

Attorney's fees

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in Mt. Laurel II litigation

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Memorandum of Law

CIVIL RIGHTS ATTORNEY'S FEES
IN MOUNT LAUREL II LITIGATION

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THE FACTS

In 1974 the Urban League of Greater New Brunswick instituted suit in the Chancery Division of the state of New Jersey against twenty-two municipalities in Urban League v. Borough of Carteret. The Urban League sought injunctive relief against zoning practices which had the effect of excluding low and moderate income black, white, and hispanic peoples. The plaintiffs sought relief under the New Jersey Constitution; New Jersey Welfare Statutes; 42 U.S.C. 1981, 1982 and 3601 et seq.; and the Thirteenth and Fourteenth Amendment to the United States Constitution.

At trial Judge Furman ruled, inter alia, that the plaintiff had no standing to pursue its federal claims in state court and dismissed 42 U.S.C. 1981, 1982 and 3601 et seq. for lack of evidence of willful discrimination. But at the Court of Appeals Judge Antel ruled on the federal claims, and reversed the trial courts rejection of standing. The Court then remanded for a factual determination on the federal claims.

However the plaintiffs decided not to take the remand, and instead, joined their case with NAACP v. Mount Laurel II. The Supreme Court of New Jersey held for the plaintiffs on the state and constitutional claims, and the federal claims were not litigated at all. The federal claims were left pending at the Court of Appeals.

The Urban League nonetheless was the prevailing party in achieving substantially all the relief it sought on the state and federal claims. The court invalidated the exclusionary zoning practices, and ordered that ordinances be revised and a determination be made for a fair share of low and moderate income housing. While still in the fair share and revision stages the plaintiffs seek attorney's fees under 18 U.S.C 1988.

INTRODUCTION

The "American Rule" on attorney's fees has been a long standing rule throughout the country. Each party to a lawsuit is generally required to pay their own attorney's fees. However as a result of increased civil rights litigation in the 60's an exception to the rule evolved. In 1968 a private Attorney General concept in awarding attorney's fees was upheld by the United States Supreme Court in Newman v. Piggie Park Enterprises Incorporated 390 U.S. 400 (1968). In that case the court stated that a party seeking to enforce the rights protected by the statutes covered by the Constitution, if successful, should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Id 390 U.S. 400, 402.

In 1975 the Burger Court rejected the private Attorney General theory set out in Newman, and reaffirmed the "American Rule." Alyeska Pipeline Service Co. v. Wilderness Society 412 U.S. 240 (1975). Congress quickly responded by enacting certain exceptions to the rule, and in effect overruling Alyeska Pipeline. One of these exceptions is the Civil Rights Attorney's Fees Awards Act of 1976 42 U.S.C. 1988 (West 1981). The statute reads:

In any action or proceeding to enforce a provision of Section 1981, 1982, 1983, 1985, or 1986 of this Title IX of Public Law 92-318, or in any civil action or proceeding to enforce or charging a violation of a provision of the United States

Internal Revenue Code or Title VI of the Civil Rights Act of 1964, the court in its discretion, may allow the prevailing party a reasonable attorney fees as part of costs.

The language of the statute clearly affords a right to attorney's fees to litigants who enforce an enumerated section of the Civil Rights statutes.

However issues arise when litigants assert enumerated civil rights claims but prevail on non-statutory "non-fee" claims. In Urban League v. Borough of Carteret 92 N.J. 158, 456 A2d 390 (1983) the plaintiffs asserted inter alia violations of 42 U.S.C. 1981, 1982, 3601 et seq., and the Thirteenth and Fourteenth Amendment to the United States Constitution. However these claims were left pending, and the Urban League pursued and gained all the relief they sought on state constitutional grounds. It's clear, the plaintiffs are in fact prevailing parties, but the challenging issue that this memorandum addresses is whether Urban League can be considered a "prevailing party" within the meaning of Section 1988.

