

Bridging the Finality Gap

By Kirsten E. Small

Federal Rule 58(e) gives a district court discretion to delay entry of final judgment to resolve a pending claim for attorneys' fees.

Getting Appeals of the Merits and Attorneys' Fees on the Same Track

In 1988, Seventh Circuit Judge Richard Posner observed, with characteristic flair, that litigation over attorneys' fees “has become a heavy burden on the federal courts. It can turn a simple civil case into two or even more cases—the

case on the merits, the case for fees, the case for fees on appeal, the case for fees for proving fees, and so on ad infinitum, or at least ad nauseam.” *Ustrak v. Fairman*, 851 F.2d 983, 987 (7th Cir. 1988). The financial toll of attorneys' fees litigation also falls on the party that must pay a fees award covering the opposing party's lawyers' fees as well as his or her own. This burden can be alleviated, to some degree, by pursuing a single, consolidated appeal of the merits and of the attorneys' fees. But because attorneys' fees proceedings occur after the merits of litigation have been resolved, and given that a district court has only limited authority to extend the time for filing a notice of appeal from a merits judgment, the losing party may be required to appeal the merits judgment long before the district court issues an order regarding fees. This “finality gap” between a judgment on the merits and a decision on fees may stretch out for months, making consolidation of

the merits and fee appeals impractical, if not impossible.

One possible solution is to file an appeal from a merits judgment and then ask the appellate court to stay the appeal until the district court resolves the pending attorneys' fees motion. But the court of appeal will lack the district court's familiarity with the litigation and have no way of knowing how long it might have to wait for an order on attorneys' fees, and consequently the appellate court may be reluctant to grant such a motion. Fortunately, the Federal Rules of Civil Procedure provide a mechanism for coordinating appeals of the merits and attorneys' fees, allowing counsel to bridge the “finality gap.”

The discussion in this article is premised on the following hypothetical scenario: A plaintiff files suit against your client in federal district court, alleging that your client breached a contract with the plaintiff and also asserting a claim based on stat-



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utory law. Unfortunately, the plaintiff prevails after lengthy litigation and a jury trial. Fourteen days after entry of judgment on the jury's verdict—while you are still drafting your motion to alter or to amend under Fed. R. Civ. P. 59(e)—the plaintiff's counsel moves for an award of attorneys' fees, noting that both the contract and the statute entitle the prevailing party in litigation to an award. See Fed. R. Civ. P. 54(d)(2) (providing that a motion for attorneys' fees must "be filed no later than 14 days after the entry of judgment" and must "specify the judgment and the statute, rule, or other grounds entitling the movant to the award").

The amount of fees requested by the plaintiff is astronomical. Given the length of the proceedings, a large fee request is to be expected, but as you review the motion it appears that the hourly rates charged by the plaintiff's counsel are unjustifiably high. It also appears that the case was overstaffed and that the amount of time devoted to certain tasks was excessive. Your advice to the client, therefore, is to challenge the amount of the fee request, even though there is no question that the plaintiff is entitled to an award of attorneys' fees in some amount, unless the district court reverses the merits judgment.

Long before the motion for attorneys' fees is resolved, the district court enters an order denying your Federal Rule 59(e) motion, making the merits judgment final and appealable. Your client wants to pursue an appeal of the merits judgment but is also aware that it may be necessary to appeal the attorneys' fees award, which may not be entered for several more months. Successive appeals of the merits and of the attorneys' fees would greatly increase the cost of appellate proceedings, however.

The Origin of the "Finality Gap"

The finality gap is a natural consequence of the collateral nature of an attorneys' fees award. A notice of appeal "must be filed... within 30 days after entry of the judgment or order appealed from." Fed. R. App. P. 4(a)(1)(A). The timely filing of a notice of appeal is a jurisdictional requirement. *Bowles v. Russell*, 551 U.S. 205, 214 (2007). The 30-day clock begins ticking when the district court enters a final decision that "ends the litigation on the merits and leaves

nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945).

