

Research on appeals of attorney-fee and merits decisions (Fed R Civ P 58(c)(2)) as presented to the Advisory Committee on Civil Rules in May 2006

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Federal Judicial Center 2006

In early 2006, the Federal Judicial Center examined the prevalence of the use of Federal Rule of Civil Procedure 58(c)(2), and the circumstances under which appeals of judgments on the merits and decisions regarding attorney fees can occur at the same time. Two resulting memoranda were presented to the Advisory Committee on Civil Rules in May 2006.

Documents:

Coinciding appeals of a judgment on the merits and a decision regarding attorney fees
March 7, 2006
6 pages

Fed.R.Civ.P. 58(c)(2)
January 30, 2006
2 pages

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memorandum

DATE: March 7, 2006
TO: Tom Willging and Joe Cecil
FROM: Rebecca Norwick
SUBJECT: Coinciding appeals of a judgment on the merits and a decision regarding attorney fees

Per your request, I have researched the circumstances under which appeals of judgments on the merits and decisions regarding attorney fees can occur at the same time. I discovered several different circumstances under which these appeals can occur simultaneously.¹ Within the 19 recent district court cases that my search yielded, there were at least six different circumstances under which these appeals coincided. At the end of this memo is a table that summarizes the circumstances under which the appeals occurred in each of the 19 cases. Although some cases were difficult to classify (see the final full paragraph of this memo), those that could be classified are described below, along with how frequently the situation occurred within the set of 19 cases:

- A single order contained both a judgment on the merits and a decision regarding attorney fees. This single order was subsequently appealed. [Occurred in 5 of 19 cases]
- Multiple orders implemented either a judgment on the merits or a decision regarding attorney fees. An appeal of two or more of these orders followed. In two cases in this sample, the part of the appeal that related to the earlier of the two decisions was ruled by the Courts of Appeals to be untimely. In the third case, both decisions were affirmed. [Occurred in 3 of 19 cases]
- A notice of appeal (NOA) was filed regarding a judgment on the merits, and later, following a decision regarding attorney fees, an amended NOA was filed regarding both the judgment on the merits and the fees decision. [Occurred in 2 of 19 cases]
- Following a judgment on the merits, a motion was filed that automatically extended the deadline by which to file an appeal (e.g., a motion to amend judgment, a motion for relief from judgment). An appeal was filed following a ruling on this motion and a decision regarding a previously pending motion for attorney fees. [Occurred in 2 of 19 cases]
- Following an appeal of a judgment on the merits, the Court of Appeals ruled that it would not hear the appeal until a pending motion for attorney fees was also decided. The motion for fees was subsequently granted and an appeal of both the judgment on the merits and the fees decision was heard. [Occurred in 1 of 19 cases]
- Summary judgment was granted, and the judge set a deadline for the prevailing party to file a motion for attorney fees. Final judgment was entered following submission of this fees motion. Attorney fees were awarded soon after, and an appeal of the final judgment and the fees decision followed. [Occurred in 1 of 19 cases]

¹ To research this question, I first collected a set of U.S. Courts of Appeals opinions that discussed an appeal both of a judgment on the merits and of a decision regarding attorney fees. I then obtained and read the docket sheets from the district court cases from which these appeals originated, in order to identify and classify the circumstances leading to the appeals. To find the Courts of Appeals opinions, I searched within Westlaw's U.S. Courts of Appeals Cases database for the terms *appeal*, *attorney! fee!*, and *judgment*, all appearing within the same sentence. I reviewed the 30 most recent results (as of 2/21/06), and by excluding those opinions that did not address both types of appeals, was left with a sample of 19 cases. The appellate cases I reviewed were decided between November 2005 and February 2006; the district court cases were filed between September 1998 and February 2004.

Several points worth noting emerged during this research. First, none of these 19 cases seems to involve the problems associated with F.R.Civ.P. 58(c)(2) that appeared in *Wikel v. Birmingham Pub. Sch. Bd. of Educ.*, 360 F.3d 604 (6th Cir. 2004). Within these 19 cases, the relevant Court of Appeals ruled that it lacked jurisdiction in three: in one, the Court ruled it lacked jurisdiction over an appeal of a summary judgment ruling because the appeal was untimely and thus, a (timely) appeal of an attorney fees decision was ruled to be moot; in a second, the Court ruled that an appeal of a judgment on the merits was untimely but affirmed a timely appeal of an attorney fees decision; and in the third, the Court affirmed a summary judgment ruling but dismissed an appeal of an attorney fees decision because the Court of Appeals ruled that it lacked jurisdiction due to the appeal's interlocutory nature and the fact that the amount of fees had not yet been decided by the district court. It does not appear that the appellant requested an extension of time under Rule 58(c)(2) in any of these three cases.