In Point One this memorandum establishes a widely held threshold. When statutory or constitutional claims are not expressly denied, a favorable determination on an enumerated section in 1988 is not necessary to a fee award under the Act. From this threshold the memo, in Point Two, then explores the viability of Urban League's fee claim in the New Jersey Court as a prevailing party that has raised federal claims, but prevailed on state constitutional grounds only.

POINT ONE

Whether a prevailing plaintiff may be awarded attorney's fees under 42 U.S.C. 1988 without prevailing on an enumerated section of the Civil Rights statutes.

The determination of whether a plaintiff is a "prevailing party" for the purposes of awarding attorney fees under 42 U.S.C. 1988 has been the subject of many recent decisions by the United States Supreme Court, the Courts of Appeals, and in state courts in New Jersey and throughout the country. The courts have overwhelmingly held that a favorable judgement under an enumerated section of the Civil Rights statute is not necessary to an award under Section 1988. Maher v. Gagne 448 U.S. 131 (1980), State of Maine v. Thiboutot 448 U.S. 1 (1980), Ross v. Horn 598 F.2d 1312 (3rd Cir. 1979) cert denied 100 S.Ct. 3048, Gurule v. Wilson 635 F.2d 782 (10th Cir. 1980), Oldham v. Erhlich 617 F.2d 163 (8th Cir. 1980), Kimbrough v. Arkansas Activities Association 574 F.2d 423 (8th Cir. 1978). Nadeau v. Helgemoe 581 F.2d 275 (1st Cir. 1978), Singer v. State 95 N.J. 487 (1984), Wyman v. Inhabitants of Skohegan 464 N.E.2d 181 (Me. 1983), Davis v. Everett 443 S.E.2d 1232 (Ala. 1983). However Section 1988 attorney's fees have been denied when federal claims were held to be without merit. Bunting v. City of Columbia 639 F.2d 1090 (4th Cir. 1981). Right to Choose v. Byrne 91 N.J. 287 (1982).

It is evident that we must focus first on the meaning of the Civil Rights Attorney's Fees Awards Act of 1976 42 U.S.C. 1988. In pertinent part 1988 states; in any action or

proceeding to enforce Sections 1981, 1982, 1983, or 1985 of this Act, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fees as part of cost.

The language of the statute seems to limit fee awards to parties who prevail on the enumerated sections of the Act. However the courts have been guided by the broad and sweeping language of the Congressional History. In State of Maine v. Theboutot 448 U.S. 1 (1980) the Supreme Court clearly states

A major purpose of the Civil Rights Attorney's Fees Awards Act was to benefit those claiming deprivations of Constitutional and Civil Rights. Principal sponsors of the measure in both the House and Senate, however, explicitly stated during floor debates that the statute would make fees available more broadly.

In Maier v. Gagne 448 U.S. 122 (1980) the Supreme Court noted that the Senate report expressly stated "for purposes of the award of counsel fees parties may be considered to have prevailed when they vindicated their rights through a consent judgement or without formally obtaining relief." S.Rep. No. 94-1011 p.5 (1976). The Supreme Court also noted that "the Legislative History makes it clear that Congress intended fees to be awarded where a pendent constitutional claim is involved even if the statutory claim on which the plaintiff prevailed is one for which fees cannot be awarded." Id 448 U.S. 122, 131.

Only a few cases need to be analyzed to establish the widely accepted standard on fee claims.

In Mayer v. Gagne 448 U.S. 122 (1980), the Supreme Court approved an award against a state government in a case that

had been settled without any judgement. Plaintiff had challenged certain Connecticut welfare regulations, and alleged that they violated her rights to equal protection and due process. While discovery was proceeding, Connecticut amended its regulations. Plaintiff filed an amended complaint alleging continued violations of her constitutional rights. Thereafter, a settlement was negotiated and a consent decree was entered. Following a hearing fees were awarded. The Supreme Court noted:

Respondent was the 'prevailing party' within the meaning of §1988 because while not prevailing in every particular she won substantially all the relief originally sought in her complaint in the consent decree.

