

OVERVIEW: COURT-AWARDED ATTORNEYS' FEES

In an era of soaring government deficits and a conservative Civil Rights Commission and Justice Department, the role of public interest litigation is becoming increasingly essential in protecting the rights of the under-represented. Such litigation is difficult, however, without the continued enforcement of 42 U.S.C. § 1988, which allows courts to award attorneys' fees to lawyers for prevailing parties in civil rights litigation. This issue of the *Review* presents some viewpoints on the many complex issues involved.

Laura Macklin and Roy Simon, Jr. each explore the implications of the recent Supreme Court decision in *Marek v. Chesny*. In that case, the Court held that plaintiffs who receive a lower award at trial than was previously offered in settlement, (pursuant to Rule 68 of the Federal Rules of Civil Procedure) must forego court-awarded attorneys' fees accrued after the settlement offer. Macklin illustrates how this policy encourages settlement at a very early stage and thereby precludes one of the most important phases of litigation, judicial fact-finding. Simon discusses questions left open by the case, and possible strategies for defendants and plaintiffs in light of *Marek*.

Richard Larson addresses the issue from the legislative perspective. He argues that current congressional bills, which restrict fee entitlements and limit the amount of fee awards, would drastically undermine current fee-shifting practices and eviscerate the policies that these practices seek to implement.

Kenneth Feinberg and John Gomperts describe Chief Judge Jack B. Weinstein's calculation of attorneys' fees in the *Agent Orange* case. Judge Weinstein's innovative approach holds lessons for fee determinations in future mass tort litigation.

Finally, the *Review* presents two amicus briefs filed in *Evans v. Jeff D.*, recently decided by the Supreme Court. In that case the Court upheld the use of a coerced waiver of statutory attorneys' fees as part of a settlement agreement. The amicus briefs illustrate how court approval of coerced fee waivers will discourage, if not prevent, public and private civil rights lawyers from bringing lawsuits. The brief submitted by the ACLU, the NAACP Legal Defense Fund, The Lawyers' Committee for Civil Rights Under Law, and the New York Legal Aid Society argues that approval of coerced waivers defeats the policy of 42 U.S.C. § 1988. The Committee on Legal Assistance of the New York City Bar Association's brief argues that a coerced waiver agreement violates the norms of professional ethics. The arguments in these briefs suggest that the effect of the *Jeff D.* decision, combined with the *Marek* decision, will be to vastly curtail the scope of civil rights litigation in the United States.

