of a statute are clear and unambiguous on their face, the plain meaning of the statute is the final expression of Congress' intent. Caminetti v. United States, 242 U.S. 470, 490 (1917). The plain meaning rule forbids a court to add or subtract to the plain meaning of the words. *Id.*

[52] *See* text accompanying notes 53-60 *infra*.

[53] Coffman, *Essay on Statutory Interpretation*, 9 MEM. ST. U. L. REV. 57, 65-67 (1978) [hereinafter cited as Coffman].

[54] *Id.* at 66; *see* Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 866 (1930) [hereinafter cited as Radin] (words of statute may not be disregarded).

[55] Coffman, *supra* note 53, at 71.

[56] Merz, *The Meaninglessness of the Plain Meaning Rule*, 4 U. DAYTON L. REV. 31, 39-40 (1979) [hereinafter cited as Merz]. *See generally* Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533 (1947) (judges must capture what is below surface of words).

pose" theory in *United States v. American Trucking Associations*.[57] In *American Trucking*, the Court stated that no rule of law could forbid court consideration or court interpretation of a statute according to the statute's purpose.[58] If a legislature does not express itself clearly, a court's literal interpretation of a statute may result in a failure to deal with the policy problem the legislature intended the enactment to address.[59] Under these circumstances, the court has a duty to reconcile the statute with its purpose.[60]

In *Flint*, the Fourth Circuit should have considered the legislative history and purpose of section 1915 to determine the statute's meaning.[61] Congress enacted section 1915 to provide people who cannot afford to pay the costs of litigation with equal access to United States courts.[62] A court assessment of full costs may deter an indigent's decision to protect

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[57] 310 U.S. 534 (1940).

[58] *Id.* at 543-44. In *United States v. American Trucking Ass'ns*, the Supreme Court considered a statutory regulation of "employees" of motor carriers. *Id.* at 535. The Supreme Court stated that to interpret a statute properly a court must construe the language of the statute to give effect to the congressional intent. *Id.* at 542. The Supreme Court reaffirmed the *American Trucking* language in *Cass v. United States*. 417 U.S. 72, 76-79 (1974). In *Cass*, the Court refused to ignore the clearly relevant history of a statute that provided for a readjustment of the pay of an armed forces reservist. *Id.* at 79. The *Cass* Court rejected the argument that a statute could be so plain as to render inquiry into legislative history improper. *Id.* at 76-78. *Contra*, Packard Motor Car Co. v. NLRB, 330 U.S. 485, 492 (1947) (unambiguous statute requires no clarification by resorting to legislative history).

While interpreting a statute, a court may not completely ignore the words of the statute. United States v. American Trucking Ass'ns, 310 U.S. at 543; Radin, *supra* note 57, at 866. Complete disregard for the statutory language would eliminate protection against a court's superimposing its individual wishes on the statute. *See generally id.* at 879-81.

Despite the lack of support for the plain meaning rule from the Supreme Court, some lower federal courts still use plain meaning rule language. *E.g.*, Globe Seaways, Inc. v. Panama Canal Co., 509 F.2d 969, 971 (5th Cir. 1975) (court must not refer to legislative history if statutory language is clear); Heilman v. Levi, 391 F. Supp. 1106, 1112 (E.D. Wis.) (if language is plain, court must enforce language), *cert. denied*, 440 U.S. 959 (1975); *see* Kernochan, *Statutory Interpretation: An Outline of Method*, 3 DALHOUSIE L.J. 333, 340 (1976). Even though some lower federal courts use plain meaning rule language, a majority of these courts generally will not refuse to look at the legislative history of a statute. Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1304-05 (1975). The Supreme Court also has used plain meaning rule language and then considered the legislative history of a particular statute. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 201-11 (1976); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 736 n.8 (1975). The *Ernst* decision is a typical case that considers both the plain meaning of a statute and the statute's legislative history. 425 U.S. at 201-11. After using the plain meaning rule to support its interpretation of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-77lll (1976 & Supp. IV 1980), the Court considered the legislative history of the 1934 Act before concluding that a private cause of action for damages would not lie under § 10(b) in the absence of any allegation of scienter. *Id.*

[59] *See* Merz, *supra* note 59, at 33.

[60] Coffman, *supra* note 56, at 66-67.

[61] *See* note 47 *supra*.

[62] *Id.*

his rights.[63] Courts should interpret section 1915 as providing equal, uninhibited access to the courts, not as requiring an assessment of full costs against indigent litigants.

Because federal courts have had to create their own standards for assessing court costs, courts have applied section 1915 inconsistently.[64] A lack of statutory direction in the formulation of a standard of indigency compounds the confusion surrounding section 1915.[65] The Supreme Court has furnished the only guidance for defining indigency in *Adkins v. E.I. DuPont de Nemours & Co.*[66] The Supreme Court stated in *Adkins* that a petitioner for in forma pauperis status need not be destitute to invoke section 1915.[67] Beyond the *Adkins* decision, no uniform standards

[63] *See* text accompanying notes 46-50 *supra*.

[64] *See* note 5 *supra*. The Supreme Court has added to the uncertainty of whether to require indigents to pay costs. In *Boddie v. Connecticut*, the Court ruled that welfare recipients who were seeking a divorce did not have to pay the average $60.00 fee that was a prerequisite to a divorce action. 401 U.S. 371, 377 (1971). In two subsequent decisions, the Supreme Court limited the broad *Boddie* decision in favor of a waiver of costs for indigents. Ortwein v. Schwab, 410 U.S. 656, 657 (1973) (per curiam) (filing fee for appeal of administrative hearing on welfare matter); United States v. Kras, 409 U.S. 434, 444-45 (1973) (fee to file bankruptcy proceedings). The Court in *Kras* stated that the two elements upon which the Court based the *Boddie* decision, a fundamental relationship and state monopolization, were not present in Kras' bankruptcy proceeding. 409 U.S. at 444-45. The Supreme Court did not support a waiver of the prerequisite bankruptcy court fee because Kras' interests did not rise to the same constitutional level as that in *Boddie*. 409 U.S. at 445. The Court in *Kras* stated further that the exclusive government control in *Boddie* was not present. *Id.* at 445; *see* Comment, *The Heirs of* Boddie: *Court Access for Indigents After* Kras *and* Ortwein, 8 HARV. C.R.-C.L. L. REV. 571, 590 (1973).

The statute's failure to define court costs and fees has led to inconsistent court interpretations of § 1915. Catz & Guyer, *supra* note 5, at 659-60; *Indigent Access*, *supra* note 17, at 26-29. Litigation expenses fall into four categories. Catz & Guyer, *supra* note 5, at 659. First, costs, or "taxable costs," are the normal and incidental expenditures of the parties in preparing for litigation with the exception of attorney's fees. *Id.*; Columb v. Webster Mfg. Co., 76 F. 198, 200 (D. Mass. 1896), *aff'd*, 84 F. 592 (1st Cir. 1898). Second, fees, or "costs," are the expenditures a litigant must pay to various officers of the court at successive stages. Catz & Guyer, *supra* note 5, at 659-60. This category includes filing fees, marshal and process fees, jury fees, and subpoena fees. 28 U.S.C. § 1920 (1976). A court may tax the nonprevailing party with such fees. *Id.* Third, security bonds are deposits that a court requires to insure payments and damages by the losing party. Catz & Guyer, *supra* note 5, at 660. Courts frequently require the deposits as a prerequisite to the exercise of equitable powers such as replevin and injunction. *Id.*; *see* FED. R. CIV. P. 65(c). Last, expenses are any expenditures that do not fall within the other three categories. Catz & Guyer, *supra* note 5, at 660. Examples of expenses are attorney's fees and expenditures for the preparation of evidence, reimbursement of witnesses, and discovery. *Id.* The different categories of court costs has engendered inconsistency in court application of § 1915. *Id.* at 659-60. Congressional guidelines creating uniform notions of court costs would help eliminate the confusion. *Id.*

[65] *Id.* at 663; *Indigency*, *supra* note 6, at 551-52.

[66] 335 U.S. 331 (1948).

[67] *Id.* at 339; *accord*, Earls v. Superior Court, 490 P.2d 814, 818, 98 Cal. Rptr. 302, 306 (1971) (applicant for in forma pauperis status need not be destitute); People *ex rel.* Barnes v. Chytraus, 228 Ill. 194, 196, 81 N.E. 844, 846 (1907) (applicant for in forma pauperis status need not be a pauper).

and procedures exist to guide the federal courts in the evaluation of in forma pauperis petitions.[68] Exercising judicial discretion in creating standards for applying section 1915, some courts have adopted a plan assessing partial payment of court costs.[69] In *Flint*, the Fourth Circuit could have balanced the equal access and cost-benefit analysis considerations more accurately by implementing an assessment of partial costs under section 1915. In *Braden v. Estelle*,[70] the Texas district court adopted a flexible plan requiring partial payment of court costs by prisoners seeking in forma pauperis status but who could afford a minimal payment.[71] Although the *Braden* court created the partial payment scheme specifically in response to increased prisoner litigation,[72]

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[68] Catz & Guyer, *supra* note 5, at 663. Federal courts have adopted different standards of indigency to review petitions for in forma pauperis status. *See, e.g.*, Ward v. Werner, 61 F.R.D. 639, 640 (M.D. Pa. 1974); Shimabuku v. Britton, 357 F. Supp. 825, 826 (D. Kan. 1973), *aff'd*, 503 F.2d 38 (10th Cir. 1974). In order to attain in forma pauperis status, a poor litigant, either a plaintiff or a defendant, must file a motion for pauper status with an attached affidavit of poverty. 28 U.S.C. § 1915(a) (1976). A litigant may file the in forma pauperis petition at any stage of the proceedings. Flowers v. Turbine Support Div., 507 F.2d 1242, 1245 (5th Cir. 1975) (civil rights action alleging sex discrimination). The court grants or denies the petition according to the standard of indigency in effect. Catz & Guyer, *supra* note 5, at 661. One commentator has proposed a standard of indigency based on net income and relative liquidity of assets over a standard focusing on an applicant's gross income and assets. Catz & Guyer, *supra* note 5, at 663-64. Another commentator has supported a standard based on an applicant's financial status at the time the applicant petitions for pauper status instead of a test that considers the applicant's fitness to work and makes assumptions regarding employment availability. *Indigency, supra* note 6, at 551-52.

In reviewing applications for in forma pauperis status, courts also will consider the merit of the claim. *Petitions to Sue, supra* note 5, at 746-52. Courts differ in the amount of merit necessary for an applicant to qualify for in forma pauperis status. *Id.* Some courts support a very easy standard. Watson v. Ault, 525 F.2d 886, 891 (5th Cir. 1976) (claim of in forma pauperis status must be of arguable merit); Durham v. United States, 400 F.2d 879, 880 (10th Cir. 1968) (possible to make rational argument on law or facts in support of claim), *cert. denied*, 394 U.S. 932 (1969). Under a stricter standard, courts grant in forma pauperis status only in "exceptional circumstances." Weller v. Dickson, 314 F.2d 598, 600 (9th Cir. 1963) (petition for in forma pauperis status must show exceptional circumstances). The standard of review between the two extremes requires that the applicant's claim have a reasonable chance of success. Jones v. Bales, 58 F.R.D. 453, 464 (N.D. Ga. 1972) (more than a slight chance of success), *aff'd per curiam*, 480 F.2d 805 (5th Cir. 1973); Deshotels v. Liberty Mut. Ins. Co., 116 F. Supp. 55, 59 (W.D. La. 1953) (reasonable chance of success), *aff'd*, 219 F.2d 271 (5th Cir. 1955).

[69] Zaun v. Dobbin, 628 F.2d 990, 993 (7th Cir. 1980) (per curiam) (when not unfair to pay portion of costs, court can require partial payment and waive rest); Williams v. Spencer, 455 F. Supp. 205, 209 (D. Md. 1978) (at least substantial partial payment of costs); Braden v. Estelle, 428 F. Supp. 595, 596 (S.D. Tex. 1977) (partial payment of court costs by prisoners seeking to proceed in forma pauperis who can afford minimal payment); United States *ex rel.* Irons v. Pennsylvania, 407 F. Supp. 746, 747 (M.D. Pa. 1976) (at least partial payment of costs).

[70] 428 F. Supp. 595 (S.D. Tex. 1977).

[71] *Id.* at 598.

[72] *Id.* at 601.

the Texas court's analysis is not limited to prisoner suits.[73] Courts have expanded the plan's application to indigent suits in general.[74]

The *Braden* court used the discretion that Congress implicitly provided in section 1915 to waive part of the costs of litigation.[75] The result has been to create cost standards that are not prohibitive for indigents.[76] The Texas court used previously adopted mandatory affidavits of indigency to give an accurate representation of the litigant's assets.[77] After determining the applicant's assets, the court assessed costs according to the indigent's ability to pay.[78] Although the indigent is unaware of the exact amount of costs he will have to pay, the realization that a court may assess costs will require the indigent to consider the relative merit of his claim.[79]

The Fourth Circuit's decision to assess the entire amount of costs against litigants proceeding in forma pauperis is suspect. The purpose of section 1915 is to provide equal access to the courts.[80] The Fourth Circuit's decision in *Flint* defeats the purpose of section 1915.[81] The undesirable effect of *Flint* is to allow courts in the Fourth Circuit to assess costs against in forma pauperis litigants.[82] The Fourth Circuit was correct, however, in noting that a court creates the danger of litigants' overloading court calendars with frivolous claims by giving complete financial immunity to indigent litigants.[83]

To reduce the unnecessary inconsistency and confusion that presently surrounds the statute, Congress should enact legislation to create uniformity in the granting of in forma pauperis status. Short of congressional guidelines or a specific ruling by the Supreme Court, the Fourth Circuit should institute standards of partial payment of costs.[84] By implementing a partial payment plan, the Fourth Circuit would not threaten

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[73] *See* note 69 *supra.*

[74] *Id.*

[75] 428 F. Supp. 595, 597 (S.D. Tex. 1977).

[76] *Id.*

[77] *Id.* at 600. The *Braden* court also had direct access by telephone and computer to records of prison inmates' trust account balances during the prisoners' incarcerations. *Id.*

[78] *Id.* at 600-01.

[79] *Id.* at 596.

[80] *See* text accompanying note 45 *supra.*

[81] *See* text accompanying notes 44-50 *supra.*

[82] Perkins v. Cingliano, 296 F.2d 567, 568 (4th Cir. 1961) (court may assess costs against indigents).

[83] *See* text accompanying notes 39-42 *supra.*

[84] *See* text accompanying notes 68-78 *supra.* Courts could require persons applying for pauper status to complete a detailed statement of poverty that the person must submit with the affidavit of poverty that § 1915 requires. 28 U.S.C. § 1915(a) (1976). By filling out the statements, the applicant would create a financial profile that courts could use to review the in forma pauperis petition. Under § 1915, courts already must review the pauper petitions on a case-by-case basis. If the court grants the litigant pauper status and the litigant is unsuccessful, the court can determine the proportion of costs the court should assess against the indigent, if any, on the basis of the indigent litigant's financial profile.

an indigent's right to equal access to the courts.[85] Partial payment would require the indigent to evaluate the relative merits of his claim. Because courts already consider an applicant's affidavit of indigency on an individual basis, instituting standards of partial payment would not overburden the courts.[86]

RICHARD LEAR

### *B. Injunction Modification Standards: Uniformity v. Flexibility*

Injunctions are equitable remedies designed to protect rights, to enforce obligations, and to prevent wrongs for which no adequate remedy at law exists.[1] In issuing an injunction a court attempts to devise an appropriate response to the commission of a wrong by entering either a preventive or protective order.[2] A permanent injunction is a final remedy, obtained after a full hearing on the merits of a particular case.[3] The term permanent is illusory, however, because permanent injunctions are subject to modification or dissolution.[4] A permanent injunction

[85] *See* text accompanying notes 75-79 *supra*.

[86] *See* text accompanying note 77 *supra*; 28 U.S.C. § 1915(a) (1976).

[1] 4 POMEROY'S EQUITY JURISPRUDENCE § 1338 (5th ed. 1941) [hereinafter cited as POMEROY]. Due to considerations of expediency and convenience of both potential litigants and the judicial system itself, equitable remedies are applicable to only those cases in which legal remedies would be neither full nor adequate. *Id.* Equity, in its substantive aspect, consists of a body of principles dedicated to the same basic notions of justice that courts of law traditionally applied. R. NEWMAN, EQUITY AND LAW: A COMPARATIVE STUDY 11 (1961) [hereinafter cited as EQUITY]. The principles of equity extend beyond the legal notions of justice to provide relief from hardship when the law cannot act. *Id.* at 11. The doctrine of equity emerged in England in the fourteenth century as a means to avoid the strict procedural requirements of early law which left little room for adaptation to individual hardship. *Id.* at 12-13, 25. The Office of the Chancellor of England provided the necessary executive authority to establish equity as a separate and viable system of justice. *Id.* at 22. Equity emerged as a flexible doctrine that supplements the law by applying considerations of what is fair and just. *Id.* at 11.