Respondent was entitled to fees under the Act because in addition to her statutory claim she had alleged constitutional claims that were sufficiently substantial to support federal jurisdiction under the reasoning of Hagens v. Lavine 415 U.S. 528.

Id at 448 U.S. 122, 127

The court went on to describe the legislative history that explained why a Section 1988 award was in order despite no adjudication in the plaintiffs favor on Section 1983. "The Senate report expressly stated parties may be considered to have prevailed when they vindicate rights through a consent judgement or without formally obtaining relief." Id at 131.

The court concluded by reasoning that

Congress was acting within its enforcement power in allowing the award of fees in a case in which the plaintiff prevails on a wholly statutory, non-civil rights claim pendent to a substantial constitutional claim or in one in which both a statutory and a substantial constitutional claim are settled favorable to the plaintiff without adjudication. Id at 132.

It is obvious from Maher that a favorable judgement on a Section 1983 claim is not necessary to an award under 1988.

In that case the Section 1983 claim was not addressed. The matter was settled without adjudication.

The Circuit Courts have applied this principle broadly. In Ross v. Horn, 598 F.2d 1312 (3rd Cir. 1979), Cert denied, 100 S.Ct. 3048 (1980), the Third Circuit recently considered whether plaintiff had prevailed against New Jersey Commission of Labor, John Horn. Judgement had been entered against plaintiff on all counts of their complaints. However the Court of Appeals reversed the denial of attorney's fees under Section 1988 because the litigation had nevertheless resulted in the revision by defendants of certain administrative regulations. The court noted: "Appellees recognize that attorney's fees may be awarded to a party even though no judgement in the parties favor had been entered." Id at 1322.

In Gurule v. Wilson 635 F.2d 782 (10th Cir. 1980) the court noted that United States Supreme Court had recently decided three cases which together effectively precluded plaintiff's claim under 42 U.S.C. 1983. Thus, there could be no favorable 1983 judgement. Nevertheless plaintiff inmates, by bringing the litigation, fostered the adoption by prison officials of a manual delineating prisoners rights. As a result the Gurule court held that plaintiffs prevailed and were entitled to fees under Section 1988.

Although the principle in Maher has been broadly applied it has also been distinguished when federal constitutional and civil rights claims were held to be without merit. In Bunting v. City of Columbia 639 F.2d 1090 (4th Cir. 1981) the plaintiff prevailed on its state cause of action, but the Court

held its federal claim under section 1983 to be without merit. The Court accordingly rejected the claim for fees under 1988 (discussed infra in detail in Right to Choose v. Byrne). Fees claims have also been rejected when parties obtain preliminary or interlocutory relief without prevailing on the merits of at least some of their federal claims. Hanrahan v. Hampton 446 U.S. 754 (1980).

It is obvious from Maher and the analysis above that when a federal constitutional or statutory claim is not expressly rejected, a favorable judgement on a Section 1983 claim is not necessary to an award under Section 1988. Urban League v. Borough of Carteret was adjudicated in the Courts of New Jersey. The New Jersey courts are bound by Maher in construing Section 1988. The Maher holding and analysis is supportive of the Urban Leagues prospect for attorney's fees under Section 1988. In Maher the "fee-claim" was not even addressed because the case was settled without adjudication. Urban League was settled on state constitutional ground. The "fee-claims" were not expressly rejected. They were not addressed at all. However there is one caveat that may make Maher distinguishable.

In Maher, like in Urban League the trial court did not find federal constitutional and civil rights violations. The crucial difference is that in Maher the constitutional issues remained in the case until the dispute was settled through a consent decree. But in Urban League the federal statutory and constitutional issues were left pending at the Court of Appeals and were not adjudicated at the New Jersey Supreme

Court. Although this is a technical difference it may be an undermining factor in Urban Leagues project for a fee claim.