Second, in seven instances, the Court of Appeals opinion clearly documented an appeal of both a judgment on the merits and a decision regarding attorney fees, but this information was not evident from the district court cases' docket sheets. In six of these seven instances, the district court docket sheets did not mention a decision or appeal regarding attorney fees. In the remaining instance, the docket sheet did not explicitly mention the appeal of a judgment on the merits. This made these cases difficult to classify in the list at the beginning of this memo (only two are included). This also supports our observation from the Rule 58(c)(2) research that, at times, searches relying exclusively on docket sheets can overlook relevant cases, due to some docket sheets' lack of information.

In short, it seems that there are multiple ways in which an appeal of a judgment on the merits and of a decision regarding attorney fees can occur simultaneously.

I would be happy to conduct any additional research that would be helpful. Please let me know how you wish me to proceed.

ATTACHMENT: Table

Case	Circumstance: A single order contained both a judgment on the merits and an attorney fees decision. This order was appealed.
Pinner v. Budget Mortg. Bankers, Ltd., 2006 WL 238376 (2nd Cir.)	A “minute entry” in the docket records a jury verdict in favor of the plaintiff on one cause of action. That entry reports that the judge states that any motion for attorney fees is due within two weeks. Following the plaintiff’s subsequent motion for attorney fees, the judge issues an order that awards the attorney fees, enters the judgment, and closes the case. The defendant appeals this order. The Court of Appeals affirms the decision.
CenterPoint Energy Houston Elec. LLC v. Harris County Toll Road Authority, --- F.3d ---, 2006 WL 91478 (5th Cir.)	Final judgment is entered in favor of the plaintiff. Both parties appeal this judgment within 30 days. According to the Court of Appeals opinion, the defendant appealed the judgment and the plaintiff appealed the denial of attorney fees (although there is no mention of attorney fees in the district court docket). The Court of Appeals affirms the final judgment, but vacates and remands the fees decision.
Weiss v. Violet Realty, Inc., 2005 WL 3527870 (2nd Cir.)	The judge issues an order in which the defendant’s motion for summary judgment is granted in part and the defendant’s request for attorney fees is granted in part (among other rulings). The plaintiff files a NOA of this order. The Court of Appeals affirms the merits decisions, and vacates and remands the attorney fees decision.
HSBC Bank, PLC v. Goldstein, 155 Fed.Appx. 923 (7th Cir. 2005)	A “consolidated motion by [the plaintiff] for entry of judgment, voluntary dismissal of outstanding claims, and award of prejudgment interest, and attorney fees” is granted in one order. The defendant files a NOA of the order. The Court of Appeals dismisses the defendant’s appeal because it is without merit.
Baker v. American Airlines, Inc., 430 F.3d 750 (5th Cir. 2005)	The judge grants two separate motions by the defendant to compel, awarding the defendant attorney fees as sanctions each time. Final judgment is entered in favor of the defendant – the complaint is dismissed with prejudice. The judge orders that the defendant will recover from the plaintiff “all costs of court incurred by it.” The plaintiff files a NOA of the judgment and order. The Court of Appeals affirms the judgment and the awards of attorney fees as sanctions.

Case	Circumstance: Multiple orders implemented either a judgment on the merits or an attorney fees decision. Two or more of these orders were appealed.
Gnesys, Inc. v. Greene, --- F.3d ---, 2005 WL 3489378 (6th Cir.)	On 8/22/00, a consent permanent injunction and final judgment are entered. Two years later, on 11/26/02, the defendant is found in contempt of court and the judge requests from the plaintiff documents to support an award of damages within 20 days. The plaintiff submits documents on 12/16/02. The judge awards damages on 8/27/03. In the damage order, the judge requests documents to support an award of attorney fees within 30 days. The plaintiff submits documents on 9/24/03. The judge awards attorney fees on 7/21/04. The defendant files a NOA on 8/20/04 of three orders: the finding of contempt, the award of damages, and the award of attorney fees. The Court of Appeals rules that the appeal of the contempt and damages decisions is untimely. The Court of Appeals affirms the ruling regarding attorney fees.
O’Brien v. ABB DE Inc., 2005 WL 3445574 (11th Cir.)	Final judgment is entered on 6/15/04 for the defendant, dismissing the case. On 7/14/04, the defendant files a motion for attorney fees. On 3/16/05, the fees are awarded. On 4/11/05, the plaintiff files a NOA of the order awarding fees. The Court of Appeals opinion states “O’Brien appeals...entry of summary judgment...and court’s order awarding fees,”