A judgment is final even if a collateral issue, such as a motion for sanctions, remains unresolved. The question, then, is whether an unresolved motion for attorneys' fees is a collateral matter that does not preclude a merits judgment from becoming final. The Supreme Court first considered this question in 1988, when it decided *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988). In *Budinich*, the Court considered "whether a decision on the merits is a 'final decision' as a matter of federal law under §1291 when the recoverability or amount of attorneys' fees for the litigation remains to be determined." *Id.* at 199. Noting that an award of attorneys' fees to the prevailing party in litigation "does not remedy the injury giving rise to the action, and indeed is often available to the party defending against the action," the *Budinich* court thought it "indisputable," at least "[a]s a general matter... that a claim for attorneys' fees is not part of the merits of the action to which the fees pertain." *Id.* at 200. The Court acknowledged that some fee-shifting statutes might characterize attorneys' fees as part of the merits but declined "to adopt a position that requires the merits or nonmerits status of each attorneys' fee provision to be clearly established before the time to appeal can be clearly known." *Id.* at 202. Rather, "[c]ourts and litigants are best served by the bright-line rule" that a motion for attorneys' fees is always collateral to the proceeding to which the fees pertain. *Id.*

The brightness of the line drawn in *Budinich* dimmed considerably when lower courts began applying it to contractual, as opposed to statutory, fee-shifting provisions. Despite *Budinich's* clear rejection of a merits or nonmerits status test for attorneys' fees awards, several circuit courts concluded that the distinction was still relevant to contractual fee-shifting provisions, reasoning that entitlement to attorneys' fees incurred for pre-lawsuit activities, such as sending demand letters or notices of default, were part of a substantive claim. Therefore, even though a court awarded these fees after a judgment, they were not fees "for the litigation" and did not fall within the *Budinich* rule. See, e.g.,

Justine Realty Co. v. Am. Nat'l Can Co., 945 F.2d 1044, 1047-48 (8th Cir. 1991). Other circuit courts, in contrast, concluded that *Budinich's* "bright-line rule" applied to all unresolved claims for attorneys' fees, including claims arising from contractual provisions. See, e.g., *United States ex rel. Familian Nw., Inc. v. RG & B Contractors, Inc.*, 21 F.3d 952, 955 (9th Cir. 1994).

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In January of this year, the Supreme Court resolved the split among the circuit courts by deciding *Ray Haluch Gravel Co. v. Central Pension Fund*, 134 S. Ct. 2205 (2014). The plaintiffs in *Ray Haluch*, several pension funds, filed suit for unpaid contributions required by federal law and the parties' collective bargaining agreements. In mid-June 2011, the district court granted judgment to the plaintiffs but awarded less than the plaintiffs claimed that they were owed. Roughly six weeks later, the district court granted the plaintiffs' post-judgment motion for attorneys' fees, again awarding less than the amount claimed. Within 30 days of the attorneys' fees order, the plaintiffs filed a notice of appeal regarding the merits judgment and attorneys' fees. Before the Supreme Court, the plaintiffs maintained that the notice was timely filed for all the issues because the underlying contract, which permitted recovery of "[a]ny costs, including legal fees, of collecting payments" owed to the plaintiffs, made attorneys' fees part of the merits. The Court rejected this argument for the "basic reason... that the Court in *Budinich* rejected the very distinction the [plaintiffs] now attempt to draw." *Ray Haluch*, 134 S. Ct. at 780.

The Supreme Court held that under *Budinich*, it is immaterial “whether the statutory or decisional law authorizing a particular fee claim treated the fees as part of the merits.” *Id.* at 780. The Court saw no reason to distinguish between statutory and contractual fee awards, noting that it made little sense to give “different jurisdictional effect to district court decisions

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that leave unresolved otherwise identical fee claims based solely on whether the asserted right to fees is based on a contract or a statute.” *Id.*

The end result of *Budinich* and *Ray Haluch Gravel* is that in the vast majority of cases, a judgment on the merits will become final and appealable before a district court issues an order resolving a claim by the prevailing party for attorneys’ fees. But this is only one side of the finality gap. After all, the collateral nature of attorneys’ fees proceedings would be of little concern if district courts could resolve fee motions relatively quickly so that a fees appeal would follow closely behind and could easily be consolidated with a merits appeal. But, as Judge Posner lamented in *Ustrak*, this is not the case.