[2] POMEROY, *supra* note 1, § 1337. Injunctions may be either mandatory or prohibitory in nature. W. DEFUNIAK, HANDBOOK OF MODERN EQUITY 15 (2d ed. 1956) [hereinafter cited as HANDBOOK]. Mandatory injunctions compel action. *Id.* Prohibitory injunctions forbid action. *Id.*; *see* Steinberg, *SEC And Other Permanent Injunctions—Standards For Their Imposition, Modification and Dissolution*, 66 CORNELL L. REV. 27, 28-29 (1980) [hereinafter cited as Steinberg]; note 4 *infra* (equitable nature of injunctions).

[3] HANDBOOK, *supra* note 2, at 17. *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1055 (1965) [hereinafter cited as *Developments*]. Injunctions may be either preliminary or permanent. POMEROY, *supra* note 1, § 1337. A preliminary injunction is a form of interlocutory relief granted while a suit is pending. *Id.* Litigants may obtain preliminary injunctions ex parte, or after a truncated hearing that forces a judge to render a decision based only on condensed versions of each party's position. *Developments, supra*, at 1055.

[4] *See* HANDBOOK, *supra* note 2, at 17; Steinberg, *supra* note 2, at 41-73; *Developments, supra* note 3, at 1080-86. The justification for altering permanent injunctions stems from the

is, therefore, a dynamic remedy over which courts necessarily retain jurisdiction in order to modify the injunction as equity demands.[5] Nevertheless, because some measure of finality for injunctions is desirable, the legal doctrine of res judicata extends to equitable decrees.[6] Res judicata fosters reliance on judicial economy and avoids inconsistent results by giving judgments finality.[7] The rules governing the application of res judicata balance the judicial system's desire for finality with its need for flexibility.[8] The interrelation between the dynamic nature of the injunctive remedy and the need for finality in judicial actions was an important consideration for the United States Supreme Court when it formulated the guidelines for injunction modification in *United States v. Swift & Co.* (*Swift*).[9]

In *Swift*, the Court considered the propriety of modifying an injunction issued twelve years earlier.[10] The order enjoined the Swift Company, a meat packer, from dealing with certain food products, and from cooperating with four other companies to form a monopoly of the nation's food packing and distributing industries.[11] Swift argued that during the

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equitable nature of the remedy itself. *See* Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944) (essence of equity is courts' power to mould decrees to necessities of each case). Courts must tailor the provisions of a particular injunction to fit the requirements of the particular factual setting of a dispute. *See id.* The logical consequence of an equitable remedy includes the need to change the terms of the remedy as changes occur in the factual setting giving rise to that remedy. D. DOBBS, REMEDIES 111 (1973).

[5] Santa Rita Oil Co. v. State Bd. of Equalization, 112 Mont. 359, ____, 116 P.2d 1012, 1017 (1941); *see* United States v. Swift & Co., 286 U.S. 106, 114-15 (1932); *Developments*, *supra* note 3, at 1080. Justice Frankfurter once stated that an injunction is "'permanent' only for the temporary period for which it may last." Milk Wagon Drivers Union Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 298 (1941).

Rule 60(b)(5) of the Federal Rules of Civil Procedure codifies the common law authority of courts to modify injunctions. FED. R. CIV. P. 60(b)(5). Under Rule 60(b)(5), federal courts have the power to grant partial or total relief in injunction cases through modification or dissolution if it is no longer equitable that the injunction continue. *Id.*

[6] System Fed'n No. 91 v. Wright, 364 U.S. 642, 647-48 (1961); *see Developments*, *supra* note 3, at 1080-81. Res judicata is a principle of law that does not permit relitigation of causes of action once a court has specifically determined the rights of the parties involved in the suit. *See Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 824-25 (1952) [hereinafter cited as *Res Judicata*].

[7] *Res Judicata*, *supra* note 6, at 820.

[8] *Id.*

[9] 286 U.S. 106 (1932).

[10] *Id.* at 114-20.

[11] *Id.* at 109-11. In *Swift*, the United States government obtained an injunction against Swift to dissolve a monopoly created by Swift in conjunction with four other meat-packaging companies in violation of the Sherman Antitrust Act. *Id.*; *see* 15 U.S.C. §§ 1-7 (1976). By concert of action, the five meat packers had suppressed competition in the purchase of both livestock and prepared meats and were moving to extend their operations in order to control other areas of the food industry as well. 286 U.S. at 110. The decree, entered on February 27, 1920, enjoined the defendants from maintaining a monopoly and continuing any alliance in restraint of trade. *Id.* at 111. The decree also enjoined the defendants, both jointly and severally, from dealing in either the wholesale or retail markets for many categories of food products. *Id.*

twelve year period since the injunction took effect, substantial changes had taken place in the food industry rendering the injunctive restraints unwarranted and oppressive.[12] In considering Swift's argument, the Court developed a strict standard for determining when modification is appropriate.[13] Modification may occur when a change in law or fact has occurred that has substantially reduced the dangers that prompted the original injunction.[14] In addition, there must be a showing that continuance of the injunction would constitute extreme hardship for the enjoined party.[15] The Court held modification of the injunction inappropriate because the rise in the power of chain stores did not alter the food marketing system to the degree necessary to eradicate the possibility of Swift's future industry domination.[16]

Recently, the Fourth Circuit Court of Appeals considered the *Swift* standard of injunction modification in the context of a trademark infringement suit, *Holiday Inns, Inc. v. Holiday Inn.*[17] *Holiday Inns* was the latest appeal in a series of suits between the nationally operated motel chain and a locally owned motel operating under the same name in Myrtle Beach, South Carolina.[18]

Holiday Inns of America (the chain) became a corporation in 1952.[19] The United States Patent and Trademark Office registered the com-

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[12] *See id.* at 113. After issuance of the injunction in *Swift*, the Swift Company remained in the food industry as a wholesale meat-packer. *Id.* at 117. The injunction had been successful in accomplishing change in the meat business. *Id.* The Supreme Court conceded that there was little likelihood of monopoly recurring in the meat industry because several of the original defendants were no longer operating. *Id.* at 113, 117. Changes had occurred in the retail sale of groceries as well. *Id.* at 118. The chain store had attained increased prominence since 1920. *Id.*

[13] *See id.* at 119-20.

[14] *Id.* at 119. In *Swift*, the Supreme Court emphasized that courts have the power to modify injunctions. *Id.* at 114. Justice Cardozo, writing for the majority, pointed out that injunctions are continuing decrees subject to adaptation as events may shape the need. *Id.* Federal circuit courts have held that changes in operative facts, relevant decisional law, or applicable statutory law are significant in determining the appropriateness of injunction modification. *See* Flavor Corp. of America v. Kemin Indus., Inc., 503 F.2d 729, 732 (8th Cir. 1974); King-Seeley Thermos Co. v. Aladdin Indus., Inc., 418 F.2d 31, 35 (2d Cir. 1969).

[15] 286 U.S. at 119.

[16] *Id.* In *Swift*, the Supreme Court weighed changes in the food industry to determine if they met the standard of substantial danger reduction. *Id.* at 117-19. The Court firmly believed that the danger of industry domination still existed with respect to the forbidden grocery business. *Id.* at 118. The Court reasoned that grocery chains to which Swift sold did not produce the food they marketed, but depended on Swift for meat products and would turn to Swift for other items if the court granted modification. *Id.* The Court also considered the Swift Company's potential for future abuse in light of its past actions and the possible hardship the Company would suffer if modification of the injunction did not occur. *Id.* at 114-19. Swift remained a powerful force in the meat packing industry and, therefore, easily could have resumed its domination of the grocery business. *Id.*

[17] 645 F.2d 239 (4th Cir. 1981), *cert. denied*, 102 S. Ct. 597 (1982).

[18] *See id.* at 242-43; text accompanying notes 29-44 *infra.*

[19] 645 F.2d at 241.

pany's distinctive "Holiday Inn" service marks two years later.[20] The local establishment (the local) had been operating under the Holiday Inn name since 1949, but had failed to register its use of that name as a protected service mark.[21] Tension between the parties began in 1956 when the chain authorized construction of a franchise facility in Myrtle Beach.[22] The local objected to the chain's projected use of the name Holiday Inn, and so, with the permission of the chain, the franchise began operations as the "Holiday Lodge."[23]

Despite the local's concern for its own rights, it proceeded from the start to capitalize on the goodwill and national reputation of Holiday Inns of America.[24] The local adopted a slogan similar to the chain's slogan,[25] constructed a sign nearly identical to the Holiday Inn great sign,[26] advertised its name in the same style script,[27] and often used towels and other guest room supplies that bore the insignia "Holiday Inn ®."[28]

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[20] *See id.* The Lanham Trademark Act of 1946, 15 U.S.C. §§ 1051-1127 (1976), governs trademark registration. *Id.* § 1114(1). The Act provides that the United States Patent and Trademark Office has the authority to register patents and trademarks. *Id.* § 1051. Section 1051 sets out the registration procedure, while § 1057(a) covers the form of the registration certificate. *Id.* §§ 1051 & 1057(a). In trademark law, under § 1057(b), a registration certificate is prima facie evidence of a user's exclusive right to a particular mark. *Id.* § 1057(b). The major policy of the Lanham Act is to protect a single user's right to a specific mark. *See* H. TOULMIN, TRADEMARK ACT OF 1946 4-7 (1946) [hereinafter cited as TOULMIN]. Protection of a trademark accomplishes two purposes. *See id.* at 4. First, a registered trademark protects the user's investment in a particular mark by assuring that any money or time expended to promote a mark and a product's reputation through advertisement will be part of a worthwhile effort. *Id.* Second, the public receives protection from deception. *Id.* Consumers will come to associate certain marks with the quality of certain products or services in which they have confidence. *Id.*

[21] 645 F.2d at 242-43 (Phillips, J., dissenting). In *Holiday Inns*, the local motel's failure to register its mark is an important factor because although the local was the first user of the name Holiday Inn, the chain had a registration certificate, which is prima facie evidence of an exclusive right to the name. *See id.*; note 20 *supra* and note 28 *infra.*

[22] *See* Holiday Inns, Inc. v. Holiday Inn, 364 F. Supp. 775, 778 (D.S.C. 1973), *aff'd mem.*, 498 F.2d 1397 (4th Cir. 1974).

[23] *Id.*

[24] *Id.* at 782-83.

[25] *Id.* In *Holiday Inns*, the chain registered the slogan, "Your Host From Coast to Coast," while the local used, "Your Host on the Coast" and "Your Host While in Myrtle Beach." *Id.* at 776, 779.

[26] 645 F.2d at 241. A great sign serves as the major identifying feature of each Holiday Inn facility. *See* 364 F. Supp. at 777. In *Holiday Inns*, even the manager/owner of the local could not identify any differences between the great sign and the sign erected to indicate the local motel's location until he examined photographs of each. 645 F.2d at 241.

[27] 645 F.2d at 241. The chain, in *Holiday Inns*, had registered its name in a distinctive style of script so as to make its name readily identifiable. *Id.*

[28] *Id.* The use of the symbol ® serves as notice that a mark is duly registered with the United States Patent and Trademark Office. 15 U.S.C. § 1111 (1976). The symbol stands for the phrases, "Registered in U.S. Patent and Trademark Office" or "Reg. U.S. Pat. Off." *Id.* Failure to give notice of registration in the proper fashion precludes any recovery of profits or damages in subsequent trademark suits. *Id.* The right to use the symbol issues upon any

In 1970, the chain brought suit against the local for trademark infringement and unfair competition when the local began efforts to obtain registration of the Holiday Inn mark.[29] The district court found that the local, notwithstanding its prior use of the Holiday Inn name, had engaged in several acts of unfair competition.[30] The court issued an injunction designed to accommodate the rights of both parties.[31] Under the injunction, the local could continue using the Holiday Inn name in advertising, provided that the name appear only in plain block lettering.[32] The injunction deprived the local, however, of the use of the symbol ® in conjunction with its name.[33] In an immediate appeal of the injunction, the Fourth Circuit affirmed the district court's order.[34]

Refusing to be denied the rights of registration as the entitled first user of the Holiday Inn name,[35] the local resumed a previously suspended concurrent use proceeding with the United States Patent and Trademark Office.[36] The proceeding sought to obtain concurrent registration privileges pursuant to the Lanham Trademark Act of 1946[37] since the local believed that it had a valid and simultaneous right to register the Holiday Inn name.[38] The Trademark Trial and Appeal Board denied con-

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valid registration. *Id.* The local had violated § 1111, therefore, by using the symbol ® before gaining registration privileges. *See* 645 F.2d at 241.

[29] 645 F.2d at 243 (Phillips, J., dissenting); *see* Holiday Inns, Inc. v. Holiday Inn, 364 F. Supp. 775, 776 (D.S.C. 1973); notes 37-41 *infra*.

[30] 364 F. Supp. at 783; *see* text accompanying notes 24-28 *supra*.

[31] 364 F. Supp. at 786-87.

[32] *Id.* The district court in *Holiday Inns* ordered the chain to continue operating its Myrtle Beach facilities as Holiday Lodge and Holiday Downtown in order to protect the rights of the local motel's prior use of the name Holiday Inn. *Id.* at 787.

[33] *See id.* at 786-87. The district court's order in *Holiday Inns* enjoined the local from: (a) using in its advertising a script similar to the chain's distinctive script; (b) using any sign similar to the chain's great sign; (c) using any slogan similar to the chain's registered slogan; (d) using any indicia of the chain that might have suggested the local had a connection with Holiday Inns, Inc.; (e) using any indication that the United States Patent and Trademark Office had registered its name; (f) doing anything that tended to divest the chain of the good will it had acquired in its registered marks. *Id.*

[34] Holiday Inns, Inc. v. Holiday Inn, 498 F.2d 1397 (4th Cir. 1974).

[35] The local in *Holiday Inns* derived the name Holiday Inn from a Bing Crosby movie entitled "White Christmas" in 1949. Holiday Inns, Inc., however, did not begin to use the name until its incorporation in 1952. Holiday Inns, Inc. v. Holiday Inn, 364 F. Supp. 775, 778 (D.S.C. 1973); *see* text accompanying notes 19-23 *supra*.

[36] 645 F.2d at 243 (Phillips, J., dissenting).

[37] 15 U.S.C. §§ 1051-1127 (1976); *see* note 20 *supra*.

[38] 645 F.2d at 243 (Phillips, J., dissenting). Concurrent registration is an unusual aspect of trademark law in that it undermines the policy of trademark law, which seeks to protect a single user's right to a specific mark. *See* note 20 *supra*. The concurrent registration provision in the Lanham Act, 15 U.S.C. § 1052 (1976), however, codifies the preference accorded to prior users at common law and attempts to provide an equitable solution to the difficult problem presented when two innocent users have both acquired rights in the same or similar marks. *See* TOULMIN, *supra* note 20, at 1-5. Section 2(d) of the Lanham Act provides that simultaneous users of a trademark in diverse geographical areas can sometimes register the same mark as concurrent users. 15 U.S.C. § 1052(d) (1976). The United States Patent and Trademark Office will issue concurrent registration unless the second mark's registration is likely to cause confusion or deception. *See* 15 U.S.C. § 1052(d) (1976). Concur-

current registration.[39] On appeal, however, the Court of Customs and Patent Appeals granted concurrent registration within the confines of the previously issued injunction.[40] The court also indicated, sua sponte, that the injunction should be modified in order to allow the local to use the symbol ® as evidence of its newly registered mark.[41]

Subsequently, the local sought injunction modification in the United States District Court for the District of South Carolina on the grounds that the patent appeals court's decision to grant concurrent registration represented a substantial change in circumstances that warranted changing the injunction's provisions to permit use of the symbol ® .[42] The district court refused to modify the injunction.[43] In upholding the district court's decision, the Fourth Circuit relied extensively on *Swift* and considered the quality of the alleged change in circumstance, the potential

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rent registration can also issue if a court of competent jurisdiction finally has determined that more than one user is entitled to use the same or similar marks in commerce. 15 U.S.C. § 1052(d) (1976). The local instituted a concurrent use proceeding in 1970, but the Patent and Trademark Office suspended determination of the validity of the local's right to obtain concurrent registration pending outcome of the trademark infringement action filed against the local by Holiday Inns of America, Inc. 645 F.2d at 243.

[39] Holiday Inn v. Holiday Inns, Inc., 188 U.S.P.Q. 471, 473 (1975). The Trademark Trial and Appeal Board denied concurrent registration under § 2(d) of the Lanham Act, 15 U.S.C. § 1052(d) (1976), which permits concurrent registration only when there is no likelihood of confusion. 188 U.S.P.Q. at 472; *see* note 38 *supra*. The Board found that a likelihood of confusion existed due to the fact that the chain operated several facilities under the name Holiday Inn in close proximity to the local. 188 U.S.P.Q. at 472.

[40] Holiday Inns, Inc. v. Holiday Inn, 534 F.2d 312, 318-20 (C.C.P.A. 1976). The basis for the Court of Customs and Patent Appeals' decision to grant concurrent registration was the last provision of § 2(d) of the Lanham Act, 15 U.S.C. § 1052(d) (1976). Section 2(d) permits concurrent registration regardless of the likelihood of public confusion in identifying the source of purchased goods or services if a court of competent jurisdiction had determined a party's right to use the same or similar mark in commerce. *Id.*; *see* note 38 *supra*. The court seized upon the Fourth Circuit's determination that the local could continue using the name Holiday Inn to justify granting concurrent registration. *See* 534 F.2d 312, 318-20; Holiday Inns, Inc. v. Holiday Inn, 364 F. Supp. 775, 787 (D.S.C. 1973).

