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FEDERAL PRACTICE AND PROCEDURE

This provides a practical overview of the Tenth Circuit's decisions involving federal practice and procedure issues which arose during the past year. Consequently, the following discussion presents brief summaries of cases considering issues involving the Federal Rules of Civil Procedure[1] and related areas.[2] One case, *Basso v. Utah Power & Light Co.*,[3] dealing with a judge's power to tax costs against a prevailing party, is discussed in greater depth because it reveals the Tenth Circuit's willingness to exercise its inherent equitable powers.

I. FEDERAL RULES OF CIVIL PROCEDURE

Applying rule 8(a) to a counterclaim,[4] the court reaffirmed its ability to construe pleadings liberally[5] by allowing the counterclaim to stand even though the party failed to specify the theory of law under which he was proceeding.[6] In two cases involving rule 19(b),[7] the court of appeals affirmed the dismissals of the actions by the trial court for failure to join an indispensable party.[8] In doing so, the court carefully considered each of the factors identified in rule 19(b) without giving greater weight to one factor over another.[9]

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[1] All citations to rules in this section are to the FEDERAL RULES OF CIVIL PROCEDURE unless otherwise indicated.

[2] A number of cases involving jurisdiction based on diversity under 28 U.S.C. § 1332 (1970), while involving procedural issues, are omitted from discussion because they primarily involve applications of local law.

[3] 496 F.2d 76 (10th Cir. 1974).

[4] Misco Leasing, Inc. v. Keller, 490 F.2d 545 (10th Cir. 1974).

[5] *See, e.g.*, Dearman v. Woodson, 429 F.2d 1288 (10th Cir. 1970); United States v. Missouri-Kan.-Tex. R.R., 273 F.2d 474 (10th Cir. 1959); Knox v. First Security Bank, 196 F.2d 984 (10th Cir. 1946); Clyde v. Broderick, 144 F.2d 348 (10th Cir. 1944).

[6] In so holding, the Tenth Circuit followed the general purpose of the rule to permit claims to be stated in general terms. *See* 2A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 8.13 (2d rev. ed. 1974) [hereinafter cited as J. MOORE].

[7] Tewa Tesuque v. Morton, 498 F.2d 240 (10th Cir. 1974); Glenny v. American Metal Climax, Inc., 494 F.2d 651 (10th Cir. 1974).

[8] FED. R. CIV. P. 19(b) says, in part:

> If a person . . . cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. . . .

[9] The factors identified include prejudice to the absent party if a judgment is given in his absence, the possibility of shaping relief to protect the absent party, the adequacy of judgment given if the party is absent, and whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. *Id.* In *Glenny*, the court states that "[r]ule 19(b) does not state what weight is to be given to each factor [citation omitted],

In *In re Four Seasons Securities Laws Litigation v. Bank of America*,[10] the Tenth Circuit considered what a member of a class involved in a class action suit must do in order to opt out of the action. The Bank of America, as trustee for a member of the class, received notice of a settlement of the class action that stated the recipient of the notice would be bound by the judgment unless it elected to opt out. The Bank replied to this notice in a letter stating its "concern as to whether it could participate in the class recovery as a member of the class and also retain" a separate cause of action in a state court.[11] To do this, the Bank sent a "purported proof of claim" which was modified to allow it to pursue its state action by the addition of a proviso stating that if the proof of claim were not "accepted, the Bank would regard itself as having opted out of the class."[12] The trial court held that in this letter the "Bank effectively elected to remove itself from the class and . . . was not entitled to share in the settlement."[13] The court of appeals affirmed,[14] holding that

> a reasonable indication of a desire to opt out ought to be sufficient. . . .[F]lexibility is desirable in determining what constitutes an expression of a class member's desire to exclude himself and any written evidence of it ought to be sufficient.[15]

Therefore, despite the good faith of the Bank in its desire to protect both its class action and state claims, it effectively opted out and could not participate in the settlement.[16]

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and thus we must determine the importance of each factor on the facts of each particular case and in light of equitable considerations." 494 F.2d at 653, *citing* 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1608 (1972) [hereinafter cited as C. WRIGHT].