Section 1988 Awards in New Jersey State Courts

The issue of whether Section 1988 attorney's fees can be awarded in state courts has been settled by the United States Supreme Court in State of Maine v. Thiboutot 448 U.S. 1 (1980). In that case the Supreme Court affirmed, inter alia, the Maine Supreme Courts decision to award attorney's fees under Section 1988. Furthermore New Jersey courts have adopted Section 1988 in New Jersey Court Rules R. 4:42-9 as an exception to the "American Rule" on fee awards.

The New Jersey Supreme Court has also adopted the widely accepted federal standard that a favorable judgement on an enumerated section of the Civil Rights statutes is not necessary to an award under Section 1988, Singer v. State 95 N.J. 487 (1984). In Singer the Supreme Court held that "prevailing parties" may be awarded reasonable attorney's fees under Section 1988 without a favorable judgement on Section 1983 when the relief granted is identical to the relief sought under Section 1983.

In that case New Jersey state law N.J.S.A. 52:13D-12-127 restricted the business and finance of unpaid special state officer of the Casino Commission. The plaintiffs asserted claims, stating that the New Jersey law violated their state and federal constitutional rights, and their federal civil rights protected under Section 1983. The Trial Court granted

summary judgement for the plaintiffs on their state and federal constitutional claims, and rejected their claim under Section 1983. Based on this rejection the Trial Court also rejected the Section 1988 claim for attorney's fees. The Appellate Division reversed the Section 1983 Trial Court holding and remanded for a factual determination on the Section 1983 issue.

However the Supreme Court granted certification to determine whether plaintiffs should be awarded attorney's fees as a prevailing party without a favorable judgement on the Section 1983 claim. The Court applied the established federal standard set out in this memo supra, and held for the plaintiffs.

For the purposes of discovering a viable claim for fees in Urban League it is important to examine the Court's analysis in detail. At the onset the Court made a threshold determination whether the plaintiff could have prevailed on the Section 1983 claim. This is not required under Maher. Nonetheless the Court found that "the injunctive relief pursuant to Section 1983 was an appropriate remedy." Id at 497.

The Court then determined whether the plaintiff was a "prevailing party" by applying the two-fold test set out in Nadeau v. Helgemore 581 F.2d 275 (1st Cir. 1978) (acknowledged by the United States Supreme Court in Hensley v. Eckerhart 103 S.Ct. 1933, 1935 (1983)). The test is (1) whether plaintiffs lawsuit is causally related to securing the relief obtained and, (2) whether the relief ultimately

received had a basis in law.

The Court held that the relief sought under the constitutional and §1983 claims, to invalidate the New Jersey law, were not only causally related, but identical. Furthermore, the relief granted was decided and mandated by the courts, and was not a gratuitous offer by the defendant. It, therefore, had a basis in law. The plaintiffs could have prevailed under Section 1983, were held "prevailing parties" under the Nadeau test, and were awarded attorney's fees under Section 1988.

The New Jersey Supreme Court has also rejected a claim for Section 1988 attorney fees in Right to Choose v. Byrne 91 N.J. 287 (1982). In that case plaintiffs claimed that a New Jersey statute prohibiting medical funding for abortions except to preserve a woman's life, violates the New Jersey and the United States Constitution. The Chancery Division found that the statute violated both Constitutions, entered judgement for the plaintiffs, and awarded attorney fees under Section 1988. 169 N.J. Super 543, 405 A.2d 427.

However following the Chancery Division's decision, the United States Supreme Court in Harris v. McRae 448 U.S. 297 (1980) determined that the federal Constitution does not invest pregnant women with the right to medical funds for abortions.

The New Jersey Supreme Court held that the statute did violate the New Jersey Constitution but, in light of Harris v. McRae the statute did not violate the United States Constitution. Therefore the plaintiff could not be considered a "prevailing party" for the purposes of awarding fees under

Section 1988. The award of attorney's fees was reversed.