[41] 534 F.2d 312, 319. In its *Holiday Inns* decision, the Court of Customs and Patent Appeals noted that the injunction provision that prohibited the local from using any indication of registration, *see* note 32 *supra*, was appropriate while the local did not have a valid registration of its mark. *Id.* In view of the fact that any valid registration confers the right to use the symbol ® , 15 U.S.C. § 1117 (1976), the patent appeals court could find no further reason to deny that right to the local. 534 F.2d at 319.

[42] 645 F.2d at 240. The opinion of the district court to which the local originally applied for injunction modification is in an unpublished decision. *Id.* at 240 n.3. The Fourth Circuit quoted from the district court's unpublished opinion to explain the lower court's rationale for refusing to modify the injunction. *Id.* at 242. The district court concluded that the local would derive little, if any, practical benefit from use of the symbol ® . *Id.* In addition, the local's efforts to identify itself with the national chain deliberately nurtured the public's confusion. *Id.* Finally, in view of the fact that the local's business had not suffered from denial of the use of the symbol ® during the last six years, the court held that the local did not experience hardship to the degree of oppression as supposedly required by *Swift*. *See id.*; United States v. Swift & Co., 286 U.S. 106, 119 (1932); text accompanying notes 9-16 *supra*.

[43] 645 F.2d at 242.

for future abuse by the local, and the degree of hardship the local would suffer if the court denied injunction modification.[44]

The Fourth Circuit underscored the local's past efforts at gleaning benefits from the chain's status as a well-known and reputable establishment.[45] In view of the local's past behavior in trying to identify itself with the chain, the court concluded that the local's potential for future abuse was considerable if the chain's trademarks lost their potency through duplication.[46] In addition, the *Holiday Inns* court rejected the possibility that the local would suffer any extreme hardship if the original injunction remained in force.[47] The court observed briefly that the local's business had not suffered from competition with the chain in the past, and would not suffer in the future if denied the use of the symbol ® .[48] In essence, the court maintained that the injunction's purpose was to prevent the local from profiting from the traveling public's confusion between the chain and the local.[49] The *Holiday Inns* court found that, notwithstanding the patent appeals court's ruling, modification would increase the level of confusion between the motels and, perhaps, heighten the possibility of future acts of unfair competition by the local.[50] According to the Fourth Circuit, therefore, the change of circumstance neither substantially reduced the dangers that originally prompted the injunction, nor created a hardship that amounted to oppression.[51]

The *Holiday Inns* dissent argued that the majority's rigid construction of the *Swift* Court's language was not in accord with the intended teaching of that case.[52] According to the dissent, the majority failed to consider subsequent Supreme Court opinions that limited the rigid modification rule to cases as serious as *Swift*.[53] The dissent pointed out that the Swift Company's efforts at establishing a monopoly in the food industry had significantly affected the nation's economy.[54] The dissent maintained that a rigid construction of *Swift* is necessary only when the

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[44] *See id.* at 240-42; text accompanying notes 9-16 *supra*.

[45] 645 F.2d at 242; *see* text accompanying notes 24-28 *supra*.

[46] 645 F.2d at 242.

[47] *Id.*

[48] *Id.* The Fourth Circuit in *Holiday Inns* concluded that the local would not suffer any hardship from denial of the use of the symbol ® . *Id.* The *Holiday Inns* court, in concluding that no economic hardship would result from denial of the use of the symbol ® , failed to discuss the fact that the Lanham Act requires trademark registrants to give public notice of registration as a prerequisite to the recovery of damages in any subsequent infringement suits. *See* 15 U.S.C. § 1111 (1976). The local, therefore, could not recover damages in any subsequent trademark suit with another competitor. *See* note 28 *supra*.

[49] 645 F.2d at 241-42.

[50] *Id.* at 242; *see* text accompanying notes 24-28 *supra*.

[51] *Id.*; *see* text accompanying notes 12-15 *supra*.

[52] 645 F.2d at 245 (Phillips, J., dissenting).

[53] *Id.* at 244-45; *see* United States v. United Shoe Mach. Corp., 391 U.S. 244, 248 (1968); System Fed'n No. 91 v. Wright, 364 U.S. 642, 647 (1961); note 68 *infra*.

[54] 645 F.2d at 245 (Phillips, J., dissenting); *see* text accompanying notes 9-16 *supra*.

facts of a particular case involve the same level of wrong-doing perpetrated by the Swift Company when it attempted to dominate one of the nation's essential industries.[55] The dissent distinguished *Swift* from *Holiday Inns* on this impact basis.[56] The local inn's wrong-doing affected only the tourists and town of Myrtle Beach, not the entire nation's economy as did the defendant's activity in *Swift*.[57] In a situation of limited effect, the dissent claimed the *Swift* rule encourages flexibility in injunction modification in order to assure that courts equitably resolve modification questions.[58]

The dissent suggested that courts can best achieve flexibility by balancing the danger of potential hardship if modification does not occur, against the continuing need and viability of the original injunction.[59] In applying the balancing test to the instant case, the dissent concluded that it was unlikely that use of the symbol ® by the local would increase confusion beyond the level created by six years of legally approved, though not officially registered, concurrent use of the Holiday Inn name.[60] The dissent contended that the majority's denial of modification relief nullified the local's legal right to registration and constituted a hardship that far outweighed the need to maintain an injunction provision that, as a practical matter, did little to decrease public confusion between the local and Holiday Inns of America.[61] The dissent, therefore, would have modified the injunction.[62]

While courts generally look to *Swift* for guidance in devising standards for when injunction modification is appropriate,[63] the courts have split in interpreting the meaning of the *Swift* rule.[64] Some courts adhere strictly to the language utilized by the *Swift* Court and modify injunctions only when a substantial change in circumstance has occurred, coupled with a showing that nonmodification would result in extreme hardship for the enjoined party.[65] Other courts have developed a flexible

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[55] 645 F.2d at 245 (Phillips, J., dissenting); *see* text accompanying notes 9-16 *supra* and notes 66-75 *infra*.

[56] 645 F.2d at 244-46 (Phillips, J., dissenting).

[57] *Id.* at 245-46.

[58] *Id.* at 245. The *Swift* Court stated that if a court is satisfied that changing circumstances have turned an injunction into an instrument of wrong, the court can modify the injunction accordingly. 286 U.S. at 114-15; *see generally* text accompanying notes 1-5 *supra*.

[59] *See* 645 F.2d at 245 (Phillips, J., dissenting); Steinberg, *supra* note 2, at 59; text accompanying notes 66-76 *infra*.

[60] 645 F.2d at 247 (Phillips, J., dissenting); *see* text accompanying notes 32-33 *supra*.

[61] 645 F.2d at 248 (Phillips, J., dissenting).

[62] *Id.*

[63] *See, e.g.*, SEC v. Warren, 583 F.2d 115, 120-22 (3d Cir. 1978); De Filippis v. United States, 567 F.2d 341, 344 (7th Cir. 1977); King-Seeley Thermos Co. v. Aladdin Indus., Inc., 418 F.2d 31, 33-35 (2d Cir. 1969); notes 65-66 *infra*. *See generally* Steinberg, *supra* note 2, at 41-51.

[64] *See* Steinberg, *supra* note 2, at 41-51.

[65] *See* 286 U.S. at 119; De Filippis v. United States, 567 F.2d 341, 344 (7th Cir. 1977) (no modification of injunction that ended Marine policy against short wigs worn by Marines when another case upheld similarly short hair standards for policemen without wigs); Ridley

standard and resolve the issue of injunction modification by examining the particular facts and setting of each case, rather than by applying a uniform standard.[66] A 1968 Supreme Court decision, *United States v. United Shoe Machinery Corp. (United Shoe)*,[67] lends support to the circuits that have applied the flexible approach. The *United Shoe* Court considered the appropriateness of modifying an injunction that was not effectively achieving the intended goal of eliminating a single corporation's domination of the shoe machinery manufacturing industry.[68] The Supreme Court modified the injunction and distinguished *Swift* on the

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v. Phillips Petroleum Co., 427 F.2d 19, 22 (10th Cir. 1970) (alleged changes in natural gas supply did not warrant modification of injunction forcing oil company to supply customer with gas); Humble Oil & Ref. Co. v. American Oil Co., 405 F.2d 803, 813 (8th Cir.), *cert. denied*, 395 U.S. 905 (1969) (no modification of injunction restricting trademark use despite showing that mark had begun to receive widespread and nonexclusive usage). *But see* Coca-Cola Co. v. Standard Bottling Co., 138 F.2d 788, 790 (10th Cir. 1943) (even under *Swift*, injunction enjoining Standard from selling cola products dissolved when shown that many courts had determined Coca-Cola has no exclusive right to market cola products). The Eighth Circuit in *Humble Oil & Ref. Co. v. American Oil Co.*, refused to modify an injunction that restrained three oil companies from using certain trademarks in their gasoline business. 405 F.2d at 821. The companies had argued that modification was permissible because under the present facts and widespread use of the trademarks in question, the original injunction was no longer necessary. *See id.* at 811-14. The *Humble Oil* court rejected the company's argument and reiterated the *Swift* language, concluding that injunction modification is proper only if substantial change and unforeseeable hardship has occurred to the plaintiff. *Id.* at 813.

[66] *See* SEC v. Warren, 583 F.2d 115, 120-22 (3d Cir. 1978); King-Seeley Thermos Co. v. Aladdin Indus., Inc., 418 F.2d 31, 33-35 (2d Cir. 1969); text accompanying notes 52-59 *supra*. In *Warren*, the court modified an injunction restraining an individual from further violations of the margin requirements of the Securities Exchange Act of 1933. 583 F.2d at 122. The court declared that the types of conduct involved in *Warren* and *Swift* differed greatly. *Id.* at 120. *Warren* involved a single isolated offense in an esoteric area of the law, whereas *Swift* involved monopolistic conduct affecting the entire nation. *See id.* at 120-21. Furthermore, the defendant in *Warren* scrupulously obeyed the injunction order for a period of years. *Id.*

In *King-Seeley*, the Aladdin Company sought modification of an injunction preventing it from using the term "thermos" which King-Seeley had registered as part of its trademark. 418 F.2d at 33. The Second Circuit granted modification in view of the growing generic nature of the term. *Id.* at 35. In so doing, the court carefully distinguished *Swift* by stating that the case before it did not present a sharp conflict between right and wrong as in *Swift*, but the *King-Seeley* case presented a need for drawing the line between two kinds of right-doing. *See id.* Both companies thus had valid claims and the court found it necessary to balance the competing interests in determining the appropriateness of injunction modification. *Id.*

[67] 391 U.S. 244 (1968).

[68] *See id.* at 246-48. In *United Shoe*, the government sought modification of an injunction originally issued against the defendant corporation as a means to break up a monopoly in the shoe machinery manufacturing business. *Id.* at 247. The injunction decree contained a provision allowing either party to petition for modification after ten years. *Id.* at 246. The court imposed the ten year period to allow the injunction's provisions time to prove their effectiveness. *Id.* The government accordingly petitioned for modification, reporting that United Shoe continued to dominate the shoe machinery market and that the decree had not established workable competition. *Id.* The government again requested a division of the corporation into competing companies. *Id.* The district court denied the motion, relying on *Swift* to support the conclusion that modification was inappropriate unless new and unfore-

ground of the procedurally protracted and substantively grave nature of the *Swift* litigation.[69] The *United Shoe* Court concluded that modification depends on an appropriate showing based on the specific facts and circumstances of each case.[70] The Supreme Court's *United Shoe* decision eased the *Swift* rule by sanctioning a close scrutiny of the facts and circumstances of a case.[71] The case-by-case analysis serves as an alternative standard for determining the appropriateness of injunction modification in cases of less serious national impact than *Swift*.[72]

The Fourth Circuit has demonstrated an equally flexible approach to the question of injunction modification. In *Tobin v. Alma Mills*,[73] the Secretary of Labor brought suit against Alma Mills to enjoin future violations of the Fair Labor Standards Act.[74] The company applied for dissolution of the injunction nine years later, arguing that its long-standing compliance with the order was evidence of its good faith and constituted a change that warranted modification.[75] The Fourth Circuit agreed, and distinguished *Swift* by underscoring the absurdity of literally applying language clearly intended to cover the particular fact situation found in the *Swift* case.[76]

*United Shoe* and *Alma Mills*, therefore, provided the Fourth Circuit with an alternative standard to *Swift* for determining the appropriateness of the local's modification request since *Holiday Inns* did not have

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seen conditions had developed. *See* United States v. United Shoe Mach. Corp., 266 F. Supp. 328, 330 (D. Mass. 1967). The Supreme Court reversed the district court's decision, stating that the lower court had misconstrued the meaning of *Swift*. 391 U.S. at 248. The Court pointed to Swift's numerous attempts to have the injunction order vacated as an illustration of the Swift Company's potential for future abuse, and stated that *Swift* must be read in the light of this factual context. *Id.* at 248.

Another Supreme Court case indicating that the language of *Swift* did not establish an inflexible rule is System Fed'n No. 91 v. Wright, 364 U.S. 642 (1961). In *System Fed'n*, petitioner labor union sought to dissolve an injunction enjoining the union from discriminating against nonunion workers. *Id.* at 644-45. The authority for the injunction was § 2 of the Railway Labor Act, ch. 347, 44 Stat. 577 (1926) (current version at 45 U.S.C. § 152 (1976)), which prohibited mandatory union membership requirements. *See* 45 U.S.C. § 152 (1976). Congress later amended the act to allow contracts that required the existence of a union shop. *See* 44 Stat. 577 (1926), *as amended by* Act of Jan. 10, 1951, Pub. L. 914, 64 Stat. 1238 (1951) (current version at 45 U.S.C. § 152 (1976)). The union based its argument for modification on the change in law. *See* 364 U.S. at 644-45. The Court in granting modification did not follow a rigid construction of *Swift's* standard for modification. *See id.* at 650-51. Rather, the *System Fed'n* Court stated that sound judicial discretion calls for the modification of injunctions if circumstances of law or fact existing at the time of issuance have changed, or if new factors have arisen. 364 U.S. at 647.

[69] 391 U.S. at 248; *see generally* text accompanying notes 9-16 *supra*.

[70] 391 U.S. at 249.

[71] *See id.*

[72] *See id.*; Steinberg, *supra* note 2, at 47-51; notes 67-68 *supra*.

[73] 192 F.2d 133 (4th Cir. 1951), *cert. denied*, 343 U.S. 933 (1952).

[74] *Id.* at 134; *see* 29 U.S.C. §§ 201-219 (1976).

[75] *See id. But see* Mayberry v. Maroney, 558 F.2d 1159, 1164 (3d Cir. 1977) (stating that compliance with injunction insufficient grounds for modification).

[76] 192 F.2d at 136.

the same degree of nationwide significance as did *Swift*.[77] The *Holiday Inns* court adhered to the strict *Swift* rule, however, presumably due to the unusual facts surrounding the local's request for relief.[78] The Fourth Circuit originally upheld the injunction as the proper means to prevent public confusion between the local and Holiday Inns of America.[79] The Fourth Circuit may have believed that, by granting concurrent registration, the patent appeals court had adhered to the language of the Lanham Act but failed to recognize that the intended purpose of the Act's concurrent registration provision was to avoid the possibility of confusion.[80] The *Holiday Inns* court, therefore, refused to foster confusion by modifying the injunction.[81]

Had the Fourth Circuit applied the balancing approach advocated by the dissent, however, the court could have avoided contributing to confusion without relying on the stringent *Swift* rule. Although the dissent would have modified the injunction,[82] a balancing test on the *Holiday Inns* facts does not compel necessarily injunction modification. The degree of potential harm in deciding to modify the injunction was relatively equal with the degree of potential hardship the local would suffer if modification did not occur.[83] The local's use of the symbol ® was not likely to cause more confusion than already existed through both parties' simultaneous use of the name Holiday Inn.[84] The only practical benefit, however, that use of the registration symbol could bring to the local was the right to recover damages in subsequent trademark infringement actions.[85] In view of the fact that Myrtle Beach has an abundant supply of Holiday Inns, it is unlikely that another competitor would involve the local in litigation to protect the Holiday Inn mark.[86] Thus, on the *Holiday Inns* facts, the court could have reached the same result using the balancing test rather than the *Swift* analysis.

In most cases a balancing test is a more appropriate standard for injunction modification since flexibility is of prime importance in equitable remedies.[87] While the *Holiday Inns* decision suggests that future modification requests in the Fourth Circuit will be subject to *Swift's* rigid standard, the court could return to the more flexible balancing approach it demonstrated in *Alma Mills*.[88] The future application of the

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[77] *See* text accompanying notes 54-57 and 65-76 *supra*.

[78] *See* 645 F.2d at 241-42; text accompanying notes 35-41 *supra*.

[79] *See* 645 F.2d at 242; 364 F. Supp. at 786-87; text accompanying notes 44-51 *supra*.