[10] 493 F.2d 1288 (10th Cir. 1974).

[11] *Id.* at 1290.

[12] *Id.*

[13] *Id.* at 1289.

[14] *Id.* at 1292.

[15] *Id.* at 1291, *citing* Bonner v. Texas City Indep. School Dist., 305 F. Supp. 600 (S.D. Tex. 1969); 7A C. WRIGHT § 1287.

[16] 493 F.2d at 1290. The court also considered whether FED. R. CIV. P. 6(b), which allows the court to "order the period enlarged," permitted the enlargement of the time in which the Bank could effectively opt out of the class action. The court held that the "facts support a finding of good faith on the part of the Bank. There is no indication that the tardiness [in opting out] was part of a strategy to gain a tactical advantage. . . . Moreover, there was no prejudice suffered from the enlargement of time." 493 F.2d at 1290-91, *citing* Coady v. Aquadilla Terminal, Inc., 456 F.2d 677 (1st Cir. 1972); 4 C. WRIGHT § 1165.

The court also considered the question of enlargement of time that arose in Gooch v. Skelly Oil Co., 493 F.2d 366 (10th Cir.), *cert. denied*, 95 S. Ct. 311 (1974). In *Gooch*, cocounsel failed to communicate with each other as to when an appeal should be filed and they attempted, under FED. R. APP. P. 4(a), to have the district court extend the time for appeal on the basis of excusable neglect. Relying on dictum in Cohen v. Plateau Natural

In *United States v. 25.02 Acres of Land*,[17] the Tenth Circuit considered the quashing of that portion of a subpoena duces tecum[18] which demanded production of appraisals by the Government's expert witness made for private owners of property in the vicinity of the property involved in a condemnation action. In holding that the denial of this discovery was not an abuse of discretion, the court rejected the appellants' arguments based on rules 26 and 45(b)[19] and stated that the "rule of reason" favors the broad power of the trial court to regulate discovery.[20]

The Tenth Circuit found no abuse of discretion in the dismissal of an action on the basis of failure to prosecute in *SEC v. Power Resources Corp.*[21] The court stated that the procedural history of each case must be examined in order to determine whether dismissal is proper, and this statement is compatible with the main line of decisions in other jurisdictions.[22] In *Brennan v. Sine*,[23] where dismissal under rule 41(b) was caused by the Secretary of Labor's inaction over an 18-month period, the court held that the dismissal was justified and within the discretion of the trial court.[24]

Citing its own precedents,[25] the Tenth Circuit continued in line with the settled application of rule 50 in *Symons v. Mueller*

Gas Co., 303 F.2d 273 (10th Cir. 1962) as the basis for its holding, the Tenth Circuit held that this lack of communication did not create the unique or extraordinary circumstances required to provide excusable neglect necessary for an extension of time under FED. R. APP. P. 4(a).

[17] 495 F.2d 1398 (10th Cir. 1974).

[18] *See* FED. R. CIV. P. 30(b)(1), (5).

[19] 495 F.2d at 1400.

[20] *See, e.g.*, Benning v. Phelps, 249 F.2d 47 (2d Cir. 1957); Doglow v. Anderson, 53 F.R.D. 661 (E.D.N.Y. 1971); Essex Wire Corp. v. Eastern Elec. Sales Co., 48 F.R.D. 308 (E.D. Pa. 1969); United States v. Kohler, 9 F.R.D. 289 (E.D. Pa. 1949).

[21] 495 F.2d 297 (10th Cir. 1974).

[22] *See* 5 J. MOORE ¶ 41.11[2].

[23] 495 F.2d 875 (10th Cir. 1974).