The plaintiff argued that because they prevailed on a pendent state claim that is supported by the same facts as the federal claims, they are entitled to a fee award. However the Court stated:

Section 1988 permits an award of counsel fees to a party who prevails on a state claim only when the federal claims are adjudicated favorably for that party or not adjudicated at all. Kimbrough v. Arkansas Activis Assn 574 F.2d 423, 426 (8th Cir. 1978) (emphasis added). No counsel fees may be allowed where the federal claims have been decided adversely to the prevailing party. Luria Bros. and Co. v. Allen 672 F.2d 347, 357 (3rd Cir. 1982) 91 N.J. 287, 450 A2d 925, 940

By reading these cases together the New Jersey Supreme Court's standard in determining fees under Section 1988 can be better understood. In Singer, even though the plaintiffs prevailed on the federal Constitutional Claim the Court made a threshold determination on the Section 1983 claim. The United States Supreme Court in Maher held that a determination on Section 1983 was not at all required when a party prevailed on a federal constitutional claim.

In Right to Choose attorney's fees were denied because the federal claim was precluded by the interim decision in Harris v. McRae. Note that in Gurule the plaintiffs Section 1983 claim was also precluded by recent United States Supreme Court decision, and fees were awarded because a prisoner's rights handbook was adopted. The differentiating factor in Right to Choose and Gurule may have been a question of federal jurisdiction. However it is evident that federal jurisdiction was conferred on plaintiffs in Right to Choose before the

Harris v. McRae case was decided. (Federal jurisdiction in pendent federal claims is discussed in Point Two infra.)

The New Jersey Supreme Court has opened the door to attorney's fees in this state, but it is evident that the Court is taking a conservative and cautious path. The Urban League must proceed accordingly in making their claim for fees under Section 1988.

The Urban League must take guidance from Singer and Right to Choose. However the facts in Urban League fall between the gap of these two cases. Right to Choose is distinguishable because the federal issues in Urban League under Section 1981, 1982, 3601 et seq. and the Thirteenth and Fourteenth Amendment were not rejected, but were not adjudicated at all. In Right to Choose the Court expressly stated "Section 1988 permits an award of counsel fees to a party who prevails on a state claim...when the federal claims...are not adjudicated at all." This language seems to give Urban League bright prospects for attorney's fees.

Urban League is not on all fours with Singer. The plaintiffs in Singer had a favorable judgement on their state and federal constitutional claim. Urban League only had a favorable judgement on its state constitutional claim, and the federal constitutional claims were left pending.

At this stage of the analysis it seems that an award for attorney's fees is possible for the Urban League plaintiffs. Urban League could argue that "Section 1988 permits an award of counsel fees to a party who prevails on a state claim when a federal claim is not adjudicated at all." Right to Choose

v. Byrne 450 A2d 925, 940.

The Urban League plaintiffs meet the Nadeau test. The lawsuit was causally related to the relief obtained, and their relief obviously has a basis in law. Therefore the Urban League is a prevailing party.

To further determine if Urban League is a "prevailing party" within the language of Section 1988, the plaintiffs at least are entitled to a determination on their Section 1981, and 1982 claims for the purpose of awarding fees; just as the Court did in Singer on the plaintiff Section 1983 claim.

At best, if the Court determines the 1981 and 1982 claims to be "substantial" fees may be awarded. Kimbrough v. Arkansas Activities Association 574 F.2d 423 (8th Cir. 1978). The above prospects are discussed in further detail in Point Two infra.

POINT TWO

Whether a plaintiff may be considered a "prevailing party" under Section 1988 when the plaintiff raises claims enumerated in Section 1988 but prevails on state constitutional grounds without adjudication on the federal claims.

When a plaintiff prevails on state constitutional grounds and the case is resolved without adjudication on the federal claims the dispositive issue in determining a fee award is whether the federal claims are valid. The sponsors of Section 1988 directly addressed this issue in the House Judiciary Committee's Report.