[80] *See* 4 R. CALLMAN, UNFAIR COMPETITION TRADEMARKS AND MONOPOLIES § 98.3(b)(1) at 133 (3d ed. Supp. 1981). *See generally* text accompanying notes 17-51 *supra*.

[81] *See* 645 F.2d at 242.

[82] *Id.* at 248 (Phillips, J., dissenting); *see* text accompanying notes 52-62 *supra*.

[83] *See* 645 F.2d at 242.

[84] *Id.* at 247 (Phillips, J., dissenting); *see* text accompanying notes 60-62 *supra*.

[85] 645 F.2d at 244 (Phillips, J., dissenting); *see* text accompanying notes 28 & 48 *supra*.

[86] *See* 364 F. Supp. at 780. The town and tourists of Myrtle Beach, South Carolina supported three authorized Holiday Inn franchises located at different parts of the city. *See id.*

[87] *See* text accompanying notes 1 & 4-5 *supra*.

[88] *See* text accompanying notes 73-76 *supra*.

strict *Swift* rule may depend on the seriousness or the complexity of the fact situation underlying a modification request. An attorney in the Fourth Circuit, however, must be prepared to meet either the rigid *Swift* rule or the flexible *Alma Mills* test when requesting an injunction modification.

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### C. *Res Judicata: Exclusive Federal Jurisdiction and State Court Consent Judgments*

The doctrine of *res judicata* rests upon considerations of economy of judicial time and a public policy favoring the establishment of certainty in legal relations.[1] *Res judicata* prevents repetitious litigation by rendering a final judgment on the merits a bar to a subsequent action upon the same claim between the same parties or those in privity with the parties.[2] *Res judicata* and the full faith and credit clause of the United

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[1] *See* Commissioner v. Sunnen, 333 U.S. 591, 597 (1948). *Res judicata* is a doctrine of judicial origin. *See id.* The doctrine prevents repetitious litigation involving the same cause of action, and provides a point at which litigation ends. *See* Brown v. Felsen, 442 U.S. 127, 131 (1979); Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 525 (1931); Norman Tobacco & Candy Co. v. Gillette Safety Razor Co., 295 F.2d 362, 364 (5th Cir. 1961). *Res judicata* ensures efficient use of a court's time through avoidance of needless litigation. *See* Angel v. Bullington, 330 U.S. 183, 192-93 (1947). *Res judicata* also prevents harassment of a defendant. *See* White v. Adler, 289 N.Y. 34, 42-43, 43 N.E.2d 798, 801-02 (1942). The doctrine binds the original parties and those in privity with them not only on every matter actually litigated in the first claim, but also on any other admissible matter that a party might have offered to sustain or defeat the first claim. *See* Commissioner v. Sunnen, 333 U.S. 591, 597 (1948); Cromwell v. County of Sac, 94 U.S. 351, 352 (1876). *See generally*, 1B MOORE'S FEDERAL PRACTICE ¶ 0.405[1], 621-29 (2d ed. 1980) [hereinafter cited as 1B MOORE]; Note, *Developments in the Law—Res Judicata*, 65 HARV. L. REV 818, 820-22 (1952).

[2] *See* Brown v. Felsen, 442 U.S. 127, 131 (1979) (final judgment on merits bars further claims based on same cause of action by parties or parties in privity); Mont. v. United States, 440 U.S. 147, 153 (1979) (right, question or fact determined by court of competent jurisdiction cannot be disputed in subsequent suit between same parties or parties in privity); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 & n.5 (1979) (*res judicata* protects parties from relitigating identical issues); Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294, 299 (1917) (those bound by court judgment should recognize rights established by such judgment); Liddell v. Smith, 345 F.2d 491, 493 (7th Cir. 1965) (public policy of *res judicata* requires end to litigation); Bennett v. Commissioner, 113 F.2d 837, 839 (5th Cir. 1940) (*res judicata* rests on public policy to end litigation); Opelousas-St. Landry Sec. Co. v. United States, 66 F.2d 41, 44 (5th Cir.), *cert. denied*, 290 U.S. 684 (1933) (*res judicata* ends controversies); 1B MOORE, *supra* note 1, at 628 n.27. *See generally* Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 325 (1978) [hereinafter cited as Currie] (policy of *res judicata* is to end litigation); Note, *"To Bind or Not to Bind": Bar and Merger Treatment of Consent Decrees in Patent Infringement Litigation*, 74 COLUM. L. REV. 1322, 1322 (1974) [hereinafter cited as *"To Bind or Not To Bind"*] (*res judicata* discourages repetitive litigation).

States Constitution[3] generally require that a state court's final judgment on the merits bar a federal court from entertaining a succeeding action on the same claim between the same parties or those in privity with them.[4] The general requirement barring relitigation, however, is not absolute.[5] Federal courts adjudicate some cases which federal statutes restrict to the federal judicial system.[6] When a prior state court judgment bars an action that a federal statute restricts to a federal forum the policies of exclusive federal jurisdiction[7] may compete with the

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[3] *See* U.S. CONST. art. 4, § 1. The full faith and credit clause of the United States Constitution and its concomitant implementing statute, 28 U.S.C. 1738 (1976), generally require a federal court to give the same *res judicata* effect to a state court action as the state court itself would give to the same action. *See* Boothe v. Baker Indus., Inc., 262 F. Supp. 168, 173 (D. Del. 1966). *See also* RESTATEMENT (SECOND) OF JUDGMENTS § 86 (Final Draft); Cassad, *Intersystem Issue Preclusion and the Restatement (Second) of Judgments*, 66 CORNELL L. REV. 510, 519 (1981); Note, *The Preclusive Effect of State Judgments on Subsequent 1983 Actions*, 78 COLUM. L. REV. 610, 610 (1978) [hereinafter cited as *1983 Actions*].

[4] *See* American Surety Co. v. Baldwin, 287 U.S. 156, 166 (1932) (full faith and credit clause applies to state court judicial proceedings questioned in an independent federal court proceeding); Gart v. Cole, 263 F.2d 244, 248 (2d Cir.), *cert. denied*, 359 U.S. 978 (1959) (full faith and credit requires federal court to bar relitigation of state court decision).

[5] *See* American Mannex Corp. v. Rozands, 462 F.2d 688, 690 (5th Cir.), *cert. denied*, 409 U.S. 1040 (1972) (states interpretation of *res judicata* not necessarily binding on federal court); Schwegmann Bros. Giant Super Mkts. v. Louisiana Milk Comm'n, 365 F. Supp. 1144, 1147 (M.D. La. 1973), *aff'd*, 416 U.S. 922 (1974) (federal court to give great consideration to state interpretation of *res judicata* but does not bind court); note 71 *infra*.

[6] *See* Note, *Exclusive Jurisdiction of the Federal Courts in Private Civil Actions*, 70 HARV. L. REV. 509, 509-14 (1957) [hereinafter cited as *Exclusive Jurisdiction of the Federal Courts*]. Federal courts have limited jurisdiction. *See* Northwest Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO, 451 U.S. 77, 95 (1981); 1 MOORE'S FEDERAL PRACTICE ¶ 0.60[1], 603 (2d ed. 1981) [hereinafter cited as 1 MOORE]. Federal courts, as courts of limited jurisdiction generally do not review determinations of state courts. *See* Mitchell v. National Broadcasting Co., 553 F.2d 265, 274 (2d Cir. 1977); Bricker v. Crane, 468 F.2d 1228, 1231-32 (1st Cir. 1972), *cert. denied*, 410 U.S. 930 (1973). Parties normally appeal judgments of state trial courts to state appellate courts and then to the United States Supreme Court. *See* Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-16 (1923); Chang, *Rediscovering the Rooker Doctrine: Section 1983, Res Judicata and the Federal Courts*, 31 HASTINGS L.J. 1337, 1342 (1980). *See generally*, U.S. CONST. art. III, § 2; Vestal, *State Court Judgment as Preclusive in Section 1983 Litigation in a Federal Court*, 27 OKLA. L. REV. 185, 187 (1974). The United States Constitution gives Congress power to confer jurisdiction on lower federal courts. U.S. CONST. art. I, § 8; Cary v. Curtis, 15 U.S. (3 How.) 409, 416 (1844). Congress generally has vested state and federal courts with concurrent jurisdiction, and federal statutes containing no contrary provision allow state courts to exercise concurrent jurisdiction. *See* The Moses Taylor, 71 U.S. (4 Wall.) 411, 429-30 (1866); 1 MOORE, *supra* at ¶ 0.06[1], 603; *Exclusive Jurisdiction of the Federal Courts, supra*, at 509. Federal courts, however, have exclusive jurisdiction in several areas. *See* 15 U.S.C. § 78aa (1976) (securities regulation); 28 U.S.C. §§ 1333 (admiralty), 1334 (bankruptcy), 1338 (1976) (patents, copyrights, trademarks, and unfair competition).

[7] *See* Nash County Bd. of Educ. v. Biltmore Co., 464 F. Supp. 1027, 1031-32 (E.D.N.C. 1978). Congress conferred exclusive jurisdiction on federal courts to promote policies of uniform application of its legislation. *See id.* at 1032. The federal judicial system often fails to achieve uniformity because the 12 circuit courts may differ in their approaches to similar questions, and the United States Supreme Court only occasionally will resolve inconsistencies among the circuits by review of their decisions. *See Exclusive Jurisdiction of the*

policies underlying *res judicata*.[8] In *Nash County Board of Education v. Biltmore Company*[9] the Fourth Circuit considered whether a state court action brought under state antitrust laws barred under *res judicata* a later federal antitrust suit which only a federal court could hear.[10]

In the state action preceding *Nash County*, the Attorney General of North Carolina brought suit under North Carolina antitrust laws[11]

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*Federal Courts*, *supra* note 6, at 511-12 & 20. Exclusive federal jurisdiction provides litigants with various procedural and remedial advantages that a state forum might not provide. *See, e.g.*, Borak v. J.I. Case Co., 317 F.2d 838, 849 (7th Cir. 1963), *aff'd*, 377 U.S. 426 (1964) (state statute requiring security for expenses not applicable where federal court had jurisdiction); Siegfried v. Kansas City Star Co., 298 F.2d 1, 5 (8th Cir.), *cert. denied*, 369 U.S. 819 (1962) (right to jury trial under civil antitrust claim); 15 U.S.C. § 15 (1976) (treble damage recovery for violation of federal antitrust laws); 15 U.S.C. § 78aa (1976) (provision for nationwide service of process under federal securities law); FED. R. CIV. P. 26-37 (broad discovery rules in federal civil cases). Additionally, a grant of federal jurisdiction allows the federal bench to gain experience over technical problems or complex concepts inherent in actions involving specialized or abstruse areas of law. *See* Einhorn & Gray, *The Preclusive Effect of State Court Determinations in Federal Actions Under the Securities Exchange Act of 1934*, 3 J. CORP. L. 235, 241-42 (1978) [hereinafter cited as Einhorn & Gray]; *Exclusive Jurisdiction of the Federal Courts*, *supra* note 6, at 512.

[8] *See* Einhorn & Gray, *supra* note 7, at 241-42. *Compare* text accompanying notes 1 & 2, *supra* (*res judicata* goals include judicial economy and certainty in legal relations) *with* text accompanying notes 6-8, *supra* (exclusive federal jurisdiction objectives include uniformity, procedural and remedial advantages, and expertise). *See generally* Note, *The Collateral Estoppel Effect of Prior State Court Findings in Cases Within Exclusive Federal Jurisdiction*, 91 HARV. L. REV. 1281, 1286 (1978) [hereinafter cited as Note, *Exclusive Federal Jurisdiction*]. The first case to confront the competing policies in an antitrust context was Straus v. Am. Publishers' Ass'n, 201 F. 306, 310 (2d Cir. 1912), *appeal dismissed*, 235 U.S. 716 (1914). In *Straus*, the Second Circuit determined whether a prior state action under a state antitrust statute barred under *res judicata* a later federal antitrust suit. *See id.* at 310. The *Straus* court indicated that although plaintiff brought the first action under a state statute and the second under a federal statute that granted federal courts exclusive jurisdiction, the judgment of the first action nonetheless bound the parties. *See id.*

[9] 640 F.2d 484 (4th Cir.), *cert. denied*, 50 U.S.L.W. 3250 (U.S. Oct. 6, 1981).

[10] *See id.* at 486.

[11] *See* N.C. GEN. STAT. §§ 75-1 to 28 (1981). Before the enactment of antitrust legislation in North Carolina, restraints of trade and unfair trade practices were subject to judicial scrutiny under the common law. *See* Culp v. Love, 127 N.C. 457, 461, 37 S.E. 476, 477 (1900) (combination to destroy competition is against public policy). North Carolina first passed an antitrust statute in 1889. *See* Ch. 374, [1889] N.C. Sess. L. 372. The North Carolina General Assembly enacted a new antitrust statute in 1913. *See* Ch. 41, [1913] N.C. Sess. L. 66. Within this statute the General Assembly adopted a counter part of § 1 of the Sherman Act. *Compare* Ch. 41, § 1, [1913] N.C. Sess. L. 66 *with* 15 U.S.C. § 1 (1976). The substantive provisions of the 1913 legislation currently appear in N.C. GEN. STAT. §§ 75-1, 75-5(b)(1)-(6) (1981). The North Carolina Supreme Court has acknowledged that the language of § 75-1 derives from § 1 of the Sherman Act. *See* Rose v. Vulcan Materials Co., 282 N.C. 643, 655, 194 S.E.2d 521, 530 (1973). Chapter 75 applies primarily to such restraints of trade as price fixing, exclusive territorial arrangements, exclusive dealing, refusals to deal, monopolization, attempts to monopolize, combinations and conspiracies of monopolize, unfair methods of competition, and unfair trade practices. *See* N.C. GEN. STAT. § 75-5 (1981). *See generally* Aycock, *Antitrust and Unfair Trade Practice Law in North Carolina—Federal Law Compared*, 50 N.C. L. REV. 199, 200, 206-07 (1972).

against nine dairy companies.[12] The Attorney General charged the dairy companies with selling milk products to the state public school systems at artificially high and noncompetitive prices through agreements in restraint of trade.[13] The Attorney General claimed to represent each public school system in the state,[14] and sought both injunctive relief and treble damages.[15] Before trial, however, the Attorney General and the nine dairy companies entered into a consent decree[16] that established

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[12] *See* 640 F.2d at 485-86. The North Carolina Attorney General brought an action in October, 1974, against nine dairy companies in the case Attorney General v. The Biltmore Company, *et. al.*, filed in the General Court of Justice, Superior Court Division of Wake County. *See* Joint Brief of Appellees at 2, Nash County Bd. of Educ. v. Biltmore Co., 640 F.2d 484 (4th Cir. 1981). The Attorney General's suit arose from a two year investigation of the dairy companies, instigated in response to complaints from various North Carolina school boards doing business with the dairy companies. *See* 640 F.2d at 485.

[13] *See* 640 F.2d at 485; N.C. GEN. STAT. § 75-1 (1981). The North Carolina Attorney General's complaint in *Attorney General v. Biltmore Company* charged that the defendants joined in agreements, combinations and conspiracy in restraint of trade in the sale of milk to North Carolina's public school systems. *See* 640 F.2d at 485. The complaint further alleged that the defendants had restrained and eliminated price competition in the sale of fluid milk and milk products to the public school systems in violation of North Carolina antitrust laws, leading to unreasonably high, artificial and noncompetitive prices. *See id*; N.C. GEN. STAT §§ 75-1, 75-2 (1981).

[14] *See* 640 F.2d at 485. In the state court action prior to *Nash County* the North Carolina Attorney General asserted the right to represent each public school system in North Carolina that received state funds for the purpose of purchasing milk to be resold or given away to students attending the schools in each public school system. *Id.* The North Carolina Attorney General has authority to represent all North Carolina state departments, bureaus, agencies, institutions, commissions or other organized activities of the state that receive support from the state. *See* N.C. GEN. STAT. § 114-2 (1978). This broad grant of authority is supplemented in the antitrust context by the North Carolina antitrust statutes, which empower the Attorney General to bring suit to enforce the statutes. *See* N.C. GEN. STAT. §§ 75-14, to 16 (1981); 640 F.2d at 494-95. The Attorney General sought to have certified, pursuant to Rule 23(a) of the North Carolina Rules of Civil Procedure, a class consisting of all public school systems in North Carolina that had used state tax money to purchase milk from any of the nine defendants in the state action brought by the Attorney General. *See id.* at 486, N.C. GEN. STAT. § 1A-1 Rule 24 (1969). The purported class, however, was never certified. *See id.* at 486.

[15] *See* 640 F.2d at 485. Section 75-14 of the North Carolina General Statutes authorizes the Attorney General of North Carolina to sue on behalf of the state to obtain permanent or temporary injunctions. N.C. GEN. STAT § 75-14 (1981). Section 75-16 allows recovery of treble damages in the event of violation of the state antitrust laws. N.C. GEN. STAT. § 75-16 (1981).