	although the appeal of the summary judgment decision is not evident from the district court docket. The Court of Appeals rules that it lacks jurisdiction over the appeal of the summary judgment decision because the appeal is untimely and thus, the appeal of the attorney fees decision is moot.
Twentieth Century Fox Film Corp. v. Entertainment Distributing, 429 F.3d 869 (9th Cir. 2005)	Judgment and order: the defendant must pay statutory damages. The defendant files a motion for reconsideration. The defendant files a NOA of the judgment and order. The defendant's motion for reconsideration is denied. The plaintiff files a motion for attorney fees. The plaintiff's motion for fees is granted in part. The defendant files a NOA of the fees award. The Court of Appeals affirms the judgment and the fees decision.

Case	Circumstance: A NOA of a judgment on the merits was filed. Following an attorney fees decision, an amended NOA was filed, addressing both the merits and fees decisions.
Applied Medical Resources Corp. v. U.S. Surgical Corp., --- F.3d ---, --- F.3d ---, 2006 WL 163187 (Fed.Cir.)	*NOTE: Docket starts with entry 738* An order grants the plaintiff's motion for enhanced damages. The defendant files a NOA of that order. Later, a final judgment of willful infringement in favor of the plaintiff is entered. The final judgment grants the plaintiff damages, enhanced damages, attorney fees, interest, and costs. The defendant files an amended NOA of this judgment and order. The Court of Appeals affirms the final judgment order.
Haagen v. Saks & Co., 2005 WL 3503149 (9th Cir.)	The defendant's motion for summary judgment is granted. The judge sets an approx. three week due date for any motion for attorney fees and costs. The plaintiff files a NOA of the summary judgment. The defendant files a motion for attorney fees, which is granted. The plaintiff files an amended NOA, appealing the summary judgment ruling and fees decision. The Court of Appeals reverses and remands the summary judgment ruling, and vacates the attorney fees decision.

Case	Circumstance: Following a judgment on the merits, a motion automatically extended the deadline for filing an appeal. Following a ruling on this motion and on a previously pending motion for attorney fees, an appeal of both decisions was filed.
Murphy Oil USA, Inc. v. Wood, --- F.3d ---, 2006 WL 350394 (10th Cir.)	Jury trial: three verdicts in favor of the defendant, one in favor of the plaintiff. Approx. a month later, the judge partially sets aside the jury verdict and issues JMOL in favor of the plaintiff. The plaintiff files a motion for attorney fees. The defendant files a motion to amend the judgment and findings; this motion is later denied. The plaintiff's motion for attorney fees is granted. The defendant files a NOA of three orders: the JMOL decision, the denial of the motion to amend judgment, and the grant of the plaintiff's motion for attorney fees. The Court of Appeals reverses the JMOL decision and the attorney fees decision.
Kruman v. Class Law Solicitors, 2005 WL 3556188 (2nd Cir.)	An order grants the defendant's motion to dismiss. NOA – affirmed in part, vacated in part, and remanded. Settlement proceedings begin. A motion by the defendant for attorney fees is denied. An order and final judgment awards attorney fees, costs, etc., to the plaintiff. A motion for relief from judgment and for attorney fees by the defendant is denied. The defendant files a NOA of the denial of the motion for relief from judgment and of the attorney fees decision. The Court of Appeals affirms.

