Comments

ATTORNEY FEES

SIMULTANEOUS NEGOTIATION AND THE CONDITIONING OF SETTLEMENT OFFERS ON THE MERITS UPON WAIVER OF STATUTORY ATTORNEY'S FEES: AN ETHICAL AND POLICY ANALYSIS

In *Evans v. Jeff D.*,[1] the United States Supreme Court considered whether it is proper for attorneys to negotiate the merits of a case while simultaneously negotiating statutory attorney's fees. In addition, it examined the desirability of allowing settlement offers on the merits to be conditioned upon the waiver of statutory attorney's fees. Both questions were considered within the context of the Civil Rights Attorneys' Fees Awards Act of 1976 (hereinafter the Fees Act).[2] In holding that such practices are not prohibited per se,[3] the Court ruled on issues which had divided the lower courts.[4] However, the diverging views found within the lower court deci-

1. 106 S. Ct. 1531 (1986).

2. Civil Rights Attorneys' Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (1976), as amended by the Equal Access to Justice Act, Pub. L. No. 96-481, § 205(c), 94 Stat. 2330 (1980) (codified as amended at 42 U.S.C. § 1988 (Supp. 1981). Section 1988 reads in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. § 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

3. *Evans*, 106 S. Ct. at 1542-43.

4. Those courts opposed to simultaneous negotiations include: Prandini v. National Tea Co., 557 F.2d 1015, 1021 (3d Cir. 1977)(Courts should "insist upon settlement of the damage aspect of the case separately from the award of statutorily authorized attorney's fees."); Mendoza v. U.S., 623 F.2d 1338, 1353 (9th Cir. 1980)(Strongly discouraged simultaneous negotiations but would approve settlement where circumstances indicate that the potential for impropriety has been neutralized). *See also* Lisa F. v. Snider, 561 F. Supp. 724 (N.D. Ind. 1983); Jones v. Orange Housing Authority, 559 F. Supp. 1379 (D.N.J. 1983); Regaldo v. Johnson, 79 F.R.D. 447 (E.D. Ill. 1978); Lyon v. State of Arizona, 80 F.R.D. 665 (D. Ariz. 1978); Munoz v. Arizona State Univ., 80 F.R.D. 670 (D. Ariz. 1978).

Those courts allowing simultaneous negotiation and waiver include: Gram v. Bank of Louisiana, 691 F.2d 728, 730 (5th Cir. 1985)(plaintiff may waive right to fees in a negotiated settlement); Chicano Police Officer's Assoc. v. Stover, 624 F.2d 127, 132 (10th Cir. 1980)(plaintiff may agree to waive fees as part of a settlement agreement). *See also* White v. New Hampshire Department of Employment Security, 455 U.S. 445, 453 n.15 (1982).

Those courts allowing only *voluntary* waivers include: Lazar v. Pierce, 757 F.2d 435, 438-39 (1st Cir. 1985)(counsel may "elect" to waive fees during negotiation, but for defendant to insist upon waiver of fees or unreasonably low fees is improper); Moore v. National Ass'n of Sec. Dealers, Inc., 762 F.2d 1093, 1104-05, 1110 (D.C. Cir. 1985) (plaintiff may voluntarily waive fees during simultaneous negotiations).

sions preceding *Evans* may well continue despite the *Evans* holding.

THE FACTUAL SETTING

The respondents, a class of some 2,000 emotionally and mentally handicapped children, brought suit against the governor of Idaho and several other officials charged with their care.[5] The complaint alleged certain deficiencies existed in the education and health care services provided by the State. The class sought injunctive relief, costs, and statutory attorney's fees under the Fees Act.

One week before trial, and thirty-one months after the claim was filed, the State offered to give nearly all the injunctive relief sought provided that respondents waive all claims for fees and costs.[6] Counsel for the respondent class grudgingly accepted the offer contingent upon district court approval of the fee waiver. In the respondent's view, it was improper for the State to exact such a "coerced" waiver.[7] In arguing the impropriety of the fee waiver to the court, the respondents stated that the waiver request exploited counsel's ethical duty to his clients. They requested that the court approve the settlement without the waiver provision.[8] The district court found no ethical violation and consequently denied the respondents' motion approving the settlement *in toto*. On appeal, the Ninth Circuit invoked its power to approve class action settlements,[9] considered the public policy embodied within the Fees Act,[10] and held the waiver invalid.[11] The United States Supreme Court reversed the Ninth Circuit's decision. The Court held the simultaneous negotiation of fees and merits, and the conditioning of settlement offers upon waiver of statutory attorney's fees is not invalid per se.[12]

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5. The facts of *Evans* are set out at 106 S. Ct. at 1534-36. The suit was in the nature of a class action brought under 42 U.S.C. § 1983. The Fees Act entitles parties prevailing under § 1983 to an award of reasonable attorney's fees. *See supra* note 2.

6. The educational claims were settled by partial consent decree shortly after the filing of the State's answer. The decree provided each party would bear its own costs and fees to date. *Evans*, 106 S. Ct. at 1534.