[16] *See* 640 F.2d at 486. A consent decree is a negotiated agreement between a defendant and plaintiff whereby the defendant agrees to cease alleged illegal activities and the plaintiff drops the action against the defendant. *See* Timberg, *A Primer on Antitrust Consent Judgments and FTC Consent Orders*, 39 BROOKLYN L. REV. 567, 567-68 (1973) [hereinafter cited as Timberg]; *"To Bind or Not to Bind," supra* note 2, at 1324-25 (1974). A consent decree constitutes a judicial determination even though based upon an agreement between the parties. *See* United States v. Swift & Co., 286 U.S. 106, 114-15 (1932); United States v. Radio Corp. of Am., 46 F. Supp. 654, 655 (D. Del. 1942) *appeal dismissed*, 318 U.S. 796 (1943); Timberg, *supra* at 568; note 44 *infra*. The United States Attorney General relies on consent decrees to enforce federal antitrust laws. *See* United States v. ASCAP, 331 F.2d

procedures for negotiating milk contract prices with the North Carolina public school systems.[17] The consent decree did not provide monetary damages for the state or the school systems.[18]

Following resolution of the state action, the Nash County Board of Education (Board) instituted an action in the United States District Court for the Eastern District of North Carolina[19] against the same nine dairy companies that were defendants in the prior state action, alleging violations of the Sherman Antitrust Act (Sherman Act).[20] The dairy companies moved for summary judgment, arguing that the consent decree in the North Carolina state court action barred the federal suit under the doctrine of *res judicata*.[21] The district court granted the motion in a memorandum opinion, and the Board appealed to the Fourth Circuit.[22]

On appeal, the Board made arguments regarding all three elements required in the application of *res judicata*.[23] The judgment in the prior action must constitute a final judgment on the merits, both actions must

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117, 123-24 (2d Cir. 1964). Consent decrees resolve 80-85% of the civil antitrust cases brought by the Justice Department's Antitrust Division. *See* Timberg, *supra*, at 567. *See generally* Note, *The Consent Judgment as an Instrument of Compromise and Settlement*, 72 HARV. L. REV. 1314, 1320-21 (1959).

[17] *See* 464 F. Supp. at 1028-29. The consent decree between the North Carolina Attorney General and the dairy companies provided mandatory procedures for reporting to the Attorney General's office all bids and negotiated prices for milk contracts with North Carolina public school systems. *See id.* The consent decree stated that all matters in controversy arising from the action were settled to the satisfaction of both the Attorney General and the defendant dairy companies. *See id.* at 1028.

[18] *See id.* at 1029.

[19] *See id.* The Nash County Board of Education (Board) brought suit against nine dairy companies in reliance upon a letter from the North Carolina Attorney General to all school superintendants stating that the consent decree did not preclude individual school systems from instituting actions to recover money damages arising out of the antitrust activity of the dairy companies. *See id.* The Board brought suit as a class-action on behalf of itself and all other county and city boards of education in North Carolina. *See id.* at 1028; N.C. GEN STAT. § 1A-1 Rule 23(a) (1969).

[20] *See* 640 F.2d at 486. In *Nash County* the Nash County Board of Education alleged that nine dairy companies combined and conspired to fix prices and monopolize the public school market for milk and milk products in North Carolina in violation of §§ 1 and 2 of the Sherman Act. *See* 464 F. Supp. at 1028; 15 U.S.C. §§ 1, 2 (1976). The Sherman Act, 15 U.S.C. §§ 1-7 (1976), makes illegal the restraint of trade or commerce. *See id.* § 1(a). The United States Supreme Court has acknowledged the substantial federal interest in enforcing a national policy in favor of competition, and has called the Sherman Act the "Magna Carta of free enterprise." *See* California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 110-11 (1980), *quoting* United States v. Topco Associates, Inc., 405 U.S. 596, 610 (1972); Note, California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.: *Federal Power Under the Twenty-First Amendment?*, 38 WASH. & LEE L. REV. 302, 308 n.30 (1981). *See generally* W. LETWIN, LAW AND ECONOMIC POLICY IN AMERICA 54-70 (1965); H. THORELLI, THE FEDERAL ANTITRUST POLICY (1954); Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191, 1203 (1977).

[21] *See* 464 F. Supp. at 1028.

[22] *See* 640 F.2d at 486.

[23] *See id.* at 486-87, 493.

involve the same cause of action, and there must be an identity of parties or those in privity with the parties in the two suits.[24] The Board asserted that none of the elements of *res judicata* were present in their federal action.[25] The Board argued that the consent decree in the first action did not constitute a final judgment because the Board never agreed to the decree.[26] Further, the Board maintained that it was neither a party to the state action nor in privity with the North Carolina Attorney General as plaintiff in the state action.[27] Finally, the Board contended that the North Carolina action under state antitrust law constituted a different cause of action from the federal action based on the Sherman Act.[28] The Board relied on the Second Circuit decision in *Lyons v. Westinghouse Electric Corp.*[29] to argue that a state court judgment may not bar a

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[24] *See id.*

[25] *See* Brief for Appellant at 10-11, Nash County Bd. of Educ. v. Biltmore Co., 640 F.2d 484 (4th Cir. 1980) [hereinafter cited as Brief for Appellant].

[26] *See* 640 F.2d at 486-87; Brief for Appellant, *supra* note 25, at 33-35; Reply Brief for Appellant at 25-26, Nash County Bd. of Educ. v. Biltmore Co., 640 F.2d 484 (4th Cir. 1980) [hereinafter cited as Reply Brief]. In *Nash County*, the Board argued that even if the Board was in privity with the North Carolina Attorney General, the consent judgment under North Carolina law did not bind the Board because the Attorney General entered into the agreement without the Board's consent. *See* 640 F.2d at 496; Town of Bath v. Norman, 226 N.C. 502, 505, 39 S.E.2d 363, 364-65 (1946) (consent judgment void without consent); Brief for Appellant, *supra* note 25, at 33-35.

[27] *See* 640 F.2d at 493-96; Brief for Appellant, *supra* note 25, at 11-15; Reply Brief, *supra* note 26, at 21-24.

[28] *See* 640 F.2d at 487-90; Brief for Appellant, *supra* note 25, at 30-41; Reply Brief, *supra* note 26, at 12-21. The Board in *Nash County* argued that although the North Carolina and federal antitrust statutes are similar, courts have applied the statutes differently. *See* Brief for Appellant, *supra* note 25, at 38. As an example of disparate treatment of similar statutes, the Board asserted that North Carolina law offers no remedy to plaintiffs injured by concerted refusals to do business, while the Sherman Act offers plaintiffs remedies for such injuries. *Compare* McNeill v. Hall, 220 N.C. 73, 74-75, 16 S.E.2d 456, 457 (1941) (no remedy under North Carolina law for plaintiff injured by concerted refusal to deal) *with* Montague & Co. v. Lowry, 193 U.S. 38, 46 (1904) (concerted refusal to deal violates § 1 of Sherman Act). *See* Brief for Appellant, *supra* note 25, at 38.

[29] 222 F.2d 184 (2d Cir.), *reh. denied*, 222 F.2d 195, *cert. denied*, 350 U.S. 825 (1955). In addition to *Lyons*, the Board in *Nash County* cited Cream Top Creamery v. Dean Milk Company, 383 F.2d 358 (6th Cir. 1967) and Englehardt v. Bell & Howell Co., 327 F.2d 30 (8th Cir. 1964) to support its argument that state interpretation of state law should not preempt a federal antitrust action under *res judicata*. *See* 640 F.2d at 489-90; Brief for Appellant, *supra* note 25, at 39-40. In *Cream Top Creamery*, the Sixth Circuit denied the preclusive effect of a state court action brought under state law. *See* 383 F.2d at 363. The Fourth Circuit in *Nash County* distinguished *Cream Top Creamery* by noting that *res judicata* should not apply when the relief afforded in the federal and state forums differs. *See* 640 F.2d at 490; note 60 *supra*. In *Englehardt*, a federal court dismissed under *res judicata* an action previously brought under state antitrust laws and subsequently removed to federal court under diversity jurisdiction. *See* 327 F.2d at 31. The Fifth Circuit dismissed *Englehardt* because the plaintiff's prior state action was removed to federal court for diversity and then dismissed with prejudice. *See id.* The *Nash County* court reasoned that *Englehardt* was an action on a state statute, and since the dismissal acted to preempt the later federal action under *res judicata*, *Englehardt* actually supported the application of *res judicata* in *Nash County*. *See* 640 F.2d at 489; 327 F.2d at 31.

subsequent federal court action brought under federal antitrust laws.[30]

In *Lyons*, the Second Circuit considered whether a judgment on appeal in a state court action should stay a later federal action between the same parties brought under federal antitrust statutes.[31] As defendant in the state action involving a consignment contract account, Lyons built his defense against Westinghouse on antitrust grounds.[32] The state court found no merit in Lyons' antitrust defense, and awarded judgment for Westinghouse.[33] Lyons then brought an antitrust suit in federal court against Westinghouse while appealing the state judgment.[34] Westinghouse filed a motion to stay the federal suit until final resolution of the antitrust question in the state court.[35] The district court granted Westinghouse's motion to stay,[36] but the Second Circuit ordered the district court to vacate the stay.[37] The *Lyons* court indicated that the grant to federal courts of exclusive jurisdiction over antitrust actions infers an immunity of their decisions from prejudgment.[38] The court

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[30] *See* 640 F.2d at 490; 222 F.2d at 188-89. The Second Circuit in *Lyons* did not clarify whether a grant of exclusive federal jurisdiction itself creates in a federal suit a separate and distinct cause of action from a similar state court action between the same parties. *See* 222 F.2d at 188-89. The Eighth Circuit interpreted *Lyons* as implying that the state and federal causes of action were the same, but nonetheless denied state court preemption of the federal action under *res judicata* for policy reasons. *See* Englehardt v. Bell & Howell Co., 327 F.2d 30, 34-35 (8th Cir. 1964). *Englehardt* thus framed the issue in *Lyons* as whether an exception should be made to the general finality rule of prior adjudications, and not whether the causes of action are the same. *See id.* at 35; Nash County Bd. of Educ. v. Biltmore Co., 464 F. Supp. at 1031 (agreeing with Eighth Circuit identification of proper inquiry as whether circumstances warrant exception).

[31] *See* 222 F.2d at 185.

[32] *See id.*

[33] *See id.*

[34] *See id.*

[35] *See* Lyons v. Westinghouse Elec. Corp., 16 F.R.D. 384, 384 (S.D.N.Y. 1954).

[36] *See id.*

[37] *See* 222 F.2d at 190. *Lyons* involved collateral estoppel rather than *res judicata*. *See* 640 F.2d at 490. Collateral estoppel extends only to facts and issues decided and necessary to the original decision, while *res judicata* extends not only to all matters pleaded, but to all matters that might have been pleaded. *See, e.g.*, Industrial Credit Co. v. Berg, 388 F.2d 835, 841 (8th Cir. 1968) (collateral estoppel bars litigation in second suit of basic issues adjudicated in first suit); Cream Top Creamery v. Dean Milk Co., 383 F.2d 358, 362 (6th Cir. 1967) (collateral estoppel precludes relitigation of issues determined in prior suit); Republic Gear Co. v. Borg-Warner Co., 381 F.2d 551, 555 n.1 (2d Cir. 1967) (collateral estoppel bars relitigation of issue even against different defendants). *See generally* 1B MOORE, *supra* note 1, ¶ 0.441[1] at 3771-74. The distinction between collateral estoppel and *res judicata* is unimportant to the analysis in *Nash County* because a collateral estoppel plea that embraces all the constituent elements of a federal claim has the same effect as *res judicata* to bar a federal action. *See* 640 F.2d at 488; text accompanying note 57 *infra*.

[38] *See* 222 F.2d at 189. One commentator considering *Lyons* has noted that neither legislative history nor judicial pronouncement indicates whether Congress' grant of an exclusive remedy under the antitrust laws rests upon a policy so strong as to immunize the federal courts from the effect of state court judgments. *See* Comment, *Exclusive Federal Jurisdiction: The Effect of State Court Findings*, 8 STAN. L. REV. 439, 447 (1956) [hereinafter cited as Comment, *Effect of State Court Findings*].

reasoned that federal antitrust statutes, which are national in scope, require uniform administration, and that federal courts would best accomplish uniform administration through untramelled jurisdiction.[39] The Second Circuit also noted that the remedy in the state court was different from the treble damages available in the federal court, and concluded that the state court judgment should not preclude the treble damage recovery.[40] In holding that the state court decision does not bar the federal action the Second Circuit thus prevented the preclusion of exclusive federal jurisdiction by a state court ruling.[41]

The Fourth Circuit rejected each of the Board's arguments.[42] The *Nash County* court held that the consent decree constituted, for *res judicata* purposes, a final judgment on the merits.[43] The court recognized that fraud, lack of jurisdiction, or lack of actual consent by the parties may invalidate consent decrees.[44] The Fourth Circuit determined,

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[39] *See* 222 F.2d at 189. In *Lyons* the Second Circuit could have supported its holding with additional factors that underlie grants of exclusive federal jurisdiction, such as the federal bench's experience in hearing antitrust litigation and the availability of extensive discovery under the Federal Rules of Civil Procedure. *See* Note, *Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State-Court Determinations*, 53 VA. L. REV. 1360, 1365 (1967) [hereinafter cited as Note, *State-Court Determinations*]; text accompanying notes 7-8 *supra*.

[40] 222 F.2d at 189. The *Lyons* court concluded that since two-thirds of the damages recovered in a federal antitrust actions are punitive, a state judgment should not foreclose such recovery. *See id.* The *Lyons* court considered the availability of treble damage recovery under the federal antitrust statute to be basic to the private enforcement of federal antitrust laws. *See id.* Preclusion of the treble damage recovery by state court would inhibit such private enforcement actions, thus undermining the effort to prevent monopoly and restraint of commerce. *See id*; 640 F.2d at 491; Note, *State-Court Determinations*, *supra* note 39, at 1365.

[41] *See* 222 F.2d at 484. Judge Hand's reasoning in *Lyons* appears in a subsequent case under the Economic Stabilization Act, P.L. 91-379 (Aug. 15, 1970); 12 U.S.C. § 1904 (1976) in which the court faced the question of the preclusive effect of a prior state adjudication. *See* United States v. Ohio, 487 F.2d 936, 943 (Temp. Emer. Ct. App. 1973), *cert. denied*, 421 U.S. 1014 (1975). In denying the preclusive effect the court stated that the Act manifested a clear intent to give federal courts exclusive jurisdiction over litigation arising from the Act. *Id.* The court reasoned that the national scope of the Act and the doctrine of federal preemption should negate giving any *res judicata* effect to the state court judgment. *See id.*; note 58 *infra*.

[42] *See* 640 F.2d at 487, 493, 496-97.

[43] *See id.* at 487.

[44] *See id.* Under *res judicata*, consent decrees bar any attempt to relitigate the issues raised in the first suit. *See* United States v. Radio Corp. of Am., 46 F. Supp. 654, 656 (D. Del.), *appeal dismissed*, 318 U.S. 796 (1942). Exceptions to this rule exist when a defendant engaged in illegal conduct after entering into the consent agreement, when the consent decree has become obsolete as a result of changed circumstances or legal standards, or when a different plaintiff or statute is involved. *See, e.g.*, Aluminum Co. of Am. v. United States, 302 U.S. 230, 232 (1937) (decree not a bar to suit involving substantially different subject matter and parties); United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 345 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954) (per curiam) (change in legal standards); Timberg, *supra* note 16, at 576-77 (exceptions to general rule that consent judgments bar relitigation). *See also* Swift & Co. v. United States, 276 U.S. 311, 324 (1928) (consent decree

however, that these factors were not at issue in the *Nash County* appeal.[45] The *Nash County* court also found that the Board was in privity with the Attorney General in the state action.[46] The court acknowledged that the Board had authority under state law to sue on its own behalf.[47] The court reasoned, however, that the Board's authority did not conflict with the Attorney General's right to represent the state's school districts.[48] Moreover, the Fourth Circuit found that the Attorney General's failure to consult with the Board before entering into the consent decree did not adversely affect the legality of the consent decree, because the Attorney General, as legal representative of the sovereign, had power to bind the state and its subdivisions by his acts.[49]

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voidable when entered without actual consent or when fraud in procurement); Sagers v. Yellow Freight Systems, Inc., 68 F.R.D. 686, 690 (N.D. Ga. 1975) (consent decree voided in class action because entered into without adequate notice of terms and conditions to class members).

[45] 640 F.2d at 486-87. Although the Fourth Circuit determined that lack of actual consent was not at issue in the *Nash County* appeal, the Board did contend that it never consented to be bound by the consent decree, which the North Carolina Attorney General negotiated. *See id.*; Brief for Appellant, *supra* note 25, at 33-35; note 26 *supra*. The Fourth Circuit neutralized the Board's argument by finding that the Attorney General had the authority as the Board's representative to bind the Board to the consent decree. *See* 640 F.2d at 495; note 14 *supra*. Nevertheless the Fourth Circuit's characterization of the consent issue as uncontested is inaccurate. *See* 640 F.2d at 487; text accompanying note 27 *supra*.