[24] Judge Holloway dissented from this conclusion, saying that "the dismissal of these actions with prejudice was an abuse of discretion when all circumstances are considered, including the possible effect on rights of employees allegedly under the Fair Labor Standards Act." *Id.* at 877-78 (Holloway, J., dissenting). The circumstances Judge Holloway considered were the difficulties in obtaining discovery and a pretrial hearing considering whether the defendants in *Brennan* were entitled to assert their privilege against self-incrimination with respect to disclosure of information. In Judge Holloway's opinion, "dismissals with prejudice [are] . . . . [a] harsh sanction, reserved for extreme cases." *Id.* at 879, *citing* Meeker v. Rizley, 324 F.2d 269 (10th Cir. 1963).

[25] Taylor v. National Trailer Convoy, Inc., 433 F.2d 569, 571 (10th Cir. 1970); Wilkins v. Hogan, 425 F.2d 1022, 1024 (10th Cir. 1970); Sweargin v. Sears, Roebuck & Co., 376 F.2d 637, 639 (10th Cir. 1969).

Co.[26] by holding that a grant of directed verdict is proper only when there is no reasonable basis for the conclusion drawn by the jury. In *United States v. Fisher-Otis Co.*,[27] the court found that there were no grounds for a claim of deprivation of due process when the trial court granted summary judgment without an oral hearing.[28] Although rule 58 requires that every judgment be set forth on a separate document,[29] the Tenth Circuit held in *United States v. Clearfield State Bank*[30] that an order granting summary judgment is in itself a separate document when there is no opinion or memorandum which provides any other basis for the entry of judgment.

II. COLLATERAL ESTOPPEL

A. *Finnerman v. McCormick*, 499 F.2d 212 (10th Cir. 1974)

In *Finnerman v. McCormick*,[31] the plaintiffs, Gerald Finnerman and the widow and son of Robert Sparr, sought damages for the wrongful death and injury resulting from the crash of a plane operated by deceased defendant McCormick and owned by his permanent employer, Sunset Drive-In Theatre, the owner of the airplane. The present action was held in abeyance until the claim filed by McCormick's widow before the Colorado Division of Labor was settled. That claim asserted that McCormick was employed at the time of his death by Finnerman's and Sparr's employer, Aubrey Schenck Enterprises, Inc. ("Schenck"), and that Ms. McCormick was entitled to workmen's compensation benefits from Schenck.[32] The referee found in favor of Ms. McCormick and the award of workmen's compensation was upheld by the Colorado Court of Appeals in an unpublished opinion. Based upon the Industrial Commission's determination that McCormick was an employee of Schenck and that plaintiffs and McCormick were coemployees, the federal district court granted a motion for summary judgment against the plaintiffs.[33]

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[26] 493 F.2d 972 (10th Cir. 1974).

[27] 496 F.2d 1146 (10th Cir. 1974). For other Tenth Circuit cases interpreting FED. R. CIV. P. 56, see O'Bryan v. Chandler, 496 F.2d 403 (10th Cir. 1974), *cert. denied*, 95 S. Ct. 245 (1974); Brantner v. Poole 487 F.2d 1326 (10th Cir. 1973).

[28] 496 F.2d at 1149.

[29] FED. R. CIV. P. 58 states that "[e]very judgment shall be set forth on a separate document."

[30] 497 F.2d 356 (10th Cir. 1974).

[31] 499 F.2d 212 (10th Cir.), *cert. denied*, 43 U.S.L.W. 3330 (U.S. Dec. 10, 1974) (No. 74-355).

[32] The claim was brought under the Workmen's Compensation Act, COLO. REV. STAT. ANN. §§ 81-1-1 to -17-7 (1963).

[33] 499 F.2d at 212.