<p>Case</p>	<p>Circumstance: The Court of Appeals ruled it would not hear an appeal of a judgment on the merits until a pending attorney fees motion was decided. Following a decision on the fees motion, an appeal of both the judgment and the fees decision was subsequently heard.</p>
<p>Hamilton v. Washington State Plumbing & Pipefitting Industry Pension Plan, 433 F.3d 1091 (9th Cir. 2006)</p>	<p>The original complaint is for “benefits due and attorney fees and costs.” The plaintiff’s motion for summary judgment is granted. The plaintiff files a motion to amend the judgment to include attorney fees. A NOA of the summary judgment ruling is filed by the cross-claimant. The Court of Appeals orders “Proceedings in this court shall be held in abeyance pending the district court’s resolution of the pending [attorney fees] motion.” A subsequent “supplemental judgment” awards the plaintiff attorney fees. The defendant files a NOA of the summary judgment and the fees decision. The Court of Appeals reverses the summary judgment ruling and fees decision and remands the case.</p>
<p>Case</p>	<p>Circumstance: Following a summary judgment decision, the court set a deadline for filing an attorney fees motion. After submission of a motion for fees, the court entered the final judgment and ruled on the fees motion. An appeal of both decisions followed.</p>
<p>FieldTurf Intern., Inc. v. Sprinturf, Inc., 433 F.3d 1366 (Fed.Cir. 2006)</p>	<p>The defendant’s motion for summary judgment is granted. The judge states that the defendant may file a motion for attorney fees within 30 days. After the motion for fees is filed, the docket states “parties agree that court’s order [granting summary judgment; docketed approx. two months earlier] be entered as the judgment in this case subject to appeal...” Approx. 10 days later, the judge grants the motion for attorney fees. The plaintiff files a NOA of the summary judgment and fees decisions. The Court of Appeals affirms one summary judgment decision, reverses two others, and vacates the award of attorney fees.</p>
<p>Case</p>	<p>Circumstance: Difficult to classify based upon the district court docket sheet.</p>
<p>Goodwin v. C.N.J., Inc., --- F.3d ---, --- F.3d ---, 2006 WL 216695 (1st Cir.)</p>	<p>*NOTE: This case is <i>Lunnin v. C.N.J., Inc., et al</i> in both the Court of Appeals docket and the district court docket* An order of partial summary judgment is issued in favor of the defendant. A NOA is filed by the plaintiff. The Court of Appeals opinion states that the appeal is of both the summary judgment ruling and an attorney fees decision, although there is no mention of attorney fees in the district court docket. The Court of Appeals affirms the summary judgment ruling and the denial of attorney fees.</p>
<p>Corrigan v. Dale, 2006 WL 83342 (9th Cir.)</p>	<p>An order grants two motions by the defendant for summary judgment, and one motion by the counter-claimant for summary judgment. The plaintiff objects the next day to attorney fees (which implies that a fees ruling may have been included with summary judgment order, although that is not stated in the district court docket). The plaintiff appeals the order. The Court of Appeals opinion states that the plaintiff appealed two summary judgment rulings and a ruling awarding attorney fees. The Court of Appeals affirms the summary judgment rulings but reverses the fees ruling.</p>
<p>Perricone v. Medicis Pharmaceutical Corp., 432 F.3d 1368 (Fed.Cir. 2005)</p>	<p>Judgment is entered in favor of the defendant. An appeal and cross-appeal are filed. The Court of Appeals opinion states that the cross-appeal is of a denial of a motion to declare the case “exceptional” and of an award of attorney fees, although the fees appeal is not evident from district court docket. The Court of Appeals affirms both decisions.</p>

<p>Rapid Displays Inc. v. Gorder, 155 Fed.Appx. 962 (9th Cir. 2005)</p>	<p>Judgment is granted in favor of the plaintiff. Both parties appeal the judgment. The Court of Appeals opinion states that the plaintiff also appeals a denial of a motion for attorney fees, but this is not evident from the district court docket. The Court of Appeals “reverse[s] the district court’s damages award in part, affirm[s] in part, and remand[s] for recalculation of damages...[and] to consider whether judgment creditor had any valid claim for attorney fees.”</p>
<p>Hobratschk v. Spahr, 154 Fed.Appx. 400 (4th Cir. 2005)</p>	<p>An order partially grants and partially denies the plaintiff’s motion for summary judgment (among other rulings, although there is no mention of attorney fees in this order). The plaintiff files an “interlocutory notice of appeal” of the order. The Court of Appeals opinion states that the plaintiff appeals both the summary judgment ruling and an award of attorney fees to the defendant. The Court of Appeals affirms the grant of partial summary judgment and dismisses the appeal of the attorney fees decision.</p>



memorandum

DATE: January 30, 2006
TO: Tom Willging and Joe Cecil
FROM: Rebecca Norwick
SUBJECT: Fed.R.Civ.P. 58(c)(2)

As you requested, I have conducted a preliminary examination regarding the prevalence of the use of Federal Rule of Civil Procedure 58(c)(2), and have summarized the results below. In brief, I found few indications of requests for extension of time under the Rule.