[46] 640 F.2d at 494. Although no single accepted definition of privity exists, one definition refers to privity as a "mutual or successive relationship to the same right of property." *See* California v. United States, 235 F.2d 647, 663 n.16 (9th Cir. 1956) *quoting* Litchfield v. Goodnow, 123 U.S. 549, 551 (1887); International Tel. & Tel. Corp. v. Gen. Tel. & R. Corp., 380 F. Supp. 976, 983 & n.7 (M.D.N.C. 1974), *vacated* 527 F.2d 1162 (4th Cir. 1975); Hawkeye Life Ins. Co. v. Valley Des Moines Co. 220 Iowa 556, 561-62, 260 N.W. 669, 673 (1935). One commentator has noted that with regard to *res judicata* the term "privity" does not state a reason for either including or excluding a person from the binding effect of a prior judgment. Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 IOWA L. REV. 27, 45 (1964) [hereinafter cited as Vestal]. Rather, privity represents a legal conclusion that the relationship between the one who is a party on the record and the non-party is sufficiently close to apply the principles of preclusion. *See id; see also* Bruszewski v. United States, 181 F.2d 419, 423 (3d Cir.) (Goodrich, J., concurring), *cert. denied*, 340 U.S. 865 (1950) (privity denotes relationship between party on record and another who is close enough to be included within *res judicata*).

[47] *See* 640 F.2d at 495; N.C. GEN. STAT. § 115-27 (1978). North Carolina General Statute § 115-27 states that the board of education of each county in the state has authority to prosecute and defend its own suits. *See* N.C. GEN. STAT. § 115-27 (1978). Under General Statute § 115-31(a) each school board may bring suit to recover debts. *See id.* § 115-31(a); Locklear v. N.C. State Bd. of Elections, 514 F.2d 1152, 1153 (4th Cir. 1975) (each North Carolina school board an independent corporate body).

[48] *See* 640 F.2d at 496. Of the common law and due process requirements of *res judicata*, the Fourth Circuit in *Nash County* appeared to have the greatest difficulty determining the requirement of an identity of parties. *See id.* The *Nash County* court surveyed the common law and statutory authority of the state Attorney General in finding that the Attorney General had authority to represent the Board. *See id.* at 494. The Fourth Circuit found no North Carolina statutory or constitutional provision limiting the authority of the Attorney General to represent departments, agencies or other organized activities receiving support from the North Carolina state government. *See id.*

[49] *See* 640 F.2d at 496; note 14 *supra*.

Finally, the Fourth Circuit found the causes of action of the state suit and the federal suit virtually identical.[50] The *Nash County* court acknowledged that both suits involved the same purchases of dairy products from the same nine dairy companies and alleged the same wrongful act of an illegal price-fixing conspiracy.[51] The court noted that the state and the federal statutes contain identical language,[52] with the exception that the federal statute requires a showing that the alleged antitrust activity involve interstate commerce.[53] The Fourth Circuit recognized that the difference between statutes which provide the basis of two suits will not necessarily destroy the identity of the actions in a *res judicata* context.[54]

The Fourth Circuit found unpersuasive the *Lyons* argument that exclusive federal jurisdiction implies an immunity from prejudgment.[55] The Fourth Circuit noted that the *Lyons* court conceded that single facts determined in the state action, if not decisive of the whole federal antitrust violation, could preclude relitigation in federal court of the facts already determined.[56] The *Lyons* court reasoned, however, that single facts determined by the state court which encompassed the whole nexus of facts comprising the antitrust violation could not be allowed, by federal court recognition of their determination, to defeat the exclusivity of the federal antitrust law jurisdiction.[57] Considering judicial decisions after *Lyons* which have largely ignored the importance the *Lyons* court attached to unfettered federal jurisdiction, the Fourth Circuit found untenable the distinction between single fact determination and whole issue determination.[58]

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[50] 640 F.2d at 488.

[51] *See id.*

[52] *See id.*; *compare* 15 U.S.C. § 1 (1976) (every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations declared illegal) *with* N.C. GEN. STAT. § 75-1 (1981) (every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in the state of North Carolina declared illegal).

[53] *See* 640 F.2d at 488; 15 U.S.C. § 1 (1976). *See also* Crane v. Intermountain Health Care, Inc., [1980-1] Trade Cas. 77,593, 77,596 (10th Cir. 1980), *rehearing en banc granted*, No. 78-1346 (10th Cir. Sept. 16, 1980) (complaint dismissed for failure to disclose defendants' restraint of trade and substantial effect on interstate commerce); Note, *Interstate Commerce and the Sherman Act*, 58 DEN. L.J. 273, 273 (1981).

[54] *See* 640 F.2d at 488; Williamson v. Columbia Gas & Electric Corp., 186 F.2d 464, 469 (3d Cir. 1950), *cert. denied*, 41 U.S. 921 (1951) (same cause of action between same parties in two suits though brought under different federal antitrust laws).

[55] *See* 640 F.2d at 492.

[56] *See id.* at 491; 222 F.2d at 188-89; note 37 *supra*.

[57] *See* 222 F.2d at 188. The Fourth Circuit in *Nash County* admitted that when a plea of collateral estoppel based on a prior state action between the parties embraces all the constituent elements of the federal antitrust claim, the acceptance of the plea acts with the same effect of *res judicata* to defeat exclusive federal jurisdiction. *See* 640 F.2d at 491; Comment, *Effect of State Court Findings*, *supra* note 38, at 444-46; Note, *State-Court Determinations*, *supra* note 39, at 1368-69.

[58] *See* 640 F.2d at 491-92. Cases are rare which hold that special grants of jurisdiction cannot be limited by adjudication made by some other court. *See* United States v. Ohio, 487

In noting that the remedies available in the federal action did not differ from those available in the state action, the Fourth Circuit found the second ground of the *Lyons* reasoning inapplicable.[59] In *Lyons* treble damages were not available in the state action, yet the damages recoverable under the North Carolina antitrust statute and the Sherman Act are identical.[60] The Fourth Circuit further distinguished *Lyons* because the plaintiff in *Nash County* could choose his forum which the *Lyons* plaintiff, as defendant in the state action, could not.[61]

Faced with the apparently competing goals of *res judicata* and exclusive federal jurisdiction, the Fourth Circuit's decision in *Nash County* is sound. Prejudgment in a state court that precludes under *res judicata* a federal court's exclusive jurisdiction potentially subverts the goals underlying grants of federal jurisdiction.[62] Under the facts of *Nash County*, however, the rationales supporting *res judicata* and exclusive federal jurisdiction did not conflict.[63] The Fourth Circuit's examination of the federal and state antitrust statutes shows that different sovereigns created a common remedy for the same wrong.[64] The state and federal antitrust statutes require the same evidence for proof of violation, and the penalties under each statute are equally severe.[65] The Fourth Circuit

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F.2d 936, 943 (Temp. Emer. Ct. App. 1973); note 41 *supra*. Most courts, however, have ignored the exclusive federal jurisdiction arguments of *Lyons*. *See* Granader v. Public Bank, 417 F.2d 75, 81 (6th Cir. 1969), *cert. denied*, 397 U.S. 1065 (1970) (antitrust conspiracy); Nelson v. Swing-A-Way Mfg. Co., 266 F.2d 184, 186-87 (8th Cir. 1959) (patent infringement); Vanderveer v. Erie Malleable Iron Co., 238 F.2d 510, 512-13 (3d Cir. 1956), *cert. denied*, 353 U.S. 937 (1957) (patent infringement); Connelly v. Balkwill, 174 F. Supp. 49, 56 (N.D. Ohio 1959) (alternative holding), *aff'd*, 279 F.2d 685 (6th Cir. 1960) (Securities Exchange Act of 1934, 15 U.S.C. § 78 (1976) violation). *See generally* Currie, *supra* note 2, at 347 n.203 (1978); Note, *State-Court Determination*, *supra* note 39, at 1365 n.24.

[59] *See* 640 F.2d at 492.

[60] *See id.* Both 15 U.S.C. § 15 and N.C. GEN. STAT. § 75-16 provide treble damages in the event of antitrust violations. *See* 15 U.S.C. § 15 (1976); N.C. GEN. STAT. § 75-16 (1981); note 15 *supra*.

[61] *See* 640 F.2d at 492. *See also* Note, *State-Court Determinations*, *supra* note 39, at 1383 (plaintiffs' choice of forum waives immunity from preclusion in second action).

[62] *See* Note, *Exclusive Federal Jurisdiction*, *supra* note 8, at 1288-89. Some commentators urge that rules foreclosing relitigation of actions in federal courts after state court judgments should not apply to civil rights actions. *See* Averitt, *Federal Section 1983 Actions After State Court Judgment*, 44 U. COLO. L. REV. 191, 201-02 (1972) (vindication of paramount federal rights under supremacy clause); McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims (Part II)*, 60 VA. L. REV. 250, 276-77 (1974) (vindication of individual freedom from unlawful intrusion balanced against *res judicata*); Theis, *Res Judicata in Civil Rights Act Cases: An Introduction to the Problem*, 70 NEV. U. L. REV. 859, 868 (1976) (legislative history of Title 42 United States Code § 1985 shows congressional distrust of state courts); Note, *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1333 (1977) (foreclosing subsequent litigation in federal courts undermines basic premise of forum choice).

[63] *See* text accompanying notes 1-2, 6-8 *supra*.

[64] *See* 640 F.2d at 488; Note, *State-Court Determinations*, *supra* note 39, at 1375.

[65] *See* 640 F.2d at 488; text accompanying notes 52 & 53 *supra*.

correctly held that the state and federal causes of action do not foster distinct interests.[66] In affirming the district court, the Fourth Circuit may seem harsh in denying the Board the opportunity to sue for treble damages.[67] Nonetheless, to hold otherwise would offer the federal plaintiff the chance to harass the defendants.[68]

The Fourth Circuit's application of *res judicata* in *Nash County* does not necessarily establish a precedent neutralizing all claims of exclusive federal jurisdiction following state court judgments. The traditional limitations on *res judicata* gradually have loosened to the extent that courts need neither absolutely apply nor rigidly reject the doctrine.[69] In determining that a prior adjudication binds certain parties, courts consider the underlying facts of each case, and not solely the relative posture of the parties.[70] Moreover, federal courts may adjudicate an action following a state judgment when the action concerns questions of overriding federal policy.[71] In *Nash County* the Fourth Circuit correctly

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[66] *See* 640 F.2d at 495; Note, *State-Court Determination, supra* note 39, at 1375.

[67] *See* 464 F. Supp. at 1037. The district court in *Nash County* acknowledged that the result of precluding the Board's federal suit might appear harsh. *See id.* The district court stated that if the Board was dissatisfied with the resolution of the state action brought by the Attorney General such dissatisfaction was the price the Board paid for being a creation of the state. *See id.* The district court's statement implies a subtitle criticism of the Attorney General for not fulfilling his responsibilities as representative of the state when he entered into the consent decree without seeking monetary damages. *See id.* at 1028-29, 1037. Although the Attorney General may merit such criticism, under the North Carolina Rules of Civil Procedure the Board could have intervened in the state action to become a party proper. *See* N.C. GEN. STAT. § 1A-1 Rule 24 (1969) (intervention of right where applicant claims interest and not adequately represented by existing parties). Ordinarily North Carolina state courts have such discretion to permit proper parties to intervene. *See* Strickland v. Hughes, 273 N.C. 481, 484, 160 S.E.2d 313, 316 (1968). Through its own inaction, the Board shares the responsibility for the harsh result in *Nash County*.

[68] *Cf.* White v. Adler, 289 N.Y. 34, 42-43, 43 N.E.2d 798, 801-02 (1942) (*res judicata* designed to prevent harassment of defendant).

[69] *See* Shewmaker v. Minchew, 504 F. Supp. 156, 161 (D.D.C. 1980). *See e.g.*, Mitchell v. National Broadcasting Co., 553 F.2d 265, 269 (2d Cir. 1977) (*res judicata* a flexible doctrine); Tipler v. E. I. DuPont de Nemours and Co., 443 F.2d 125, 128 (6th Cir. 1971) (*res judicata* is not rigidly applied); Holland, *Modernizing Res Judicata: Reflections on the* Parklane *Doctrine*, 55 INDIANA L.J. 615, 631 (1980) (case-by-case discretion in use of preclusion techniques by federal courts); Vestal, *supra* note 46 at 75 (weighing process involving savings of court's time and adequacy of protection extended).

[70] *See, e.g.*, Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327-28 (1979) (court must view relative posture of litigants in first action); Gerrard v. Larsen, 517 F.2d 1127, 1132 (8th Cir. 1975) (court guided by most just and reasoned precedent); American Mannex Corp. v. Rozands, 462 F.2d 688, 690 (5th Cir. 1972) (federal court not bound by state interpretation of *res judicata*); Alderman v. Chrysler Corp., 480 F. Supp. 600, 607 (E.D. Va. 1975) (due process violation to bind a litigant who was neither a party nor a privity to earlier suit). *See generally* 1B MOORE, *supra* note 1, ¶ 0.412[1].

[71] *See* Chapman v. Aetna Finance Co., 615 F.2d 361, 364 (5th Cir. 1980) (full faith and credit clause does not compel dismissal of suit); Red Fox v. Red Fox, 564 F.2d 361, 364-65 (9th Cir. 1977) (state court judgment not invariably a basis of *res judicata* in federal suit); Williams v. Sclafani, 444 F. Supp. 895, 904 (S.D.N.Y. 1977) (well defined federal policies may

discerned that the state suit adequately addressed potential overriding federal policy considerations as well as all other compelling reasons which might have justified rejecting the application of *res judicata* to the Board's federal suit.

MATTHEW L. KIMBALL

### *D. Rule 60(b)(6)*

Rule 60(b)(6) of the Federal Rules of Civil Procedure[1] permits a district court to relieve a litigant from a final judgment or order upon the litigant's motion made within a reasonable time[2] and for "any other reason justifying relief from the operation of the judgment."[3] A trial court's consideration of a Rule 60(b)(6) motion involves balancing the

compete with *res judicata*); Cullen v. New York State Civil Service Comm'n, 435 F. Supp. 546, 555-56 & n.5 (E.D.N.Y.), *appeal dismissed*, 566 F.2d 846 (2d Cir. 1977) (policies of civil rights statutes outweighed policies of full faith and credit clause); McNally v. Esmark, 427 F. Supp. 1211, 1219 (N.D. Ill. 1977) (federal court not bound by state interpretation of when judgment is final); L.J. Taylor v. New York City Transit Authority, 309 F. Supp. 785, 791 (E.D.N.Y.), *aff'd*, 433 F.2d 665 (2d Cir. 1970) (if state provides means to assert constitutional rights, federal courts should grant full faith and credit). *See generally* 1B MOORE, *supra* note 1, ¶ 0.405[1] at 783; Einhorn & Gray, *supra* note 7, at 239.

[1] FED. R. CIV. P. 60(b) provides in part:

> On motion and upon such terms as are just, the courts may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

[2] *See id.*

[3] *See id.* Rule 60(b) must be read in conjunction with Rule 4(a) of the Federal Rules of Appellate Procedure and Rule 77(d) of the Federal Rules of Civil Procedure. Buckeye Cellulose Corp. v. Braggs Elec. Constr. Co., 569 F.2d 1036, 1038 (8th Cir. 1978) (per curiam). Rule 4(a) provides that a litigant must file a notice of appeal within thirty days of the entry of a final judgment or order. FED. R. APP. P. 4(a). Upon a showing of excusable neglect, the district court can extend the time for filing for an additional period not exceeding thirty days. *Id.* Rule 77(d) requires the clerk of the district court to serve on the parties notice by mail of the entry of the final judgment or order. FED. R. CIV. P. 77(d). Lack of notice does not, however, affect a litigant's time in which to appeal, except as permitted in Rule 4(a). *See id.*

need for finality in litigation against the desire to effect a just result between the parties.[4] In *Klapprott v. United States*,[5] the Supreme Court stated that courts should apply Rule 60(b)(6) whenever such action is appropriate to accomplish justice.[6] One year later, however, in *Ackermann v. United States*,[7] the Court distinguished *Klapprott* as an exception to the general principle of the finality of judgments.[8] The *Ackermann* Court declared that courts should grant Rule 60(b)(6) relief only under extraordinary circumstances.[9]

*Klapprott*, *Ackermann*, and their progeny,[10] while delineating the broad parameters within which courts are to exercise their discretion, have provided scant guidance concerning what constitutes extraordinary circumstances.[11] Further, the Advisory Committee on Rules has not

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[4] *See* Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 401 (5th Cir. 1981); Compton v. Alton Steamship Co., 608 F.2d 96, 102 (4th Cir. 1979); Boughner v. Secretary of HEW, 572 F.2d 976, 977 (3d Cir. 1978); N.Y. State Health Facilities Ass'n v. Carey, 76 F.R.D. 128, 132-33 (S.D.N.Y. 1977). In *Seven Elves*, the Fifth Circuit stated the general rule that Rule 60(b) balances the court's desire to preserve the finality of judgment against "the incessant command of the court's conscience that justice be done in light of *all* the facts." 635 F.2d at 401 (quoting Bankers Mortgage Co. v. United States, 423 F.2d 73, 77 (5th Cir.), *cert. denied*, 399 U.S. 927 (1970)) (emphasis in 635 F.2d 396). *See generally* Kane, *Relief from Federal Judgments: A Morass Unrelieved by a Rule*, 30 HAST. L. J. 41, 68-70 (1978) [hereinafter cited as Kane]; Comment, *Rule 60(b): Survey and Proposal for General Reform*, 60 CALIF. L. REV. 531, 533 (1972) [hereinafter cited as *Proposal for General Reform*]; Note, *Federal Rule 60(b)*, 38 WASH. & LEE L. REV. 469, 469 n.3 (1981).