On appeal, the Tenth Circuit reversed and remanded, holding that the finding of employment by the Industrial Commision did not bar the plaintiffs' claim.[34] The court emphasized two points. First, unlike the common law interpretation of "employee," the broad interpretation given to the term "employee" under the Workmen's Compensation Act creates a presumption favoring the finding of an employee relationship.[35] The court argued that this definitional distinction was such as to place the issue of McCormick's employment status in different contexts in the two actions. Thus, the plaintiffs were not collaterally estopped from litigating the employment issue in the federal courts.[36]

Second, the court held that a finding of temporary, special employment of McCormick by Schenck did not preclude a finding of vicarious liability on the part of the primary employer under the agency principle that one is able to serve two masters when the temporary service of one does not involve an abandonment of service to the other.[37] Collateral estoppel is not applicable when a plaintiff is seeking to establish "a positive and not inconsistent thesis," such as the one involved in *McCormick*.[38]

B. *Brown v. DeLayo*, 498 F.2d 1173 (10th Cir. 1974)

In *Brown v. DeLayo*,[39] plaintiff brought an action under sections 1981 and 1983 of the Civil Rights Act[40] asserting a denial of due process guaranteed by the fourteenth amendment as a result of an improper termination of her employment as a school teacher. Holding that the due process issue had been litigated to

[34] *Id.* at 213. The district court based its action on COLO. REV. STAT. ANN. § 81-1-4 (Supp. 1967) which prevents coemployees from suing one another for injuries sustained while jointly employed if they have elected to receive benefits under the Workmen's Compensation Act.

[35] COLO. REV. STAT. ANN. § 81-2-7(2) (1963) defines the term "employee" to include

> [e]very person in the service of any person, association of persons, firm, private corporation, including any public service corporation, personal representative, assignee, trustee, or receiver, under any contract of hire, express or implied . . . but not including any persons who are expressly excluded from this chapter [81] or whose employment is but casual and not in the usual course of trade, business, profession or occupation of his employer. . . .

[36] 499 F.2d at 214, *citing* Embry v. Equitable Life Assurance Soc'y, 451 F.2d 472 (10th Cir. 1971), *cert. denied*, 405 U.S. 1041 (1972); Young & Co. v. Shea, 397 F.2d 185 (5th Cir. 1968), *cert. denied*, 395 U.S. 920 (1969); 1B J. MOORE ¶ 0.443[2].

[37] 3 AM. JUR. 2d *Agency* §§ 234-35 (1962); 2A C.J.S. *Agency* §§ 278-79 (1972).

[38] 499 F.2d at 214.

[39] 498 F.2d 1173 (10th Cir. 1974).

[40] 42 U.S.C. §§ 1981, 1983 (1970) [hereinafter cited as the Civil Rights Act].

an adverse conclusion in the state courts, the federal district court dismissed the complaint as res judicata. The court of appeals affirmed the dismissal on the basis of collateral estoppel.

Although proceeding under the Civil Rights Act appeared to give a new context to the action, the court held that the Civil Rights Act was "not a vehicle for collateral attack on a final state court judgment."[41] The adjudication of a federal constitutional right in a state court precludes relitigation of the identical right in a federal court. The only recourse from an adverse state decision involving a federal right is certiorari review by the Supreme Court of the United States.[42]

Plaintiff's additional argument that a change in defendants from the state to the federal action barred application of estoppel was found to be without merit. Collateral estoppel in federal courts is "not grounded upon the 'mechanical requirements of mutuality,' "[43] but on "whether a litigant has had a 'full and fair opportunity for judicial resolution' of the issue."[44]

III. THREE-JUDGE COURTS

Doe v. Rampton, 497 F.2d 1032 (10th Cir. 1974)

Doe v. Rampton[45] involved a challenge to the State of Utah's regulations requiring welfare recipients to aid in the location of absent parents as a requisite to receiving Aid to Families with Dependent Children.[46] The plaintiffs alleged that the State regulations were in conflict with those of the Federal Government and were therefore void under the supremacy clause of the U.S. Constitution. The district court, on cross-motions for summary judgment, held that the State regulations were contrary to the federal statutes and, as a result, void.