7. Respondents define a "coercive waiver" as resulting when a defendant "(1) offers a settlement on the merits of greater or equal value than that which plaintiffs could reasonably expect at trial, but (2) conditions the offer upon a waiver of plaintiffs' statutory eligibility for attorney's fees." *Evans*, 106 S. Ct. at 1538.

The main thrust of this Comment involves a discussion of the "coerced waiver" problem. All references to waiver are intended in that context. However, this Comment also considers the other problem associated with the simultaneous negotiation of fees and merits: the "sweetheart deal." *See infra* notes 97-101 and accompanying text.

8. *Id.* at 1535 n.6. Counsel for respondent argued the waiver request put him in a position where he had to choose between negotiating for his clients or negotiating for his attorney's fees. According to counsel, the tendering of a favorable offer on the merits forced him to forego his fees in the best interest of his clients rather than risk a less favorable result at trial. *Id.*

9. FED. R. CIV. P. 23(e) states: "A class action shall not be dismissed or compromised without approval of the court. . . ."

10. *See infra* notes 22-30 and accompanying text. In general, the Fees Act seeks to attract competent counsel to represent the claims of civil rights plaintiffs.

11. Jeff D. v. Evans, 743 F.2d 648, 652 (9th Cir. 1984).

12. *Evans*, 106 S. Ct. at 1542-43.

THE LEGAL SETTING: ORIGINS AND PURPOSES OF THE CIVIL RIGHTS ATTORNEYS' FEES AWARDS ACT OF 1976

Central to the consideration of the issues presented in *Evans* is a basic understanding of the Fees Act. Congress drafted the Fees Act in response to the United States Supreme Court decision in *Alyeska Service Co. v. Wilderness Society*.[13] In *Alyeska*, the Court held the federal courts may not award fees on the "private attorney general" theory[14] absent specific Congressional authorization.[15] Consequently, Congress promptly provided such authorization in enacting the Fees Act.[16]

In general, the Fees Act gives state and federal courts[17] the discretion to award reasonable attorney's fees to prevailing plaintiffs[18] and defendants[19] in certain enumerated civil rights actions.[20] However, the Fees Act is to be liberally construed to further the public policy of encouraging the enforcement of civil rights.[21]

The legislative history of the Fees Act[22] is replete with statements regarding its purpose.[23] One commentator stated that the goals of the Fees Act are to stimulate legal representation in the civil rights arena, to facilitate the enforcement of civil rights through better access to the courts, to deter noncompliance with civil rights statutes, and to demonstrate a national commitment to the protection of civil rights.[24]

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13. 421 U.S. 240 (1975).

14. *See* Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968). While vindicating his own civil rights, a plaintiff acts as a "private attorney general" as such vindication furthers Congressional policy for the benefit of all. *Id.* at 402.

15. *Alyeska*, 421 U.S. at 269.

16. *See* S. REP. NO. 1011, 94th Cong., 2nd Sess. 4 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5908, 5911-12. ("It [the Fees Act] remedies gaps in the language of these civil rights laws by providing the specific authorization required by the Court in *Alyeska*. . . .").

17. Maine v. Thiboutot, 448 U.S. 1, 10-11 (1980)(fees may be awarded in both state and federal courts entertaining civil rights suits encompassed by the Fees Act).

18. Hensley v. Eckerhart, 461 U.S. 424 (1983). A prevailing party is eligible for the award of fees in relation to its degree of success. *Id.* at 440. Furthermore, a prevailing plaintiff should "ordinarily receive attorney's fees, unless special circumstances make an award unjust." *Id.* at 429. Also, a prevailing plaintiff, who substantially vindicates rights through a consent decree, is deemed to have prevailed. Maher v. Gagne, 448 U.S. 122, 129 (1980).

19. *Hensley*, 461 U.S. at 429 n.2 (A prevailing defendant may be entitled to fees only where the suit was "vexatious, frivolous or brought to harass or embarrass the defendant."). *See also* Christianburg Garment Co. v. E.E.O.C., 434 U.S. 412, 422 (1978); H. Rep. No. 1558, 94th Cong., 2nd Sess. 7 (1976).

20. *See supra* note 2.

21. Shadis v. Beal, 685 F.2d 824, 829 (3d Cir. 1982), *cert. denied*, 459 U.S. 970 (1982). *See also* H. Rep. No. 1558, *supra* note 19, at 19.

22. For a complete legislative history of the Fees Act see SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE SENATE COMMITTEE ON THE JUDICIARY, 94TH CONG., 2ND SESS., CIVIL RIGHTS ATTORNEYS' FEES AWARDS ACT OF 1976—SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS AND OTHER DOCUMENTS (Comm. Print, 1976)(hereinafter the Source Book).

23. S. REP. NO. 1011, 94th Cong., 2nd Sess. 1, 3, 5, 6 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5908, 5909-10, 5913; H. REP. NO. 1558, 94th Cong., 2nd Sess. 1,6,9 (1976); 122 CONG. REC. NO. 1473, S16491 (daily ed. Sept. 23, 1976)(remarks of Sen. Tunney); 122 CONG. REC. NO. 1473, S16251 (daily ed. Sept. 21, 1986)(remarks of Sen. Mathias); 122 CONG. REC. NO. 151, pt. II, H12160 (daily ed. Oct. 1, 1976)(remarks of Rep. Drinan).