[5] 335 U.S. 601 (1949).

[6] *Id.* at 614-15. *Klapprott* involved a Rule 60(b) petition to reopen a default judgment of denaturalization. *Id.* at 602-03. Klapprott was in prison on an unrelated charge at the time he suffered his default judgment. *Id.* Despite due diligence, he failed to answer the complaint or appear in court. *Id.* at 604-08. The *Klapprott* court held that the "extraordinary" circumstances of the case warranted relief under Rule 60(b)(6). *Id.* at 613.

[7] 340 U.S. 193 (1950).

[8] *Id.* at 202.

[9] *Id. Ackermann* involved a petition to reopen a default judgment of denaturalization. *Id.* at 194. The petitioner in *Ackermann* claimed that he had not appealed his default judgment because of financial inability to do so. *Id.* at 195-96. The Court denied Rule 60(b) relief, finding that Ackermann's actions demonstrated a conscious choice not to appeal, rather than an extraordinary excuse for not appealing. *Id.* at 197-98.

[10] *See* Polites v. United States, 364 U.S. 426 (1960).

[11] *See* 7 MOORE'S FEDERAL PRACTICE ¶ 60.27[1],[2] (1979) [hereinafter cited as MOORE]; 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2864 (1973); Kane, *supra* note 4, at 42. According to *Klapprott* and *Ackermann*, extraordinary circumstances exist only when the Rule 60(b) movant does not have the opportunity to choose between appealing and not appealing a judgment. *See* 340 U.S. at 197-98; Kane, *supra* note 4, at 53. At first glance, the standard appears clear. The extraordinary circumstances test thus seems to compel trial courts to focus on whether the movant made a fair and deliberate choice not to move for relief at an earlier time. If so, the trial court should not relieve the movant of that choice. *See* Horace v. St. Louis Sw. R.R., 489 F.2d 632, 633 (8th Cir. 1974); Lubben v. Selective Serv. Sys. Local Bd. No. 27, 453 F.2d 645, 651-52 (1st Cir. 1972); Rinieri v. News Syndicate Co., 385 F.2d 818, 822-23 (2d Cir. 1967). The free and deliberate choice inquiry, however, has had minimal impact in practice. *See* Kane, *supra* note 4, at 57. Only in denaturalization cases have courts been able to discern readily when extraordinary cir-

proposed an amendment to Rule 60(b)(6) to clarify the "any other reason" language of the rule.[12] As a result, courts frequently find it difficult to determine the existence of extraordinary circumstances in particular cases.[13] The confused state of the law has prompted increased litigation and therefore has undermined the policy of finality sought to be furthered by the extraordinary circumstances limitation.[14] In *Hensley v. Chesapeake and Ohio Railway Co.*,[15] the Fourth Circuit Court of Appeals considered whether Rule 60(b)(6) relief was appropriate to extend the time for appeal when a litigant failed to receive notice of the entry of a final order. In a decision favoring the policy of finality, the Fourth Circuit denied Rule 60(b)(6) relief because the movant had not demonstrated extraordinary circumstances.[16]

Hensley brought an action against his employer, The Chesapeake and Ohio Railway Company (C&O), under the provisions of the Federal Employers' Liability Act.[17] Alleging negligence by C&O,[18] Hensley sought monetary damages for personal injuries sustained during the course of his employment. A jury awarded the plaintiff $40,000 on his claim and the district court entered judgment on the verdict.[19] Apparently dissatisfied with the amount of the verdict, Hensley moved for a new trial.[20]

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cumstances are present. *Id.* Courts have looked to whether the defendant defaulted, whether the defendant was incarcerated and unable to obtain counsel, and whether the defendant was in a condition to make decisions concerning his defense. *See e.g.*, Zurini v. United States, 189 F.2d 722, 726 (8th Cir. 1951); United States v. Backofen, 176 F.2d 263, 268 (3d Cir. 1949); United States v. Failla, 164 F. Supp. 307, 314 (D.N.J. 1958). The usefulness of the free and deliberate choice inquiry breaks down in other settings when the parties are represented by counsel. *See* Kane, *supra* note 4, at 58. When the party's attorney either makes or negligently fails to make the decision to appeal, courts generally deny relief, finding that the decision was free and deliberate. *Id.* Moreover, courts deny relief by invoking the general rule that the court is to impute the lawyer's negligence to his client. *Id.* The free and deliberate choice inquiry most often serves, therefore, as merely another talisman for denying relief. *Id.*

[12] *See Proposal for General Reform*, *supra* note 4, at 531 n.2; *Report of Proposed Amendments to Rules of Civil Procedure for the United States District Courts* 61-63 (1955) [hereinafter cited as *Proposed Amendments*]. The Advisory Committee on Rules has not proposed amendments to Rule 60(b) since 1955. *See Proposal for General Reform*, *supra* note 4, at 531 n.2; *Proposed Amendments*, *supra*. The last amendment adopted dates from 1948. *See Proposal for General Reform*, *supra* note 4, at 531 n.3; *Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States* 78-84 (1946).

[13] *See* text accompanying note 71 *infra*.

[14] *See* Kane, *supra* note 4, at 85-86.

[15] 651 F.2d 226 (1981).

[16] *Id.* at 231.

[17] 45 U.S.C. § 51 (1976).

[18] 651 F.2d at 227.

[19] *Id.*

[20] *Id.* In *Hensley*, the plaintiff requested that the district court grant a new trial on the issue of damages alone, or alternatively on all of the issues raised in the trial. *See* Appendix to Brief for Appellant at 7, 651 F.2d 227 (1981).

The district court denied the plaintiff's motion and the clerk of the court complied with the court's direction to mail certified copies of its order of denial to all counsel of record.[21] Counsel for C&O received notice of the order.[22] Counsel for Hensley, however, claimed not to have received notice of the order at that time.[23]

Six months after Hensley filed his motion for a new trial, Hensley's counsel directed a letter to the district court, inquiring into the court's decision on the motion.[24] The clerk of the court informed the attorney that the court had entered its order of denial approximately three and one-half months prior to the inquiry.[25] Hensley's counsel subsequently received a copy of the order.[26] Shortly thereafter, Hensley made a Rule 60(b)(6) motion to the district court to reconsider the order or, alternatively, to vacate the order and reenter it as of a later date to allow him an opportunity to bring a timely appeal.[27]

The district court granted Hensley's motion to vacate and also reentered the denial order as of a later date.[28] Hensley immediately filed an appeal challenging the substance of the reentered order of denial.[29] C&O cross-appealed, challenging the district court's order granting the plaintiff's Rule 60(b)(6) motion.[30]

The district court based its disposition of Hensley's motion on three grounds. First, relying on the decision of the Fourth Circuit in *United States v. Cato Brothers*,[31] the court ruled that relief was appropriate

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[21] 651 F.2d at 227. The docket sheet of the district court in *Hensley* reflects that the clerk complied with the directive of the court. *Id.*

[22] *Id.*

[23] *Id.* In *Hensley*, local and out-of-state counsel of record represented Hensley. *See* Appendix to Brief for Appellant at 19-24, 651 F.2d 227 (1981). Both counsel submitted affidavits stating that neither they nor anyone in their offices had received notice of the order denying Hensley's motion for a new trial. *Id.*

[24] 651 F.2d at 227-28. In *Hensley*, Hensley's counsel made the motion for a new trial on March 23, 1979. *Id.* Out-of-state counsel directed the letter of inquiry to the court on September 25, 1979. *Id.*

[25] *Id.* at 228.

[26] *Id.*

[27] *Id.* In *Hensley*, Hensley's local counsel brought the motion to vacate and reenter, alleging excusable neglect to justify relief under Rule 60(b)(6) and Rule 4(a). *See* Appendix to Brief for Appellant at 12-14, 651 F.2d 227 (1981). Rule 4(a) was inapposite at that time, however, since the sixty-day appeals period had expired. *See* note 3 *supra*. Additionally, the motion failed to indicate why the plaintiff chose to seek relief under Rule 60(b)(6) rather than under Rule 60(b)(1), which expressly provides relief for "excusable neglect." *See* Appendix to Brief for Appellant at 12-14, *supra*; note 1 *supra*.

[28] Hensley v. Chesapeake & Ohio R.R. Co., 86 F.R.D. 555, 561 (S.D.W.Va. 1980).

[29] 651 F.2d at 228.

[30] *Id.*

[31] 273 F.2d 153 (4th Cir. 1959), *cert. denied*, 362 U.S. 927 (1960). In *Cato Brothers*, the Fourth Circuit stated that a court generally should grant relief under Rule 60(b)(6) when the movant has a meritorious claim or defense and when vacation and reentry of the "final" judgment or order will not prejudice the non-moving party. *Id.* at 157. Other circuits also employ this claim and prejudice analysis. *See* Tozer v. Charles A. Krause Milling Co., 189

since Hensley would not have another opportunity to have the denial of the motion reviewed on its merits[32] and because C&O had not shown that relitigation of the issue would prejudice the company.[33] Second, the court ruled that the existing circumstances constituted something more than the mere failure to notify Hensley's counsel.[34] The court found that Hensley's counsel could have justifiably assumed that the court's decision on the motion might take a long time since the motion had presented sixteen grounds for argument.[35] The court underscored the probable lack of familiarity of Hensley's out-of-state-counsel with local practice, and his likely desire not to antagonize the court with repeated inquiries.[36] The court also emphasized that Hensley had stated in his motion for a new trial that he intended to appeal a denial of the motion.[37] Third, the court found that Hensley's counsel had met the duty of diligent inquiry.[38] The court acknowledged that the letter of inquiry

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F.2d 242, 246 (3d Cir. 1951); Comment, *Equitable Power of a Federal Court to Vacate a Final Judgment for "Any Other Reason Justifying Relief"—Rule 60(b)(6)*, 33 MO. L. REV. 427, 433 (1968) [hereinafter cited as *Equitable Power*]. The non-moving party justifiably may claim prejudice when it has relied upon the judgment, and vacation would affect the non-moving party adversely. *See* Meadows v. Cohen, 409 F.2d 750, 753 (5th Cir. 1969); Erick Rios Bridoux v. Eastern Air Lines, Inc., 214 F.2d 207, 210 (D.C. Cir.), *cert. denied*, 348 U.S. 821 (1954); Vecchione v. Wohlgemuth, 426 F. Supp. 1297, 1311-12 (E.D. Pa. 1977), *aff'd*, 558 F.2d 150, *cert. denied* 434 U.S. 943 (1977). A non-moving party's reliance upon the anticipated receipt of a financial award that results in a change in the non-moving party's circumstances or lifestyle may preclude Rule 60(b)(6) relief. *See* 409 F.2d at 753. Additionally, prejudice may arise when a change in circumstances precludes the non-moving party from an effective relitigation upon remand. *See* Rinieri v. News Syndicate Co., 385 F.2d 818, 823 (2d Cir. 1967); McCawley v. Fleischmann Transp. Co., 10 F.R.D. 624, 625 (S.D.N.Y. 1950).

[32] 86 F.R.D. at 560.

[33] *Id.* The substantive issue on appeal in *Hensley* would have been the propriety of the district court's denial of the motion for a new trial, not the earlier judgment itself. *See* Pagan v. American Airlines, Inc., 534 F.2d 990, 992-93 (1st Cir. 1976); Hodgson v. UMW, 473 F.2d 118, 124 n.28 (D.C. Cir. 1972); Wagner v. United States, 316 F.2d 871, 872 (2d Cir. 1963) (per curiam); MOORE, *supra* note 11, ¶ 60.30[3].

[34] 86 F.R.D. at 560. Presumbly, the phrase "something more" reflected the application of the "extraordinary circumstances" test by the district court in *Hensley*. *See* text accompanying note 60 *infra*.

[35] 86 F.R.D. at 560-61.

[36] *Id.* at 561.

[37] *Id.*

[38] *Id.* at 560. Federal Rule of Civil Procedure 77(d) implicitly charges the prospective appellant with a duty to diligently inquire into the progress of his case. 651 F.2d at 231. Counsel for a 60(b)(6) movant discharges his duty of diligent inquiry by inquiring of the district court or clerk of the court the status of the case. *See, e.g.*, Mizell v. Attorney Gen. of N.Y., 586 F.2d 942, 944 n.2 (2d Cir. 1978) (no diligent attempt to discharge duty when counsel waited three months following final judgment, never inquired, and did not learn of decision until publication of advance sheets), *cert. denied*, 440 U.S. 967 (1979); Buckeye Cellulose Corp. v. Braggs Elec. Constr. Co., 569 F.2d 1036, 1037 (8th Cir. 1978) (per curiam) (diligent inquiry when counsel inquired three times at office of clerk of district court); Fidelity & Dep. Co. v. Usaform Hail Pool, Inc., 523 F.2d 744, 751 (5th Cir. 1975), *cert. denied*, 425 U.S. 950 (1976) ("suitable inquiries" when counsel, upon receiving draft opinion of district court, requested court to delay entering final judgment); Planter's Trust and Savings Bank v. Mor-

by Hensley's counsel reflected his justifiable expectation that the court had not yet rendered its decision.[39] Additionally, the court noted that Hensley had filed his Rule 60(b)(6) motion within the requisite reasonable time after having received notice of the final order.[40]

On appeal, the Fourth Circuit reversed the district court's order that had granted the Rule 60(b)(6) motion to vacate the earlier order.[41] Holding that the district court abused its discretion by granting Hensley's Rule 60(b)(6) motion,[42] the Fourth Circuit opined that trial courts should rarely find that circumstances are sufficiently extraordinary or unique to justify Rule 60(b)(6) relief.[43] The *Hensley* court further held that Rule 77(d) of the Federal Rules of Civil Procedure bars Rule 60(b) relief when the sole reason asserted for that relief is the failure to receive notice.[44] The Fourth Circuit distinguished the decisions upon which the district court had relied as involving unique or extraordinary circumstances.[45] The *Hensley* court found that the plaintiff had not demonstrated the unique or extraordinary circumstances required to circumvent the proscription of Rule 77(d).[46] The court held that counsel's expectation of some delay in the rendering of the district court's decision did not warrant his waiting for six months before inquiring into the status of the case.[47] Additionally, the court found that a unique or extraordinary circumstance did not arise as a result of plaintiff's early notification to the district court of his intention to appeal in the event the court should deny his motion.[48] The Fourth Circuit reasoned that if it were to sanction the Rule 60(b)(6) vacation and re-entry procedure on the facts in *Hensley*, Rule 77(d) would never bar Rule 60(b) relief.[49] The court

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row (*In re* Morrow), 502 F.2d 520, 523 (5th Cir. 1974) (clear wording and intent of Rule 77(d) require more than mere failure to notice to permit appeal); Lathrop v. Oklahoma City Hous. Authority, 438 F.2d 914, 915 (10th Cir.) (per curiam) (Rule 77(d) charges client of prospective appellant with duty of following progress of action and advising himself when court makes order he wishes to protest), *cert. denied*, 404 U.S. 840 (1971); Long v. Emery, 383 F.2d 392, 394 (10th Cir. 1967) (same); Nichols-Morris Corp. v. Morris, 279 F.2d 81, 83 (2d Cir. 1960) (same).

[39] 86 F.R.D. at 561.

[40] *Id.*

[41] 651 F.2d at 231. The *Hensley* court also vacated the district court's recently reentered order of denial. *Id.* The Fourth Circuit reentered the earlier order and dismissed Hensley's appeal from that order for lack of jurisdiction. *Id.*

[42] *Id.*

[43] *Id.* at 230.

[44] *Id.* at 229.

[45] *Id.* at 229-30; *see, e.g.*, Klapprott v. United States, 335 U.S. 601, 613-14 (1949); Buckeye Cellulose Corp. v. Braggs Elec. Constr. Co., 569 F.2d 1036, 1038 (8th Cir. 1978) (per curiam); Smith v. Jackson Tool & Die, Inc., 426 F.2d 5, 8 (5th Cir. 1970) (per curiam).

[46] 651 F.2d at 230.

[47] *Id.* at 230-31.