On appeal, the Tenth Circuit Court of Appeals affirmed and considered whether the district court followed the proper procedure in deciding the statutory question over which it had pendent jurisdiction.[47] To resolve this procedural issue, the Tenth Circuit

[41] 498 F.2d at 1175.

[42] Atlantic Coastline R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281 (1970). *See also* S. CT. R.P. 23(1)(f).

[43] 498 F.2d at 1175-76, *quoting* P I Enterprises v. Cataldo, 457 F.2d 1012, 1015 (1st Cir. 1972).

[44] 498 F.2d at 1176, *quoting* Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971).

[45] 497 F.2d 1032 (10th Cir. 1974).

[46] 42 U.S.C. §§ 601-43 (1970).

[47] 497 F.2d at 1036.

relied on the recent Supreme Court decision of *Hagans v. Lavine*.[48] *Hagans* involved a challenge to New York welfare regulations by recipients of public assistance. The district court enjoined the implementation of the regulations on the grounds that the regulations violated the equal protection clause and conflicted with federal regulations. The Court of Appeals for the Second Circuit reversed and the Supreme Court, in affirming the decision of the district court and reversing that of the court of appeals, held that the claim was sufficiently substantial to give the district court jurisdiction.[49] The district court, therefore, could decide the statutory question of the validity of the New York statute without convening a three-judge court.[50]

In applying *Hagans*, the Tenth Circuit noted that the "allegations of the constitutional issues in [*Doe v. Rampton*] are much more substantial than" those in *Hagans* and the district court properly exercised its pendent jurisdiction.[51] The correct statutory interpretation by the district court "obviated the need to determine the constitutional challenges as well as the need to convene a three-judge court" under *Hagans*.[52]

IV. Taxation of Costs, Attorney's Fees, and Attorney's Expenses Against Successful Party as a Penalty

Basso v. Utah Power & Light Co., 495 F.2d 906 (10th Cir. 1974)

The general rule in American courts has been to deny the recovery of attorney's fees, either as costs[1] or as damages,[2] in the absence of a statute or enforceable contract providing for them. The rationale most frequently expressed in support of this rule has been that

> one should not be penalized for merely defending or prosecuting a

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[48] 415 U.S. 528 (1974).

[49] The Court said that 28 U.S.C. § 1343(3), which provides redress for the deprivation of civil rights under the color of state law, confers jurisdiction upon the federal district courts only "if [the claim is] of sufficient substance to support federal jurisdiction." 415 U.S. at 536. For criticism of the substantiality doctrine, see Rosado v. Wyman, 397 U.S. 397 (1969); Bell v. Hood, 327 U.S. 678 (1946).

[50] For a discussion of when a three-judge court must be convened in state complaints under 28 U.S.C. § 2281 (1970), see 7 J. Moore ¶ 65.16 n.16.

[51] 497 F.2d at 1036.

[52] *Id.* In the only other court of appeals' case interpreting this aspect of *Hagans*, a similar result was reached. In Mobil Oil Corp. v. Kelley, 493 F.2d 784 (5th Cir.), *cert. denied*, 95 S.Ct. 498 (1974), the Fifth Circuit did not require a three-judge court and allowed the district court to exercise its pendent jurisdiction.

[1] Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967).

[2] Day v. Woodworth, 19 U.S. (13 How.) 534 (1851); Arcambel v. Wiseman, 1 U.S. (3 Dall.) 234 (1796).

> lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included fees of their opponent's counsel.[3]

This rule has been traditionally subject to the qualification that the federal courts have discretion to allow attorney's fees in suits in equity because of the ability of the equity courts to fashion the remedy to meet the wrong.[4]

In recent years, the Supreme Court has recognized two additional exceptions to the general rule without reference to a requirement that the suit be one "in equity." The Supreme Court's most recent synthesis of cases permitting an award of counsel fees was decided in *F.D. Rich Co. v. United States ex parte Industrial Lumber Co.*[5] In *F.D. Rich*, the Court stated that it has "long been recognized that attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . . ."[6] The second exception is that when the plaintiff creates a fund for the benefit of others or confers a substantial benefit on a class of persons, an award of attorney's fees to that party distributes the expense to those benefited.[7]

The federal courts have also long recognized their power to allow, deny, or tax costs to the prevailing party in civil litigation. This discretionary power over costs has been incorporated into the Federal Rules of Civil Procedure,[8] which provides that costs are to be awarded to the prevailing party "unless the court otherwise directs,"[9] or "unless otherwise . . . ordered by the court."[10] In the absence of a statute directing the awarding of costs, "Rule 39(a) follows the principle of Rule 54(b) of the Rules of Civil Procedure that the prevailing party is entitled to costs as a matter of course unless the court orders otherwise."[11] The Supreme Court

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[3] Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967).

[4] The basis and scope of that discretion was described in Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939):

> The suits "in equity" of which these courts were given "cognizance" ever since the First Judiciary Act, 1 Stat. 73, constituted that body of remedies, procedures and practices which theretofore had been evolved in the English Court of Chancery . . . .

Id. at 164.

[5] 94 S. Ct. 2157 (1974).

[6] *Id.* at 2165.

[7] *See, e.g.*, Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939).

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

[9] *Id.*

[10] FED. R. APP. P. 39(a).

[11] 9 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 239.02[1] at 4304 (2d ed. 1973).

has recognized that the allowance of costs to the prevailing party "is not, moreover, a rigid rule."[12] Utilizing this discretionary power, the Tenth Circuit, in *Basso v. Utah Power and Light Co.*,[13] taxed as a penalty costs, attorney's fees, and attorney's expenses against the successful appellant because of "gross negligence" on part of appellant's counsel.[14]

In *Basso*, the plaintiff won a wrongful death award of $255,447.12 in a trial to the court. On appeal, the defendant for the first time contended that its principal place of business was in Utah, thus removing the requisite diversity of citizenship.[15] After remand to the district court for a determination of the federal jurisdiction issue, the court of appeals ruled that diversity did not exist and that defendant could not waive the issue nor was he estopped from making the jurisdictional attack after entry of judgment. Defendant claimed that its failure to raise an earlier objection was the result of a mistake of law in that defendant's counsel thought that participation in the proceedings had waived that issue. However, the court determined that this failure amounted to gross negligence and penalized the defendant as a consequence of this failure.

The mandate issued by the court follows precedent established in previous federal court decisions and is a proper extension of "the oppressive conduct" exception to the general rule,[16] even though the party taxed with such costs and expenses was here the prevailing party. An early circuit court of appeals decision[17] recognized the discretion in the federal courts in awarding

[12] Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 284 (1946).

[13] 495 F.2d 906 (10th Cir. 1974).

[14] *Id.* at 911. In Mobile Power Enterprises, Inc. v. Power Vac., Inc., 496 F.2d 1311 (10th Cir. 1974), the Tenth Circuit held that a dismissal with prejudice filed by plaintiff because of a settlement with one co-defendant does not convert the other co-defendant into a prevailing party entitling him to recover costs.

[15] 28 U.S.C. § 1332(c) (1970).

[16] Successful litigants have been allowed recovery of attorney's fees under this exception when, for example, in Vaughan v. Atkinson, 396 U.S. 527, 530-31 (1962), a seaman was forced to sue the shipowner for maintenance and cure, the shipowner's attitude being described as "callous" and "recalcitrant;" when a student sought injunctive relief against the school's segregation policy in Bell v. School Bd., 321 F.2d 494 (4th Cir. 1974) because the school board (1) had a long, continued pattern of evasion and obstruction, (2) had refused to take the initiative to desegrate the schools, and (3) had interposed administrative obstacles in order to block desegregation; and, in First Nat'l Bank v. Dunham, 471 F.2d 712 (8th Cir. 1973), when a debtor, in an action by a judgment creditor to set aside certain conveyances as fraudulent had attempted to conceal assets, to make fraudulent conveyances, to suborn perjury, to bribe a witness, and to falsify records for trial.