I examined a sample of more than 8500 cases from eight districts, terminated within the last eleven years. This set of cases oversampled civil rights cases and therefore may have included more cases with a request for attorney's fees than would be expected in a random sample. Of these cases, 105, or 1.2%, contain both the phrases "notice of appeal" and "attorney('s) fee(s)" within their docket sheets. Only one of these 105 cases seems to relate to Rule 58(c)(2), in that it involves a request for an extension of time to file a notice of appeal, following a motion for attorney's fees.¹ Sixteen of the 105 cases contain the terms "appeal" and a variant of "extend" (e.g., extend, extending, extension) within the same docket entry,² but in each case except the one mentioned above, the extension either does not appear to relate to an anticipated appeal or does not appear to relate to a request for attorney's fees. None of the 105 cases contains "notice of appeal" and "attorney('s) fee(s)" within the same docket entry, and none of the 105 cases makes reference to "Rule 58," "58(c)," or "58(c)(2)."

In order to test the appropriateness of the search terms used in examining the docket sheets, I obtained the docket sheets from 15 cases I identified through Westlaw as raising issues relating to Rule 58(c)(2). I then applied the search terms used above to these 15 cases' docket sheets and found that 12 of the 15 would have been identified by the first set of search terms (i.e., "attorney('s) fee(s)" and "notice of appeal" within the docket sheet). Two additional cases would be identified if the search included "attorneys' fee." Five of the 15 cases contain "notice of appeal" and "attorney('s) fee(s)" in the same docket entry (as compared to no cases in the docket search above). As above, none of these 15 docket sheets contains reference to "Rule 58." Finally, six of the 15 cases would have been identified by the more limited search for "appeal" and a variant of "extend" within the same docket entry. The other cases would not have been identified, for idiosyncratic reasons (e.g., a request for extension was made orally and was not listed in the docket sheet; the docket sheet was sparse; one entry read "*staying* the time" rather than "extending the time," etc.). In addition, some of the 15 cases were appeals court decisions

¹ In this Massachusetts case, the judge granted the defendants' request to extend the time to file an appeal until after he disposed of the plaintiff's pending motion for attorney's fees. Note that *Wikol v. Birmingham Pub. Sch. Bd. of Educ.*, 360 F.3d 604 (6th Cir. 2004) would not have appeared because it was not part of the sample examined.

² Within the subset of 105 cases that included both "notice of appeal" and "attorney('s) fee(s)" in the cases' docket sheets, the exact grep search command in Unix was: `grep -ip appeal * | grep -ip "exten.*"`

that cited Rule 58(c)(2) in ruling that because no request for extension had been made, the appeal was untimely. These results suggest that it may be difficult to identify, through searches of docket sheets, some cases in which the parties struggled with Rule 58(c)(2). This identification difficulty arises because docket entries do not seem to use consistent terminology when referencing these cases, and because an important aspect of Rule 58(c)(2) can be a failure to file a timely motion; this *lack* of action will rarely be reflected within a docket entry.

Finally, I conducted a search within CourtLink in LexisNexis. I searched at least 200,000 docket sheets for all cases that contain reference to “attorney’s fee(s)” anywhere in the docket sheet, and “appeal” and “extend” within the same docket entry.³ This search yielded only nine cases. Five of these nine cases included docket entries for a motion to extend time for filing a notice of appeal under Rule 58. In three of the cases the motion was granted and in two of the cases the motion was denied. I believe the paucity of cases reflects both the relative rarity of instances that explicitly refer to Rule 58(c)(2) and the limitations of the CourtLink database.

In short, this search of docket sheets identified few cases that refer to requests for extensions of time for appeal due to a motion for attorney’s fees.

I regard my search of 8500 docket sheets as a preliminary effort and am willing to expand this search to more docket sheets if that will aid the committee. Please let me know how you wish me to proceed.

³ The exact CourtLink search command was, within the database “All US District Courts (Civil)”: *Key Word search ALL: appeal, extend and Key Word search ANY: “attorney’s fee.”* A second search in which I substituted “attorney fee” for “attorney’s fee” yielded only one case, which was a duplicate of one of the nine already identified.