[48] *Id.*

[49] *Id.* at 231. The *Hensley* court stated that in no event should a court permit counsel to wait six months before inquiring into the court's decision on a motion. *Id.*

concluded that Hensley had based his motion solely on his failure to receive notice of the entry.[50] Thus, since Rule 77(d) bars relief when the sole ground for relief is the failure to receive notice, the Fourth Circuit ruled that the district court had improperly granted the motion.[51]

The Fourth Circuit adopted the Tenth Circuit's position[52] that Rule 77(d) charges the prospective appellant with a duty to inquire diligently into the progress of his case.[53] The court found that Hensley's counsel, having waited six months before inquiring into the status of the district court's decision, had failed to discharge his duty of diligent inquiry.[54] Consequently, the *Hensley* court concluded that the district court improperly granted relief under Rule 60(b).[55] The Fourth Circuit thus held that since the factual context did not reflect unique or extraordinary circumstances, and because Hensley's counsel had not discharged his duty of inquiry, the district court had abused its discretion by granting the plaintiff's motion for relief.[56]

The Fourth Circuit's holding that Rule 77(d) bars Rule 60(b)(6) relief when the failure to receive notice of the entry of the judgment constitutes the sole basis asserted for relief is consistent with the wording and policy of Rule 77(d). The Advisory Committee clearly acknowledged that the purpose of the 1946 amendment to Rule 77(d) was to promote the finality of judgments.[57] The Advisory Committee sought to limit the excessive discretion that the language of Rule 60(b)(6) had granted to the district courts.[58] Further, the exceptional circumstances requirement imposed by the *Hensley* court accords with the majority of courts that have considered whether to grant relief under clause (6) of Rule 60(b).[59]

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[50] *Id.*

[51] *Id.*

[52] *See* Lathrop v. Oklahoma City Hous. Authority, 438 F.2d 914, 915 (10th Cir.), cert. denied, 404 U.S. 890 (1971); Long v. Emery, 383 F.2d 392, 394 (10th Cir. 1967); Buckley v. United States, 382 F.2d 611, 614 (10th Cir. 1967); *cert. denied*, 390 U.S. 997 (1968).

[53] 651 F.2d at 231.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *See* FED. R. CIV. P. *77(d) Notes of Advisory Committee on Rules*. The purpose of the 1946 amendment to Rule 77(d) was to overrule Hill v. Hawes, 320 U.S. 520 (1944). *See id.*; MOORE, *supra* note 11, ¶ 77.1[4]. In *Hill*, the clerk failed to send notice of entry of a judgment to counsel. 320 U.S. at 520-21. The district court vacated its judgment and reentered it to permit the party to appeal. *Id.* The court reasoned that the prospective appellant was justified in relying on lack of notice. *Id.* The Supreme Court affirmed. *Id.* at 524. The Advisory Committee made it clear that the purpose of the 1946 amendment to Rule 77(d) was to nullify *Hill*. *See* FED. R. CIV. P. *77(d) Notes of Advisory Committee on Rules* (entirely unsafe for party to rely on absence of notice from clerk).

[58] *See* FED. R. CIV. P. *77(d) Notes of Advisory Committee on Rules*; MOORE, *supra* note 11, ¶ 77.01[4].

[59] *See, e.g.*, Polites v. United States, 364 U.S. 426, 431-32 (1960); Ackermann v. United States, 340 U.S. 193, 200 (1950); Klapprott v. United States, 335 U.S. 601, 613-14 (1949); Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 401 (5th Cir. 1981); Good Luck Nursing Home,

The Fourth Circuit is among the growing number of circuits that recognize the implicit duty of the prospective appellant's attorney to keep himself advised of the progress of his case.[60] Imposition of the duty of diligent inquiry is consistent with Rule 77(d).[61] The Advisory Committee has stated that it would be unwise for counsel to rely on lack of notice as a basis for Rule 60(b) relief.[62] Decisions of the Second, Fifth, Eighth, and Tenth Circuits reaffirm the admonition to diligently inquire into the progress of litigation.[63] Courts have found that a litigant's failure to receive notice will rise to the level of an extraordinary circumstance only after the clerk has assured the inquiring litigant that he will receive notice and the litigant has relied on this assurance.[64]

While the result in *Hensley* may be correct, the reasoning is questionable. In denying Rule 60(b)(6) relief, the *Hensley* court reasoned that the policy that supports an application of Rule 60(b)(6) is that of provid-

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Inc. v. Harris, 636 F.2d 572, 577 (D.C. Cir. 1980); Compton v. Alton Steamship Co., 608 F.2d 96, 102 (4th Cir. 1979); Boughner v. Secretary of HEW, 572 F.2d 976, 978 (3d Cir. 1978); Buckeye Cellulose Corp. v. Braggs Elec. Constr. Co., 569 F.2d 1036, 1038 (8th Cir. 1978) (per curiam); International Controls Corp. v. Vesco, 556 F.2d 665, 671 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978); Brader v. University of Pittsburgh, 552 F.2d 948, 954 (3d Cir. 1977); Fidelity & Dep. Co. v. Usaform Hail Pool, Inc., 523 F.2d 744, 750 (5th Cir. 1975), *cert. denied*, 425 U.S. 950 (1976); Expeditions Unlimited Aquatic Enterprises v. Smithsonian Inst., 500 F.2d 808, 809 (D.C. Cir. 1974) (per curiam); Smith v. Jackson Tool & Die, Inc., 426 F.2d 5, 8 (5th Cir. 1970) (per curiam); Radack v. Norwegian American Line Agency, 318 F.2d 538, 542-43 (2d Cir. 1963); United States v. Cato Bros., 273 F.2d 153, 157 (4th Cir. 1959), *cert. denied*, 362 U.S. 927 (1960). Many courts, however, never mention the extraordinary circumstances test. *See, e.g.*, Planter's Trust and Savings Bank v. Morrow (*In re* Morrow), 502 F.2d 520, 521-23 (5th Cir. 1974); Cinerama Inc. v. Sweet Music, S.A., 482 F.2d 66, 71 (2d Cir. 1973); Hodgson v. UMW, 473 F.2d 118, 124 (D.C. Cir. 1972); Lord v. Helmandollar, 348 F.2d 780, 782-83 (D.C. Cir. 1965) (per curiam), *cert. denied*, 383 U.S. 928 (1966); Demers v. Brown, 343 F.2d 427, 428 (1st Cir.) (per curiam), *cert. denied*, 382 U.S. 818 (1965); Wagner v. United States, 316 F.2d 871, 872 (2d Cir. 1963) (per curiam); Williams v. Sahli, 292 F.2d 249, 251-52 (6th Cir. 1961), *cert. denied*, 368 U.S. 977 (1962). Courts fail to mention the extraordinary circumstances test for one of two reasons. *See* Kane, *supra* note 4, at 58. Some courts refuse to recognize the use of Rule 60(b)(6) to extend the time for appeal. *Id.* Other courts, while endorsing Rule 60(b)(6) for such a purpose, do not term their inquiry an "extraordinary circumstances test" because they are not certain as to the application of the standard. *Id.* One commentator has concluded that the test is similar to that described by Justice Stewart in the pornography area. *Id.*; *see* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I know it when I see it").

[60] *See* note 38 *supra*.

[61] *See* note 3 *supra*.

[62] *See* note 57 *supra*.

[63] *See* note 38 *supra*.

[64] *See, e.g.*, Buckeye Cellulose Corp. v. Braggs Elec. Constr. Co., 569 F.2d 1036, 1038-39 (8th Cir. 1978). In *Buckeye*, the Eighth Circuit found extraordinary circumstances justifying relief when counsel inquired three times into the status of his case, the clerk assured counsel that he would notify him of the decision, counsel relied on this assurance, and the clerk failed to notify counsel within the sixty-day appeal period. *Id.*; *accord*, Fidelity & Dep. Co. v. Usaform Hail Pool, Inc., 523 F.2d 744, 751 (5th Cir. 1975), *cert. denied*, 425 U.S. 950 (1976).

ing an ascertainable end to litigation so litigants may rely on final judgments and order their affairs accordingly.[65] The court, however, did not address the countervailing consideration of rendering justice to a particular litigant.[66] The *Hensley* court thus seems to have abandoned the *Cato Brothers* analysis, which the district court applied[67] and the Fourth Circuit employed recently in *Compton v. Alton Steamship Co.*[68] In *Compton*, the Fourth Circuit underscored the delicate balancing of the principles of finality and individual justice when the movant sought vacation and reentry of a default judgment.[69] The *Compton* court, not limiting its directive to the default or dismissal context, emphasized that the movant in a Rule 60(b) motion must make a prima facie showing of a meritorious claim should he relitigate the case.[70] The *Compton* court further stated that the district court should consider whether Rule 60(b) vacation and reentry would prejudice the non-moving party.[71] The district court in *Hensley* employed the *Compton* analysis in conjunction with the extraordinary circumstances test.[72]

In contrast, the Fourth Circuit did not address whether Hensley had shown a meritorious claim or whether the district court's granting of the Rule 60(b)(6) motion would have prejudiced C&O.[73] Instead, the Fourth Circuit required the movant to make a prima facie showing of having discharged his duty to inquire.[74] Since the *Hensley* court determined that Hensley's counsel had failed to discharge his duty, the court denied relief.[75] Courts most often allow relitigation in cases involving default judgments or dismissals because of the preference for judgments based on full adversarial exploration of the issues.[76] The Fourth Circuit, however, did not limit its holding to the situation in which a litigant seeks relief from final judgment after a trial on the merits.[77] As a result, it is not clear whether the court has abandoned the *Cato Brothers* claim and prejudice examination in the non-default or non-dismissal context. The court may intend to retain the claim and prejudice analysis, but simply did not reach the inquiry on the facts in *Hensley* since the movant failed to make the requisite prima facie showing of diligent inquiry.

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[65] 651 F.2d at 228.
[66] *See* text accompanying note 4 *supra.*
[67] *See* text accompanying notes 31-33 *supra.*
[68] 608 F.2d 96, 102 (4th Cir. 1979).
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *See* text accompanying notes 32-34 *supra.*
[73] *See* text accompanying notes 67-78 *supra.*
[74] 651 F.2d at 231.
[75] *Id.*
[76] Kane, *supra* note 4, at 71.
[77] 651 F.2d at 231.

Additionally, the holding of the *Hensley* court that the district court abused its discretion[78] in granting relief reflects the stricter standard now imposed by the Fourth Circuit when a litigant seeks Rule 60(b)(6) relief after a trial on the merits. The Fourth Circuit previously had held that when denial of a pre-trial motion precluded a full consideration of the merits of the case, the appellate courts should closely scrutinize the trial court's exercise of discretion.[79] The Fourth Circuit enunciated the strict scrutiny standard to permit district courts to exercise broad discretion in granting Rule 60(b)(6) relief after a default judgment or dismissal.[80] In contrast, the *Hensley* court's finding of abuse of discretion in the granting of Rule 60(b)(6) relief serves as a warning to district courts within the Fourth Circuit that absent a prima facie showing by the movant of discharge of his duty to inquire, the Fourth Circuit will reverse a district court's finding of exceptional circumstances.[81] The *Hensley* holding thus serves as an implicit warning to district courts within the Fourth Circuit to exercise narrower discretion in granting Rule 60(b)(6) relief after a trial on the merits.

Finally, the decision of the *Hensley* court, while promoting the policy of finality, may be unduly harsh to the plaintiff who was himself diligent in inquiring of his counsel into the status of his case.[82] Hensley's own

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[78] *Id.*

[79] *See* Strader v. Hall, 20 F.R. Serv. 2d 531 (4th Cir. 1975). In *Strader* the *pro se* Rule 60(b) movant had failed to receive notice of the state's motion for summary judgment filed against him since he was at the time being transferred from one penal facility to another. *Id.* The district court denied Strader's motion. *Id.* The Fourth Circuit reversed, finding that the trial court had abused its discretion. *Id.* The *Strader* court, emphasizing that courts should resolve any doubt in favor of setting aside the judgment when the defendant has not enjoyed a full trial on the merits, held that relief was appropriate under the Rule 60(b)(1) provision for "excusable neglect." *Id. See also* Tozer v. Charles A. Krause Milling Co., 189 F.2d 242, 246 (3d Cir. 1951) (appellate court should not disturb Rule 60(b) determination of trial court unless abuse of discretion). Under Rule 60(b), a trial court abuses its discretion only if no reasonable man could agree with the trial court's decision. *See* Smith v. Widman Trucking & Excavating, Inc., 627 F.2d 792, 795-96 (7th Cir. 1980); Ruiz v. Hamburg—American Line, 478 F.2d 29, 31 (9th Cir. 1973). Broad trial court discretion is proper in Rule 60(b) analysis because the trial judge is in a better position than the appellate court to determine credibility of evidence and witnesses. *See* Farmer's Co-op. Elevator Ass'n. Non-stock v. Strand, 382 F.2d 224, 231-32 (8th Cir.), *cert. denied*, 389 U.S. 1014 (1967); International Nikoh Corp. v. H. K. Porter Co., 374 F.2d 82, 84 (7th Cir. 1967) (per curiam).

[80] *See* Fackelman v. Bell, 564 F.2d 734, 735-36 (5th Cir. 1977) (preference for full consideration of merits of case).

[81] 651 F.2d at 231.

[82] *See* Appendix to Brief for Appellant at 9, 651 F.2d 227 (1981). In *Hensley*, Hensley wrote to his local counsel on July 17, 1979, inquiring into the status of the March 23, 1979 motion for a new trial. *Id.* In a letter dated July 24, 1979, Hensley's counsel responded that he did not know of any way to force the judge to make a decision, but he assumed that the court would render the decision soon. *Id.* at 10. At the time Hensley wrote to his counsel, only thirty-nine days had passed since the court had rendereds its decision on July 8, 1979. Thus, twenty-one days remained during which Hensley court have filed for appeal under Rule 4(a) on the ground of "excusable neglect." *See* note 3 *supra.*

diligence notwithstanding, the Fourth Circuit implicitly imputed his attorney's negligence to him.[83] His sole recourse would appear to be a suit for malpractice against his counsel.[84] While a malpractice suit could provide some compensation for the injured client and would not disturb the finality of the earlier judgment, this avenue of relief is unsatisfactory because the action would prove costly. Additionally, a suit for malpractice would not promote judicial efficiency.[85] Finally, the action might ultimately prove unsuccessful since Hensley would have to show that his was a case of extreme negligence.[86]

In *Hensley*, the Fourth Circuit recognized that the policy of finality allows only infrequent granting of Rule 60(b)(6) relief from final judgment. The court coupled its broad emphasis on finality, however, with neither discussion nor acknowledgment of the traditional countervailing policy consideration, the rendering of justice to an individual litigant in light of all of the facts of the particular case.[87] Consequently, the *Hensley* decision serves as a warning to prospective appellants, their counsel, and the district courts within the Fourth Circuit. After the entry of a final judgment or order following a trial on the merits, counsel for prospective appellants must make a prima facie showing of having dili-

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[83] *See* Link v. Wabash R.R. Co., 370 U.S. 626, 633 (1902). In Link, the trial court dismissed an action for failure to prosecute when the plaintiff's attorney did not appear for a scheduled pre-trial conference and offered no reasonable excuse for his non-appearance. *Id.* at 627-29. The appellate court and the Supreme Court affirmed the dismissal, holding that the dismissal did not impose an unjust penalty on the client since the client had voluntarily chosen the attorney as his representative and thus was bound by the acts of his lawyer. *Id.* at 633. *But see* Peterson v. Term Taxi Inc., 429 F.2d 888, 891-92 (2d Cir. 1970) (defaulting party's unintentional late arrival in court arguably constitutes grounds for vacation under Rule 60(b)(1) even though conduct demonstrates "failure of judgment" and "is an affront to the court").

[84] *See* Link v. Wabash R.R. Co., 370 U.S. 626, 634 n.10 (1902). In *Link*, the Court grounded its imputation of attorney negligence to the client by reasoning that the client's remedy was a suit for malpractice. *Id.* Several courts, including the Fourth Circuit, have followed *Link*, holding the client to the consequence of his presumably voluntary selection of counsel. *See, e.g.*, Universal Film Exchs., Inc. v. Lust, 479 F.2d 573, 576-77 (4th Cir. 1973); Kostenbauder v. Secretary of HEW, 71 F.R.D. 449, 452-53 (M.D. Pa. 1976); United States v. Manos, 56 F.R.D. 655, 660 (S.D. Ohio 1972); Geigel v. Sea Land Serv., Inc., 44 F.R.D. 1, 2 (D.P.R. 1968). Other courts, however, have refused to follow *Link* on motions for relief from judgment, distinguishing the decision or ignoring it on the assumption that Rule 60(b) is a permissible way of relieving the client from the error of his attorney. *See, e.g.*, Boughner v. Secretary of HEW, 572 F.2d 976, 978 (3d Cir. 1978); L.P. Steuart, Inc. v. Matthews, 329 F.2d 234, 235-36 (D.C. Cir.), *cert. denied*, 379 U.S. 824 (1964); Radack v. Norwegian America Line Agency, 318 F.2d 538, 542 (2d Cir. 1963); 50 IOWA L. REV. 641, 646-48 (1965); W. VA. L. REV. 173, 175 (1965).

[85] *See* Moore & Rogers, *Federal Relief from Civil Judgments*, 55 YALE L.J. 623, 623 (1946) (doctrine of judicial finality promotes efficient and orderly administration of judicial system); *accord*, Comment, *Temporal Aspects of the Finality of Judgments—The Significance of Federal Rule 60(b)*, 17 U. CHI. L. REV. 664, 664 (1950).

[86] *See* Huszagh & Malloy, *Legal Malpractice: A Calculus for Reform*, 37 MONT. L. REV. 279, 282 (1976). *See generally* Marks & Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 U. ILL. L. F. 193.