Achieving a quick disposition of a claim for attorneys’ fees is, at least according to the Supreme Court, the ideal. The goal of an attorneys’ fees award “is to do rough justice, not to achieve auditing perfection,” *Fox v. Vice*, 131 S. Ct. 2205, 2216 (2011), and therefore “[a] request for attorneys’ fees should not result in a second major litigation,” *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The reality, however, is that proceedings regarding a motion for attorneys’ fees may drag on

for months. Under the “lodestar” method used in federal court to determine the amount of an attorneys’ fees award, the appropriate fee is the product of the number of hours reasonably spent litigating a case and a reasonable hourly rate charged by the attorney. The burden is on a plaintiff, in the first instance, to support the reasonableness of its claimed hourly rates and time. Although this is the exception, rather than the rule, some jurisdictions have recognized, by local rule or custom, presumptively reasonable rates based on a counsel’s years of practice. *See, e.g.*, D. Md. Local Rule App. B. In most cases, an attorney will have to provide a court with evidence, usually in the form of affidavits from counsel of record attesting that the rates claimed are the counsel’s customary rates for similar work, and from other attorneys attesting that the rates claimed are consistent with the market. Second, an attorney must support the reasonableness of the time expended by submitting detailed billing records—records, which in a long-running case, may occupy hundreds of pages.

Once a fee movant has submitted a properly supported request for attorneys’ fees, the party opposing fees must present evidence and analysis of its own to challenge the movant’s figures. Such challenges may involve countering affidavits regarding appropriate hourly rates or minute parsing of time records to identify improprieties or inefficiencies. In some cases, it may be necessary to conduct limited discovery regarding attorneys’ fees. *See, e.g., Nat’l Ass’n of Concerned Veterans v. Sec. of Def.*, 675 F.2d 1319, (D.C. Cir. 1982) (holding that discovery regarding “the justification for the claimed billing rate and the nature and extent of the work done ... is essential in the calculation of the fee award”).

Moreover, in some cases, it may not be clear that the movant is entitled to an award of attorneys’ fees. In the area of patents and trademarks, for example, attorneys’ fees are available only for “exceptional” cases. *See* 15 U.S.C. 285; 15 U.S.C. 1117(a). In other circumstances, the decision whether to award fees rests in the district court’s discretion. Questions regarding entitlement to fee awards add yet another layer of complexity to the proceedings, requiring briefing by the

involved parties and decisional analysis by a court.

When briefing is finally complete, a district court must review the parties’ submissions, possibly hear oral argument, and conduct a meaningful analysis of the fee request and issue a decision that adequately explains the basis for the award. *See Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 558 (2010) (“It is essential that the judge provide a reasonably specific explanation for all aspects of a fee determination, including any award of an enhancement.”).

All things considered, therefore, a motion for attorneys’ fees may remain unresolved by a district court for many months after a merits judgment becomes final and appealable. In the meantime, however, the appeal of the merits judgment will presumably move along in the usual course. It is thus possible, or even likely, that the parties will complete the appellate briefing before the district court rules on attorneys’ fees, making consolidation impractical and requiring the parties to brief two appeals rather than one.

Bridging the Finality Gap: Federal Rule 58(e)

The Federal Rules of Civil Procedure give the parties and the district court a means of avoiding successive appeals of the merits and of attorneys’ fees. Federal Rule 58(e) gives a district court discretion to delay entry of final judgment to resolve a pending claim for attorneys’ fees:

Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees. But if a timely motion for attorneys’ fees is made under Rule 54(d) (2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely filed motion under Rule 59.

In other words, provided that the rule requirements are met, a district court can effectively delay the finality of a merits judgment, thereby facilitating a single appeal of the merits and attorneys’ fees.

There are good reasons to prefer a single appeal of merits and attorneys’ fees. First, a single appeal of the merits and attorneys’ fees promotes the purpose of the

final judgment rule, which “is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results.” *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

Second, appellate review of an attorneys’ fees award is inevitably and inextricably tied to the merits of litigation. In most cases, an appellate court cannot properly review a fee award without at least some knowledge of the merits of the case. For example, an appellate challenge to a prevailing party’s entitlement to attorneys’ fees may require a court to consider the relative merit, or lack of it, of the losing party’s claims. *See, e.g., Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014) (holding that determining entitlement to attorneys’ fees under the Lanham Act involves consideration of “the substantive strength of a party’s litigating position”). Even when entitlement to fees is not disputed, an appellate court must have some familiarity with the merits to review the district court’s determination of the number of hours reasonably spent litigating the case adequately. In view of these considerations, it will often be preferable to combine a merits appeal with a fees appeal.