To the extent a plaintiff joins a claim under one of the statutes enumerated in H. R. 15460 with a claim that does not allow attorney fees, the plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees. Morales v. Haines, 486 F.2d 880 (7th Cir. 1973). In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the nonconstitutional claim is dispositive. Hagans v. Lavine, 415 U.S. 528 [94 S.Ct. 1372, 39 L.Ed.2d 577] (1974). In such cases, if the claim for which fees may be awarded meets the 'substantiality' test, see Hagans v. Lavine, supra; United Mine Workers v. Gibbs, 383 U.S. 715 [86 S.Ct. 1130, 16 L.Ed.2d 218] (1966), attorney's fees may be allowed even though the court declines to enter judgement for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.' United Mine Workers v. Gibbs, supra, at 725 [86 S.Ct. at 1138]. H.R. Rep. No. 94-1558, p.4, n.7 (1976).

The United States Supreme Court noted this statement by the House Judiciary Committee to be a favorable analysis. Maher v. Gagne 448 U.S. 122, 133 (1980). The Supreme Court stated the Legislative History makes it clear that Congress intended fees to be awarded where a pendent constitutional

claim is involved even if the statutory claim on which the plaintiff prevailed is one for which fees cannot be awarded under the Act. Id at 133.

The Report suggest two possible test to determine if fees should be awarded. The first is that if a plaintiff prevails on a "non-fee" claim that plaintiff is entitled to a determination on the "fee claim" for the purposes of awarding counsel fees.

The second test is known as the "substantiality test." The Report instructs that it should be invoked when the fee claim involves a constitutional question which the courts are reluctant to resolve if the "non-fee" claim is dispositive. In such cases the pendent fee claims must be substantial enough to meet federal jurisdiction standards, Hagans v. Lavine 415 U.S. 528 (1974), and the "non-fee" claim must arise out of a common nucleus of operative facts United Mine Workers v. Gibb 383 U.S. 715, 725 (1966). The substnatiality test is a less burdensome standard, and has been applied more frequently. The reasoning is that "it furthers the Congressional goal of encouraging suits to vindicate constitutional rights without undermining the long standing judicial policy of avoiding unnecessary decisions of important constitutional issues." Maier v. Gagne 448 U.S. 122, 135.

The "Substantiality Test" Applied

In Kimrough v. Arkansas Activities Association, 574 F.2d 423 (8th Cir. 1978), the court applied the substantiality test to determine attorney's fees when a plaintiff raised federal

constitutional grounds but prevailed only on state law. In that case the Arkansas Activities Association (AAA) barred a student from participating in a high school football program because he violated the eight "semester rule." The court resolved the case at hearing for temporary injunction without reaching the federal constitutional issues. The court stated that the eight "semester rule" was vague, and did not bar the plaintiff from participating. The court therefore enjoined the AAA from denying the plaintiff eligibility and held that the court order was final and appealable because it effectively disposed of the case.

At hearing for Section 1988 attorney's fees the court applied the "substantiality test." The court stated that the "test" is jurisdictional in nature. When the Federal District Court invoked jurisdiction to dispose of the case it implicitly made a determination that the allegations of the complaint raised a substantial federal claim. Furthermore, the exact same facts supported the "fee claim" as did the "non-fee" claim, and therefore the non-fee claim arose from the same nucleus of operative facts. The court then held for the plaintiff.

Determining the "substantiality test" in state court cannot be done implicitly, as in *Kimrough*. State courts, nonetheless, have applied the test. In *Davis v. Everett* 443 So.R.2d 1232 (Ala. 1983) the Alabama Supreme Court awarded 1988 attorney's fees even though the plaintiff prevailed on a wholly state claim without judgement on her federal civil rights cause of action. The Trial Court grant the plaintiff

all the relief sought on state constitutional grounds and denied the Section 1988 fee award.