24. Kraus, *Ethical & Legal Concerns in Compelling the Waiver of Attorneys' Fees by Civil Rights Litigants in Exchange for Favorable Settlement of Cases under the* Civil Rights Attorneys' Fees Awards Act of 1976, 29 VILL. L. REV. 597, 623 (1984).

The United States Supreme Court, in *Hensley v. Eckerhart*,[25] recognized that the Fees Act was intended to ensure that civil rights plaintiffs have access to the legal system.[26] The legislative history,[27] the opinions of the lower courts,[28] and state bar opinions[29] amply support this position. Those materials recognize a positive correlation between the availability of fees and the willingness of counsel to represent indigent civil rights plaintiffs.[30]

The Supreme Court holding in *Evans* was predicated upon its reading of the legislative intent of the Fees Act.[31] It viewed simultaneous negotiations and offers conditioned upon waiver of fees as being consistent, at least in some cases, with the Fees Act goal of attracting competent counsel to represent civil rights plaintiffs.[32]

THE COURT'S DECISION: CENTRALITY OF THE FEES ACT

After disposing of several ancillary matters,[33] the Court narrowly defined the question presented. The Court focused upon civil rights class action litigation and the Fees Act. The sole question was whether the Act requires judicial rejection of settlement agreements where the proffered relief equals or transcends the relief expected at trial and is expressly conditioned upon the waiver of statutory attorney's fees.[34]

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25. 461 U.S. at 424.

26. *Id.* at 429. *See also* Pennsylvania v. Delaware Valley Cit. Counsel for Clean Air, 106 S. Ct. 3088, 3095 (1986).

27. S. REP. No. 1011, *supra* note 16, at 2 ("[F]ee awards have proved to be an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important congressional policies which these laws contain."); 122 CONG. REC. No. S17052 (daily ed. Sept. 24, 1976) (Remarks of Sen. Kennedy)(Congress has authorized the provision of fees "in order to insure that the rights guaranteed by the laws are not lost through the inability of those who are supposed to benefit to obtain judicial enforcement of those rights.").

28. Shadis v. Beal, 685 F.2d at 829-830 (Holding that a contract provision between a state and a legal services corporation, prohibiting the attainment of fees, is invalid because it violated the public policy of the Fees Act to "encourage compliance with and enforcement of those [civil rights] laws."). *See also* Price v. Pelka, 690 F.2d 98, 101 (6th Cir. 1982); Sargeant v. Sharp, 579 F.2d 645, 648 (1st Cir. 1978); Regaldo v. Johnson, 79 F.R.D. 447, 451 (E.D. Ill. 1978).

29. *See* Committee on Professional and Judicial Ethics of the New York City Bar Association, Op. No. 82-80, 1 (1985) (The conditioning of settlement upon waiver of fees "had the effect of undercutting the policies of the civil rights statutes which provide for fees and that accordingly the demands were prejudicial to the administration of justice." *See also* District of Columbia Bar Legal Ethics Committee, Op. No. 147, 3-4, *reprinted in* 113 DAILY WASH. L. REP. 389 (1985).

30. Kraus, *supra* note 24 at 663.

31. *Evans*, 106 S. Ct. at 1539.

32. *Evans*, 106 S. Ct. at 1540.

33. The Court's dismissal of respondents' ethical argument is discussed *infra* notes 34-41 and accompanying text. Not within the scope of this Comment is the Court's holding that the Ninth Circuit misconstrued its authority under F. RULE CIV. P. 23(e) by invalidating the waiver and letting the rest of the agreement stand. A court does not have the authority to require parties to accept a settlement to which they have not agreed. A court may only accept the settlement, or reject it and give the parties leave to renegotiate or proceed to try the case. *Evans*, 106 S. Ct. at 1537.

34. *Evans*, 106 S. Ct. at 1538. ("The question this case presents, then, is whether the Fees Act requires a district court to disapprove a stipulation seeking to settle a civil rights class action under Rule 23 when the offered relief equals or exceeds the probable outcome at trial but is expressly conditioned on the waiver of statutory eligibility for attorney's fees.").

The "Ethical Dilemma" Argument

The Court first rejected the respondents' contention that the tendering of a favorable offer on the merits, conditioned on the waiver of fees, exploited counsel's ethical duty to his clients thereby creating an "ethical dilemma."[35] In general, ethical rules require that counsel act consistent with the best interest of his clients without regard to counsel's personal interests.[36] An attorney must also respect a client's judgment on whether or not to accept a settlement offer.[37] Accordingly, counsel argued that ethical considerations "forced" him to waive his fees and to accept the offer on behalf of his clients rather than risk a less favorable result at trial.[38]

Though recognizing the offer spawned a conflict between the class' interest in relief and counsel's interest in attorney's fees, the Court denied the existence of any ethical dilemma.[39] Noting there is no ethical duty to pursue statutory attorney's fees, the Court concluded there was no "ethical dilemma" as defined.[40] It concluded that any prohibition of simultaneous negotiations or conditioned waivers must be found, if at all, within the confines of the Fees Act.[41]