In some cases, however, it may be better to delay an appeal of an attorneys’ fees award until the appeal of the merits has been resolved. *Guttierrez v. Wells Fargo Bank, N.A.*, 2013 WL 4013494 (N.D. Cal. Aug. 5, 2013), was one such case. *Guttierrez* was a long-running class action that had already made one trip to the Ninth Circuit by the time that the district court entered a final judgment on the merits of the case, granting an injunction and restitution to the plaintiff class. In the cited order, the district court denied the plaintiff class’ Rule 58(e) motion to defer entry of judgment until after the court had ruled on attorneys’ fees.

The court reasoned that the primary benefit of a Rule 58(e) order—the efficiencies attendant to a single appeal of merits and fees—would only be obtained if the plaintiff class “score[d] a complete victory on appeal.” Any other result could materially alter the mix of issues on which the plaintiff class had prevailed, necessitating recalculation of the fee award. In that

case, not only would further proceedings, including a successive appeal of attorneys’ fees, be all but inevitable, but the time and effort already expended for the now-moot fees appeal would have been wasted.

Crossing the Bridge: A Few Practice Pointers

Federal Rule 58(e) provides a limited period of time during which a district court has discretion to enter an order deferring finality of a judgment. The window opens upon the filing of a motion for attorneys’ fees “under Rule 54(d)(2)” and closes once a notice of appeal “has been filed and become effective.” The language of Rule 58(e) has given rise to a number of questions regarding the temporal scope of a district court’s discretion.

The first question is when the window opens—if it opens at all. By its terms, Federal Rule 58(e) applies only to motions for attorneys’ fees “made under Rule 54(d)(2).” Although this language implies that some motions for attorneys’ fees are not “made under Rule 54(d)(2)” and therefore are not subject to a motion under Rule 58(e), the case law indicates that this is not so. Appellate courts applying Federal Rule 58(a)(3), under which the “separate document” requirement for judgments does not apply to an order on a motion for attorneys’ fees “under Rule 54,” have rejected the notion “that some motions for awards of attorneys’ fees are ‘under’ Rule 54 and others are ‘under’ something else and therefore require a separate judgment document to start the 30-day appeal time running.” *Feldman v. Olin Corp.*, 673 F.3d 515, 517 (7th Cir. 2012). The court explained that it could not think of any reason why some attorneys’ fees orders should be exempt from the separate document rule and others should not. *See id.* At least one court has adopted this reasoning in a case under Federal Rule 58(e). *See Nasser v. White Pages, Inc.*, 2014 WL 3058570, at *8 (W.D. Va. July 2, 2014).

The second question is when the window closes. A district court loses jurisdiction to enter a Rule 58(e) order once a notice of appeal “has been filed and is effective.” *Mendes Junior Int’l Co. v. Banco de Brasil, S.A.*, 215 F.3d 306, 313 (2d Cir. 2000). Importantly, the mere filing of a notice of appeal does not necessarily deprive a dis-

trict court of jurisdiction to enter a Rule 58(e) order. In some circumstances, there will be a period during which a notice of appeal is on file but is not yet “effective,” meaning that jurisdiction has not yet vested in the court of appeals. For example, a notice of appeal filed while a Rule 59(e) motion is still pending only “becomes effective” when a court has disposed of the motion. Fed. R. App. P. 4(a)(4)(B)(i).

Conclusion

While there may be circumstances in which it is preferable to appeal an award of attorneys’ fees separately from the merits, in most cases a client would no doubt prefer to pay for one appeal rather than two. A robust challenge to a motion for attorneys’ fees at the district court level, however, may create a substantial “finality gap” between a merits judgment and an attorneys’ fees order. A timely and well-considered motion under Federal Rule 58(e) provides a way to bridge this gap. 