However the Supreme Court of Alabama found that the plaintiff was entitled to attorney's fees under Section 1988 by applying the substantiality test. The court stated that the federal claims were substantial under Hagens v. Lavine because the trial judge stated on the record that the plaintiff could have been granted identical relief under the federal cause of action. The court also stated that the state constitutional claim arose out of the same nucleus of operative facts as the federal constitution claim, and there was no need to compare the two constitutions.

The Urban League plaintiffs would have good prospects for attorney's fees if it could convince the court to adopt the "substantiality test" to determine attorney's fees under Section 1988. Like in Kimbrough and Davis the Urban League raised state and federal claims and the court decided the case on the state law claim. In Kimbrough the plaintiff was in federal court and jurisdiction was clearly conferred. In Davis the Trial Court stated that the same relief could have been granted in federal court, and through that statement conferred substantial enough jurisdiction. In Urban League the Trial Court rejected jurisdiction on the federal claims. However the Court of Appeals reversed the Trial Court's holding on jurisdiction of the federal issues. Whether if the Urban League had jurisdiction on Section 1981, 1982, and 3601 is unclear. The undermining caveat is that the Court of Appeals remanded to the Trial Court for a factual

determination on the federal claims. But, instead, Urban League joined their case with the NAACP in Mount Laurel II, and went to the Supreme Court of New Jersey to determine the state claims only.

Urban League might still argue that the reversal at the Court of Appeals on the jurisdiction rejection made the federal claims substantial enough to meet the "substantiality test" for attorney's fees. Urban League may also argue that they could have gained some of their relief on the federal claims. Unlike Davis it would be a great stretch of the imagination to claim that the Urban League could have obtained identical relief under the federal claims.

Two other barriers to a fees determination under the "substantiality test" are the New Jersey Supreme Court's analysis in Singer and Right to Choose. In Right to Choose the federal claims were clearly valid until the interim decision in Harris v. McRae. The federal claim was substantial until Harris v. McRae was handed down and the "substantiality test" was not even considered.

In Singer the plaintiffs clearly prevailed on their federal constitutional claims. The court made a threshold determination on Section 1983 for the purpose of determining a fee award. Under Maher a determination was not required. The court could have applied the "substantiality test," but it did not.

Urban League may have one other argument for the adoption of the substantiality test. They may argue that unlike the issues in Right to Choose and Singer the issues in Urban

League "involve a [federal] constitutional question which the courts are reluctant to resolve when a non-[federal] constitutional claim is dispositive." Hagans v. Lavine 415 U.S. 528 (1974). This would be a difficult argument for the court to accept. The court does not appear to be applying this judicial policy. (see Singer).

Determination on the "Fee-Claim"

The Legislative History states that when a plaintiff prevails on a "non-fee" claim it is entitled to a determination on the other "fee-claim" for the purposes of awarding attorney's fees. The New Jersey Supreme Court has not yet had the opportunity to rule on pendent federal claims for the purposes of awarding attorney's fees. However in Singer and Right to Choose the court made determinations on "fee-claims" in evaluation for attorney's fees.

Federal courts apply the substantiality test and have not made determinations on fee claims for awards under 1988. For guidance we must look to other state courts that have applied the determination on the "fee-claim" approach. In Jackson v. The Inhabitants of Searsport 456 A.2d 852 (1983) the Supreme Court of Maine applied this analysis. In that case plaintiff forced the defendant to provide a welfare grant through adjudication. The case was decided without judgement on the Section 1983 claim. At hearing for attorney fees the Maine Supreme Court stated that in this case application of the substantiality test would be improper. However the court found that the plaintiff had a right to a determination on the

Section 1983 claim for the purposes of awarding attorney's fees. The court subsequently applied a full due process analysis and found that although plaintiff prevailed on his state cause of action he could not have obtained any relief on his federal claim.

In Rahmey v. Blum 466 N.Y.S. 2d 350 the Appellate Division of New York held that attorney's fees may be awarded under Section 1988 even though there was no favorable determination on the civil rights claim. the court stated that where a party prevails on a state "non-fee" claim it is entitled to a determination on the fee claim. After a full analysis, fees were awarded.