No prohibition within the Fees Act

The respondents argued the Fees Act itself prohibits a fee waiver obtained through coercion. They claimed the use of a "coercive waiver"[42] to avoid fees liability exploits counsel's ethical duty to his clients to the detriment of the goals of the Fees Act.[43] The Court, however, found that neither the Fees Act[44] nor its legislative history[45] support the claim that Congress intended to forbid fee waivers as a means of securing substantive relief.[46] Rather, the Court viewed the Fees Act as creating a statutory eligibility for attorney's fees as an additional remedy to aid in securing the vindication of civil rights violations.[47]

The Court noted the value of the fee waiver as a bargaining tool for both parties.[48] Defendants might employ a waiver request to minimize its liability while conceding to relief on the merits, and plaintiffs could forego

35. *Evans*, 106 S. Ct. at 1537-38.
36. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5, EC 5-1, 5-2, DR 5-101A (1980); MODEL RULES OF PROFESSIONAL CONDUCT Preamble, Rules 1.2(a), 1.7(b), 3.2 (1984).
37. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 to 7-9 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1984).
38. *See supra* note 7.
39. *Evans*, 106 S. Ct. at 1537-38.
40. *Id.*
41. *Id.*
42. *Id.* at 1538. *See supra* note 7, for respondent's definition of "coerced waiver."
43. *See supra* notes 36-37 and accompanying text. Respondents "coercive waiver" argument differs from its "ethical dilemma" argument. *See supra* notes 36-40 and accompanying text. The former entails an exploitation of ethical duties to the detriment of the Fees Act goals while the latter is purely ethical in nature.
44. *See supra* note 2.
45. For a complete legislative history see SOURCE BOOK, *supra* note 22.
46. *Evans*, 106 S. Ct. at 1538-40.
47. *Id.* at 1539-40.
48. *Evans*, 106 S. Ct. at 1539 n.20.

fees in order to obtain relief where success at trial appears unlikely.[49] Finally, the Court characterized the employment of fee waivers as being not "invariably inconsistent" with the Fees Act purpose of attracting competent counsel to protect the rights of citizens.[50]

In fact, the Court turned respondents' argument on its head in reasoning that a flat ban on the negotiated waiver would, at least in some instances, impede the furtherance of civil rights by discouraging settlement.[51] The Court relied heavily upon its decision in *Marek v. Chesney*[52] to support this proposition.

In *Marek*, the Court held that Federal Rule of Civil Procedure 68[53] governed attorney's fees incurred after the rejection of a settlement offer.[54] That rule states that, where relief obtained at judgment is less than that offered in settlement, a plaintiff is not entitled to fees incurred after the offer was rejected.[55] *Marek* held such a construction did not run afoul of the Fees Act purpose of ensuring access to the courts, but merely served as an incentive for attorneys to examine offers carefully.[56]

The Court, in *Evans*, agreed with the *Marek* Court's contention that Congress, in considering the Fees Act, contemplated that civil rights actions were to be treated the same as any other civil action with regard to settlement; that civil rights plaintiffs are not to be penalized for settling out of court.[57] In an explicitly economic analysis,[58] the *Evans* Court concluded

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49. *Id.* at 1539 n.20 (citing the concurring opinion of Judge Wald in Moore v. National Ass'n of Sec. Dealers, Inc., 762 F.2d 1093, 1112 (D.C. Cir. 1985).

50. *Id.* at 1540 n.22. The fact that Congress rejected a mandatory fee shifting version of the Fees Act supports the Court's finding that waivers are consistent with the present Act wherein fee shifting is left to the discretion of the court. *See* H. REP. NO. 1558, *supra* note 19, at 3, 5, 8. Nonetheless, a statute should not be construed so as to contradict its purpose. *See infra* notes 69 and 70 and accompanying text. *See also* Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395 (1950). Therein Llewelly states:

> [A statute's] language is [often] called upon to deal with circumstances utterly uncontemplated at the time of its passage. Here the quest is not properly for the sense originally intended by the statute, for the sense originally to be put into it, but rather for the sense which can be quarried out of it in the light of the new situation. Broad purposes can indeed reach far beyond the details known or knowable at the time of drafting . . . [T]he sound quest [to determine statutory policy] does not run primarily in terms of historical intent. It runs in terms of what the words can be made to bear, in making sense in the light of the unforeseen.

Id. at 400-01.

51. *Evans*, 106 S. Ct. at 1540.

52. 473 U.S. 1 (1985).

53. FED. R. CIV. P. 68, provides in pertinent part: "If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the *costs* incurred after the making of the offer." (emphasis added).

54. *Marek*, 473 U.S. at 11. The Court concluded that, because the Fees Act referred to attorney's fees as part of *costs*, attorney's fees were within scope of Rule 68 as it pertains to *costs* incurred after the making of an offer. *Id.* at 9.

55. *See supra* note 53.

56. *Marek*, 473 U.S. at 10.

57. *Evans*, 106 S. Ct. at 1540. The Court noted:

> There is no evidence, however, that Congress, in considering section 1988, had any thought that civil rights claims were to be on any different footing from other civil claims insofar as settlement is concerned. Indeed, Congress made clear its concern that civil rights plaintiffs not be penalized for 'helping to lessen docket congestion' by settling their cases out of court.