[17] Harland v. Bankers' & Merchants' Tel. Co., 32 F. 305 (C.C.S.D.N.Y. 1887).

costs and used this discretion to deny costs to the prevailing party when his failure to raise objections by demurrer fatal to the opponent's complaint resulted in greater expense and delay to both parties.

The Seventh Circuit, in taxing the prevailing party with all costs and expenses, described the latitude of the power as being one of "wide discretion."[18] The Seventh Circuit has also recognized the power to assess partial costs against the prevailing party as a penalty for some defection on his part, such as delay "in raising objection[s] fatal to the plaintiff's case."[19] Where a judgment was reversed for want of jurisdiction and remanded with instructions to dismiss, the costs of the appeal were assessed against the appellant when the issues which disposed of the appeal were not presented to the court until after the appeals were perfected and the briefs filed.[20] Similarly, a district court held that where substantial costs were incurred because the defendant did not challenge the existence of diversity jurisdiction until after the case had been tried and submitted, the imposition of costs even though the defendant prevailed was justified.[21]

In contrast, the Seventh Circuit refused to award attorney's fees in *Signorile v. Quaker Oats Co.*[22] under a fact situation similar to that of *Basso*. In *Signorile*, the plaintiff, an Illinois resident, asserted the defendant was incorporated and had its principal place of business in New Jersey. Ten months after filing its answer, defendant obtained new counsel who became aware that defendant's principal place of business was in Illinois. In moving to dismiss the suit in the district court because of a lack of diversity jurisdiction, defendant's counsel stipulated that all discovery in the federal court could be used in the state court proceeding. The district court dismissed for lack of diversity and awarded attorney's fees and costs to the plaintiff. The court of appeals reversed the award of attorney's fees because "there was no showing of any financial burden or hardship to plaintiff. His access to the state courts to refile his lawsuit was unimpaired."[23]

In *Signorile*, the plaintiff's expenses were attributable to work which could later be used in any state court proceeding.

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[18] Jones v. Schellengberger, 225 F.2d 784, 794 (7th Cir. 1955).

[19] Chicago Sugar Co. v. American Sugar Refining Co., 176 F.2d 1, 11 (7th Cir. 1949) (dictum), *cert. denied*, 338 U.S. 948 (1950).

[20] The Castillo Bellver, 143 F.2d 779 (3d Cir. 1944).

[21] Davey v. Faucher, 84 F. Supp. 737 (N.D. Fla. 1949).

[22] 499 F.2d 142 (7th Cir. 1974).

[23] *Id.* at 145.

Additionally, the district court and court of appeals were both located in Illinois, the State of plaintiff's residence. In *Basso*, however, the court of appeals particularly noted that defendant's failure to attack jurisdiction in the district court in Utah forced the plaintiff to defend this issue in the court of appeals in Colorado. Arguably, this is the "financial burden or hardship" that was absent in *Signorile*.[24]

The federal courts have long exercised their discretion over the awarding of costs to litigants according to the conduct of the parties. The taxing of costs against the appellants in *Basso* follows existing case law and was a proper exercise of the court's discretion since all costs incurred before the Tenth Circuit were the result of defendant's failure to make his attack on jurisdiction in the district court.

The order with respect to attorney's fees and expenses was a proper application of the judicially created exceptions to the general rule denying recovery of these expenses. The award of these expenses can be justified either upon the theory of the court's equitable power or the existing decisions wherein a party has engaged in oppressive conduct.

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[24] *Id.*