The plaintiffs in Urban League could also assert that they have a right to a determination their "fee claim" for the purposes of awarding attorney's fees. This could be supported by legislative history, acknowledgement in Maher by the Supreme Court of the United States, and application in similar situations in Singer and Right to Choose by the New Jersey Supreme Court.

Determination on the fee claims would be a challenging assertion for the Urban League plaintiffs. It is evident that the New Jersey Supreme Court has granted more expansive relief than could have been obtained in the federal arena under 1981 and 1982. However if some of the relief granted could have been obtained under Section 1981 and Section 1982 a fee award may be possible. Further analysis of the federal claims are needed but are not the subject of this memorandum.

CONCLUSION

The Civil Rights Attorney's Fees Awards Act has been construed and applied broadly. The powerfully favorable Congressional History has given great support to public interest litigators seeking fee awards under the Act.

Under 18 U.S.C. 1988 attorney's fees can be awarded without prevailing on an enumerated Section in 1988. A favorable determination on an enumerated section is not necessary to an award under the Act as long as the plaintiff is a prevailing party and its federal claims are not meritless. Therefore a plaintiff may prevail on only state grounds and still be considered a prevailing party without adjudication on the federal claims.

However the "American Rule," although not without critics, remains the rule on attorney's fees in our state and throughout the country. It is a basic feature to the American judicial process. For a court to allow attorney's fees under Section 1988 to parties who assert meritless federal claim along with valid state claims would in many cases abrogate the "American Rule."

An award under Section 1988 could be possible for Urban League if it could assert and substantiate that its federal claims are valid causes of action. The court affords two possibilities in which parties prevailing on state grounds can show their federal claims to be valid. One is to show that the federal claims are substantial enough to support federal

jurisdiction.

In Urban League the Court of Appeals reversed the Trial Courts finding of no jurisdiction. Under a liberal application the substantiality test may be met. However under a conservative application a court would find that no jurisdiction was actually conferred. The plaintiffs chose to abandon the federal claims to seek final judgement on the state claims at the Supreme Court of New Jersey. Nonetheless if a court would find that jurisdiction would have been conferred, and the plaintiff gained all the relief they originally sought on the state cause of action the substantiality standard could be met.

The second opportunity to validate federal claims when a party raises federal claims, but prevails on state grounds only, is to show that, if litigated, the plaintiff would have obtained some of the relief sought under the federal claims. However a conservative application of the determination on the fee claim would require the plaintiff to show it would have gained all the relief sought under the federal claims.

In Urban League it would be a great stretch of the imagination to claim that the plaintiff could have gained all of the relief they sought on the federal claims. The Urban League may prevail on the "determination on the fee claim" under the some of the relief standard. This memo does not actually make an analysis of the viability of Urban League's federal claims. However the Urban League may have invalidated the zoning ordinances under 18 U.S.C. 1982 or 3601 et seq. Section 3601 et seq. appears to be Urban League's strongest

federal claim. Section 3601 et seq. has its own fee award section, 18 U.S.C. 3612. However the argument under 1988 may apply by analogy to a fee award under §3612. All of the civil rights fee awards originate in Title VII. The only difference in an award under §3612 is that the named plaintiffs must meet indigency standards. Further analysis of attorney's fees in Urban League must determine whether the Urban League could have obtained some of the relief under 1982 or 3601 et seq. If this determination is found to be affirmative then Urban League's prospects for a fee award would be favorable.

In order for Urban League to be considered a prevailing party for the purposes of awarding fees under Section 1988 it must state that the federal claims were substantial enough to meet federal jurisdiction standards under Hagans v. Lavine and that the federal claims were from the same nucleus of operative facts as the state claims. Alternatively the Urban League must claim that it is entitled to a determination on the "fee claim" for the purposes of awarding fees, and, if litigated, Urban League would have gained some of the relief sought under the federal claims.