Id. (quoting *Marek*, 473 U.S. at 10).

that uncertainty regarding total liability for fees and merits would discourage defendants from settling.[59] Contending that statutory attorney's fees awards may be of great magnitude,[60] and cannot be fixed with reasonable certainty,[61] the Court reasoned that a defendant could not be indifferent to their exclusion from the bargaining process.[62] It concluded that the resulting inability on the part of the defendant to settle would likely disserve plaintiffs and unduly burden the courts.[63]

THE ROLE OF THE COURTS IN POLICING FEE WAIVERS IN CLASS ACTIONS

Holding that simultaneous negotiations and fee waivers are not per se prohibited, the Supreme Court left much discretion in the hands of the district courts. While the parties in *Evans* agreed that a state could not systematically insist upon waivers in all cases, the Court did not pass on that issue.[64] Rather, it merely held that the district courts are to make a determination of the reasonableness of class action settlements based upon the totality of circumstances peculiar to each case.[65]

Examining the district court approval of the settlement at issue in *Evans*, the Court found no abuse of discretion.[66] Accordingly it reinstated the district court's approval of the settlement package.[67]

CRITICAL ANALYSIS: THE FEES ACT, PUBLIC POLICY AND ETHICAL CONSIDERATIONS

The Fees Act: Public Policy

The Fees Act was undeniably enacted for the purpose of attracting competent counsel to aid in the enforcement of civil rights.[68] Well established authority dictates that a statute should not be construed so as to contradict its purpose.[69] Accordingly, the courts have insisted the Fees Act be

58. *Evans*, 106 S. Ct. at 1540-41. The Court stated that defendants would not likely settle "unless the cost of the predicted judgment, discounted by its probability, plus the transaction costs of further litigation, are greater than the cost of the settlement package." *Id.* at 1541.

59. *Id.* The Court further reasoned plaintiffs would be discouraged from settling where fees are excluded from negotiation because defendants would make lesser offers on the merits to provide a cushion against yet undetermined fees. *Id.* at 1541 n.23.

60. *Id.* at 1541 n.24.

61. *Id.* at 1542 (quoting from *Hensley*, 461 U.S. at 436)("there is no precise rule or formula for determining attorney's fees. . . .").

62. *Id.* at 1541 n.23.

63. *Id.* at 1542.

64. *Id.* at 1543-44.

65. *Id.* at 1545 n.35. The Court made reference to the process of determining the reasonableness of a settlement agreement: "[R]easonableness can only be determined by looking at the strength of the plaintiffs case, the stage at which the settlement is effective, the substantiality of the relief obtained on the merits, and the explanations of parties as to why they did what they did." *Id.* at 23 n.35 (quoting *Moore*, 763 F.2d at 1113 (Wald, J., concurring). The Court also notes that the effect of a particular waiver upon the Fees Act policies is to be considered in determining the reasonableness of a settlement containing a fee waiver. *Id.* at 23.

66. *Id.* at 1545.

67. *Id.*

68. *See supra* notes 22-30 and accompanying text.

69. *See* U.S. v. Campos-Serrano, 404 U.S. 293, 298 (1971). *See also* Llewellyn, *supra* note 50, at 400-01.

liberally construed to further the public policy of encouraging the enforcement of civil rights.[70]

In *Evans*, the United States Supreme Court found conditional waivers and simultaneous negotiations to be consistent, at least in some instances, with the goals of the Fees Act.[71] The Court characterized the availability of fees as merely an additional remedy to vindicate civil rights violations.[72] Legislative history, however, demonstrates that Congress intended fees to occupy a preeminent position in the enforcement of civil rights.[73]

The Court also stated that prohibiting conditional waivers and simultaneous negotiations would, in some instances, undercut the vindication of civil rights by precluding settlement. It reasoned that where a defendant was uncertain of his total liability he would be reluctant to settle.[74] As Justice Brennan stated in his dissenting opinion, much of a defendant's uncertainty could be alleviated by permitting simultaneous negotiation of fees and merits, but prohibiting the waiver of fees.[75] Justice Brennan argued the parties could agree upon a reasonable fee subject to court approval.[76] Alternatively, a plaintiff could make available to the defendant an accounting of the time expended in prosecuting the claim so the defendant could estimate his fees liability and make an offer encompassing his total liability.[77]

Furthermore, the Court's conclusion that a ban on negotiated waivers would work to the detriment of the goals of the Fees Act is not supported by the legislative history.[78] In fact, it would seem to support the opposite conclusion—a failure to award fees upon ratification of a consent decree would "penalize" plaintiffs for settling out of court.[79]

Even if a ban on coerced fee waivers would preclude settlement in some cases, the Fees Act would support such a ban. Though attorneys may be committed to the vindication of civil rights, they are nonetheless entrepre-

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70. *See supra* note 21.

71. *Evans*, 106 S. Ct. at 1540.

72. *Id.* at 1539-40.

73. S. REP. No. 1011, 94th Cong., 2nd Sess. 5 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5908, 5913 ("... fees awards are *essential* if the Federal [civil rights] statutes ... are to be fully enforced ... fee awards are an *integral* part of the remedies necessary to obtain such compliance.")(emphasis added).

74. *See supra* notes 51-63 and accompanying text.

75. *Evans*, 106 S. Ct. at 1555-26 n.17 (Brennan, J., dissenting).

76. *Id.*

77. In *Hensley v. Eckerhart*, the Court discussed the factors employed in determining a reasonable fee. It concluded the most important factors were reasonable hours expended and the prevailing party's degree of success, but added a court could consider other factors as enumerated in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974). *Hensley*, 461 U.S. at 434 n.9. In Marek v. Chesney, 473 U.S. 1 (1985), the Court reasoned that a plaintiff could ascertain the costs, including attorney's fees, accrued up to the time a defendant made a settlement offer. *Id.* at 7. Therefore, a defendant should be able to reasonably ascertain its fees liability when allowed access to plaintiff's records and thus dispel much of the uncertainty as to his total liability.

78. The legislative history is set out at *supra* notes 22-29 and accompanying text.

79. H. REP. No. 1558, 94th Cong., 2nd Sess. 7 (1976)("If the litigation terminates by consent decree, for example, it would be proper to award counsel fees.... A 'prevailing party' should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion."). *Id.* (citations omitted). The Court, in *Evans*, curiously cites a portion of this passage to support negotiated fee waivers. *Evans*, 106 S. Ct. at 1540.

neurs and would seek to avoid activities lacking economic rewards.[80] Because coerced waivers would deprive counsel of the fruits of their labor, it seems academic that such waivers would have a chilling effect on the civil rights bar. This result blatantly contravenes the public policy embodied within the Fees Act.[81]

Thus, the debate surrounding negotiated waivers encompasses a conflict between the public policy favoring settlement[82] and that favoring the vindication of civil rights. Given the unequivocal concern of Congress for ensuring that civil rights victims have effective access to the courts,[83] that policy should prevail over one favoring settlement within the context of the Fees Act.[84] The employment of coercive waivers in the negotiation process should be banned as being against public policy.[85]

Ethical Considerations Bearing on Conditional Waivers

Courts,[86] commentators,[87] and state bar organizations[88] have all recog-

80. Wolfram, *The Second Set of Players: Lawyers, Fee Shifting, and the Limits of Professional Discipline*, 47 LAW & CONTEMP. PROBS. 293, 295 (1984).

81. Lazar v. Pierce, 757 F.2d 435, 438 (1st Cir. 1985)(holding counsel may *elect* to waive fees, but it is contrary to the goals of the Fees Act for defendant to require a waiver). "If counsel can foresee themselves being euchrued out of their fees, even though successful, the Congressional purpose will, pro tanto, be frustrated." *Id.* at 438. *See also* Kraus, *supra* note 24, at 633-38.

82. *See supra* notes 51-63 and accompanying text.

83. *See supra* notes 22-30 and accompanying text.

84. The Court's objective of encouraging settlement would not be defeated if negotiated waivers are prohibited. In Marek v. Chesney, 473 U.S. 1 (1985), the Court concluded fees under the Fees Act were part of the costs subject to the strictures of Rule 68. *Id.* at 9. Therefore, plaintiffs will be encouraged to accept fair and reasonable settlement offers. *Id.* at 10. *See supra* notes 52-56 and accompanying text. Defendants will be encouraged to make reasonable offers on the merits rather that risk the refusal of the plaintiffs to settle and the possibility of increased fees liability. In making such offers, defendants should be able to reasonably ascertain their fees liability when given access to the plaintiff's records. *See supra* note 77 and accompanying text. *See also* Kraus, *supra* note 24, at 641 (only the closest cases will not settle for want of uncertainty over fees liability).

85. *See* RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981). The Restatement provides:

(1) A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.

(2) In weighing the interest in the enforcement of a term, account is taken of
  (a) the parties' justified expectations,
  (b) any forfeiture that would result if enforcement were denied, and
  (c) any special public interest in the enforcement of a particular term.

(3) In weighing a public policy against enforcement of a term, account is taken of
  (a) the strength of that policy as manifested by legislation or judicial decisions,
  (b) the likelihood that a refusal to enforce will further that policy,
  (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and,
  (d) the directness of the connection between that misconduct and the term.

See also RESTATEMENT (SECOND) OF CONTRACTS § 179 (1981). It provides in part: "A public policy against the enforcement of promises or other terms may be derived by the court from (a) legislation relevant to such a policy, or. . . ."

See also Shadis v. Beal, 685 F.2d 824, 833 (3d Cir. 1982)(holding a provision in a contract, for funding between a state and a legal services corporation, which prohibits the pursuit of fees by the corporation, is void as against the public policy embodied in the Fees Act).

86. White v. New Hampshire Dep't of Employment Security, 455 U.S. 445, 453-54 & n.15 (1985); *Moore*, 762 F.2d at 1103; *Lazar*, 757 F.2d at 437-38; *Prandini*, 557 F.2d at 1020-21; Mendoza v. U.S., 623 F.2d 1338, 1352-53 (9th Cir. 1980).

87. Levin, *Practical, Ethical and Legal Considerations Involved in the Settlement of Cases in which Statutory Attorney's Fees are Authorized*, 14 CLEARINGHOUSE REV. 515 (1980); Calhoun,

nized potential conflicts between the pecuniary interests of counsel and plaintiffs' relief where merits and statutory attorney's fees are simultaneously negotiated. Conflicts typically arise in either the waiver scenario,[89] wherein limited or no fees are made available to counsel, or where a "sweetheart contract"[90] provides excessive fees to counsel to the dimunition of relief on the merits. The waiver and sweetheart scenarios, however, pose different problems for the parties.[91]

An attorney's duty to serve his clients best interests may prohibit him from advising the rejection of a favorable offer in a waiver situation.[92] Because plaintiffs have no real interest in the statutory fee and are not concerned with its forfeiture,[93] the defendant may compel an attorney to forego his fee and sustain economic injury.[94] Faced with the eventuality of fee waivers and the resulting economic loss, attorneys may become reluctant to represent civil rights claims to the detriment of the policies underlying the Fees Act.[95] In accordance with an attorney's ethical duty to further the administration of justice, defense counsel should be precluded from employing coercive waivers because their use could serve to reduce the number of attorneys providing effective access to the courts.[96]

In a "sweetheart contract," simultaneous negotiation presents conditions under which a defendant might induce plaintiff's counsel to advise the plaintiff to accept less relief than he is entitled to by offering counsel an excessive fee.[97] At least two courts have held that ethical considerations

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Attorney-Client Conflicts of Interest and the Concept of Non-Negotiable Fees Awards under 42 U.S.C. § 1988, 55 U. COLO. L. REV. 341 (1984); Kraus, *supra* note 24.

88. At least seven bar organizations have issued opinions on simultaneous negotiations and waiver. *See* Committee on Professional and Judicial Ethics of the New York City Bar Association, Op. No. 82-80, 1 (1985)(defense counsel may not demand waiver or attempt to simultaneously negotiate fees and merits); District of Columbia Bar Legal Ethics Committee, Op. No. 147, *reprinted in* 113 DAILY WASH. L. REP. 389 (1985)(waiver conditions are unethical, but defendant may make lump-sum offers); Committee on Ethics of the Maryland State Bar., Op. No. 85-74 (1985)(offers conditioned upon waiver are unethical); Grievance Commission of the Board of Overseers of the Bar of Maine, Op. No. 17 (1981)(plaintiff's attorneys are required to abstain from any simultaneous negotiation).

Compare Final Subcommittee on Attorney's Fees of the Judicial Conference of the U.S. Court of Appeals for the District of Columbia Circuit, *reprinted in* 113 BAR. REP. 4 (simultaneous negotiations are permissible and waivers not per se unethical); Michigan State Bar Committee on Professional and Judicial Ethics, Op. No. C-235 (1985)(simultaneous negotiations are permissible but any perceived conflict may be reported to the court); State Bar of Georgia, Op. No. 39, *reprinted in* 10 GA. BAR NEWS 5 (1984)(simultaneous negotiations are permissible).

89. The waiver scenario is typified by *Evans*, 106 S. Ct. at 1534.

90. *Prandini*, 557 F.2d at 1021.

91. *See* Kraus, *supra* note 24, at 624-25.

92. *See supra* notes 36-37 and accompanying text.

93. Lipscomb v. Wise, 643 F.2d 319, 320 (5th Cir. 1981).

94. *See* Committee on Professional and Judicial Ethics of the New York City Bar Association, Op. No. 80-94, *reprinted in* 36 RECORD OF NEW YORK CITY BAR ASSOCIATION 507 (1981). The Opinion states:

> Defense counsel are thus in a uniquely favorable position when they condition settlement on waiver of the statutory fee: they make a demand for a benefit which the plaintiffs's lawyer cannot resist as a matter of ethics and which the plaintiff will not resist due to lack of interest.

Id.

95. *See supra* notes 79-80 and accompanying text.

96. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(5), EC 1-1, 2-1, 2-25, 8-3 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Preamble, Rule 8.4 (1984).

97. Wolframn, *supra* note 80, at 300.

alone, without reference to the goals of the Fees Act, preclude simultaneous negotiations and thus coercive waiver.[98] They found the potential conflict of interest between plaintiffs and their counsel to be so acute that bifurcated negotiations were necessary where statutory attorney's fees were available.[99]

"Sweetheart contracts" also contravene the goals of the Fees Act.[100] Thus counsel for both plaintiffs and defendants would be ethically prohibited from entering into them because such contracts would subvert the administration of justice.[101]

However, ethical rules regulate only the conduct of attorneys, not that of laypersons.[102] Thus, individual parties to a civil rights suit could engage in the very same conduct prohibited to counsel by ethical rules.[103] To the extent parties would act independent of their attorneys and come to agreements waiving fees, the goals of the Fees Act would be subverted. In order to ensure all parties are forbidden from negotiating waivers, such a prohibition should rest upon the foundation of the public policy embodied in the Fees Act.[104]

SCOPE OF THE DECISION

In *Evans*, the Court did not hold that all waivers are permissible, only that they are not per se impermissible.[105] The scope of the decision extends far beyond the confines of the Fees Act. The courts have consistently held that an interpretation of one fees-authorizing statute is applicable to all similarily worded fees statutes.[106] As a result, settlements conditioned upon waiver of fees will be permitted under a host of statutes resembling the Fees Act.[107]

There is some question, however, whether *Evans* will have a substantial impact in practice. Given the broad discretion afforded district courts to ascertain the reasonableness of settlement offers in class actions,[108] it is possible the effect of *Evans* will be minimal. Matters left to the discretion of the lower courts are governed by the "abuse of discretion" standard upon appel-

98. *Prandini*, 557 F.2d at 1021 (holding courts should insist upon a bifurcated settlement of statutory attorney's fees and merits); *Mendoza*, 623 F.2d at 1353 (strongly discouraging simultaneous negotiations but approving settlement where circumstances indicate the potential for impropriety has been neutralized).

99. *Prandini*, 557 F.2d at 1021; *Mendoza*, 623 F.2d at 1353.

100. *See* Kraus, *supra* note 24, at 624.

101. *See supra* note 96.

102. *See* Wolfram, *supra* note 80, at 305-06.

103. *Id.*

104. The courts would be obliged not to ratify any contract which was against the public policy embodied in the Fees Act. *See supra* notes 83-85 and accompanying text.

105. *Evans*, 106 S. Ct. at 1543.

106. The courts have applied interpretations of similarly worded fees statutes interchangeably. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975); Northcross v. Board of Education of Memphis City Schools, 412 U.S. 427, 428 (1983); Hanrahan v. Hampton, 446 U.S. 754, 758 n.4 (1980). *See also* S. REP. NO. 1011, *supra* note 16, at 4.

107. *See e.g.*, Securities Act of 1933, 15 U.S.C. § 77k(e)(1981); Copyright Act, 17 U.S.C. § 911(f)(Supp. 1986); Title II, Civil Rights Act of 1964, § 204(b), 42 U.S.C. § 2000a-3(b)(1981); Title VII, Civil Rights Act of 1964, § 706(k), 42 U.S.C. § 2000e-5(k)(1981); Fair Housing Act of 1968, 42 U.S.C. § 3612(2)(1981).

108. *Evans*, 106 S. Ct. at 1545.

late review.[109] Such abuse is found only where it is deemed no reasonable person could rule as the lower court did.[110]

Thus, courts formerly prohibiting waiver of fees may conclude a favorable offer on the merits conditioned upon waiver of fees does not constitute an adequate *quid pro quo*[111] and thus disapprove the settlement agreement. A party adverse to the court's judgment would be constrained to demonstrate that a reasonable person examining all factors relevant to the reasonableness of a settlement agreement could not have agreed with the court.[112] Given this onerous standard of review, it is possible that the pre-*Evans* dichotomy will survive.[113]

Should it be the case that the courts are amenable to approving negotiated waivers, attorneys will not likely be able to insulate themselves from the economic loss associated with waivers by means other than simply avoiding civil rights claims.[114] Counsel could not require clients to reject settlement offers which exclude reasonable fees because an agreement which restricts clients' rights to settle would likely be held void as against public policy.[115]

However, state and local bar organizations could come to the aid of attorneys by amending or interpreting their ethical codes to prohibit the employment of negotiated waivers.[116] Similarly, given Congress' swift response to *Alyeska*,[117] it might accept the Supreme Court invitation to legislate in this area and amend the Fees Act to prohibit such waivers.[118]

CONCLUSION

In *Evans v. Jeff D.*, the United States Supreme Court held that simultaneous negotiation of fees and merits, and the conditioning of settlement offers upon waiver of fees, is not per se impermissible within the context of the Fees Act. However, the Court left ample discretion in the hands of the district courts. Subsequent cases will be decided on an ad hoc basis and will be of little precedential value.

The application of the *Evans* rule will resolve the question whether coerced waivers will have a chilling effect upon the availability of counsel to civil rights plaintiffs. Should experience prove that coerced waivers have such a chilling effect upon the civil rights bar, the Court may have to reas-

109. Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 (1956).

110. Delno v. Market St. Ry. Co., 124 F.2d 965, 967 (9th Cir. 1942)("Discretion is abused when arbitrary, fanciful or unreasonable, which means that if reasonable men could differ regarding the propriety of action taken," the action is sustained).

111. *Evans*, 106 S. Ct. at 1544.

112. *See supra* note 65 and accompanying text.

113. *See supra* note 5 for a summation of the pre-*Evans* dichotomy.

114. *See* Comment, *Settlement Offers Conditioned Upon Waiver of Attorneys' Fees: Policy, Legal, and Ethical Considerations*, 131 U. PA. L. REV. 793, 815 (1983), Wolfram, *supra* note 80, at 295.

115. Barnes v. Quigley, 49 A.2d 467, 468 (1946); Krause v. Hartford Accident & Indem. Co., 49 N.W.2d 41, 43 (1951).

116. *Evans*, 106 S. Ct. at 1557 (Brennan, J., dissenting)("The Court's decision in no way limits the power of state and local bar associations to regulate the ethical conduct of lawyers.") *See supra* note 89 for bar opinions to date.

117. *See supra* note 16 and accompanying text.

118. *Evans*, 106 S. Ct. at 1545.

sess its position or, in the alternative, Congress may save the courts the trouble by amending the Fees Act to prohibit fee waivers.

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