

Attorney's Fees for Frivolous, Unreasonable or Groundless Litigation

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During the survey period, the Indiana legislature enacted a statutory amendment providing for an award of attorney's fees, as a part of the costs to the prevailing party in a civil action.¹ The amendment permits a court to award attorney's fees if the court finds that either party: (1) brought the action or defense or a claim on defense that is frivolous, unreasonable, or groundless; (2) continued to litigate the action or defense after the party's claim or defense clearly became frivolous, unreasonable, or groundless; or (3) litigated the action in bad faith.² This legislative mandate for the award of attorney's fees is a departure from past Indiana practice and raises important questions for practitioners.

I. THE AMERICAN RULE

Indiana courts have traditionally adhered to the American rule that attorney's fees cannot be awarded to a prevailing party in the absence of either a specific statutory provision or an agreement between the parties.³ This rule is based on the assumption that imposing the costs of attorney's fees on the losing party will greatly discourage use of the courts.⁴ Critics of the American rule have argued for a modification of the rule for at least three reasons. First, the American rule encourages intolerably congested courts.⁵ Second, it is argued that an injured party can never be made whole if he must pay his attorney's fees.⁶ Finally, it is asserted that the rule encourages parties with unfounded or feeble claims to bring suit in hope of recovering at least the nuisance value of the suit because

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¹IND. CODE § 34-1-32-1 (Supp. 1986).

²IND. CODE § 34-1-32-1(b) (Supp. 1986).

³See, e.g., *Kikkert v. Krumm*, 474 N.E.2d 503, 505 (Ind. 1985); *Trotcky v. Van Sickle*, 227 Ind. 441, 443, 85 N.E.2d 638, 640 (1949). Courts have construed statutes that provide for an award of costs to the prevailing party as not to include an award of attorney's fees. See *State v. Holder*, 260 Ind. 336, 339, 295 N.E.2d 799, 800 (1973).

⁴*F.D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967). See Mallor, *Punitive Attorney's Fees for Abuses of the Judicial System*, 61 N.C.L. REV. 613, 615-19 (1983), for a useful discussion of the policy implications of the American rule.

⁵See Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75, 79-80 (1963).

⁶See Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792, 797 (1966).

such a party risks nothing but the costs of his own attorney's fees.⁷

It is widely recognized that the shifting of attorney's fees can have an important impact on a litigant's rights.⁸ Both Congress and the Indiana legislature have provided for an award of attorney's fees in various instances to effectuate important legislative policies.⁹

Through the exercise of their equitable powers, Indiana courts have recognized an exception to the American rule that each party to a lawsuit must bear his own attorney's fees absent expressed statutory or contractual authorization. The obdurate behavior exception permits a court to impose an award of attorney's fees¹⁰ on a party that has litigated in bad faith.¹¹ The Supreme Court of Indiana first considered the obdurate

⁷*Id.* at 792; Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216, 1223 (1967).

⁸See generally Note, *Use of Taxable Costs to Regulate the Conduct of Litigants*, 53 COLUM. L. REV. 78 (1953).

⁹For a collection of federal statutes providing for an award of attorney's fees, see *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 260-61 n.33 (1975). Indiana statutes that provide for an award of attorney's fees include: Relocation Assistance Act, IND. CODE § 8-13-18.5-13 (1982); Crime Victim's Civil Actions for Damages, IND. CODE § 34-4-30-1 (1982); Paternity Proceedings, IND. CODE § 31-6-6.1-18 (1982); Dissolution of Marriage, IND. CODE § 31-1-11.5-16 (1982); Evidence of Indebtedness; Agreement to Pay, IND. CODE § 26-2-4-1 (1982); Deceptive Consumer Sales, IND. CODE § 24-5-0.5-4 (1982); Mechanics Lien Failure to Release, IND. CODE § 32-8-1-2 (1982); Tort Claims Against Governmental Entities and Public Employees, IND. CODE § 34-4-16.5-19 (1982); and Civil Rights Claims Against Public Employees, IND. CODE § 34-4-16.7-4 (1982).

¹⁰The obdurate behavior exception permits only an award of attorney's fees and does not include other litigation expenses including deposition expenses. *Cox v Ubik*, 424 N.E.2d 127, 131 (Ind. Ct. App. 1981).

¹¹*St. Joseph College v. Morrison Inc.*, 158 Ind. App. 272, 279-80, 302 N.E.2d 865, 870 (1973). The most versatile exception to the American rule is punitive in nature and based on the existence of bad faith on the part of one of the litigants. See *Hall v. Cole*, 412 U.S. 1, 5 (1973).

Other judicially created exceptions to the American rule include the common fund exception and the private attorney general exception. See *St. Joseph College*, 158 Ind. App. at 279-80, 302 N.E.2d at 870 (quoting *La Raza Unida v. Volpe*, 57 F.R.D. 94, 96 (N.D. Cal. 1972)). The common fund exception permits an award of attorney's fees when the plaintiff's successful litigation confers "a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them." *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 393-94 (1970) (award of attorney's fees to successful shareholder plaintiffs in a suit to set aside a corporate merger). The private attorney general exception arises where a court awards attorney's fees to prevailing plaintiffs when necessary and appropriate to insure important rights or social policies. *St. Joseph College*, 158 Ind. App. at 279-80, 302 N.E.2d at 870. *But see Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975), where the Supreme Court rejected the private attorney general exception because it required the federal courts to determine a number of issues better left to legislative resolution, such as determining which statutes were of sufficient importance to justify fee shifting. *Id.* at 269.

behavior exception to the American rule in *Kikkert v. Krumm*,¹² where the court observed that the rule is a

protective measure which operates to help preserve the integrity of the judicial process. The nature of an attorney fee award under the obdurate behavior exception is punitive, designed to reimburse a *prevailing party* who has been dragged into *baseless litigation* and thereby subjected to *great expense*.¹³

Although several cases have discussed the obdurate behavior exception to the American rule,¹⁴ attorney's fees are infrequently awarded because Indiana appellate courts have required "that the party's conduct . . . be vexatious and oppressive in the extreme before the court can impose special equitable sanctions."¹⁵ For this reason, the obdurate behavior exception has limited usefulness in deterring frivolous, unreasonable, or groundless litigation practices.

*Cox v. Ubik*¹⁶ is one of the few Indiana appellate cases to affirm an award of attorney's fees by a trial court under the obdurate behavior exception. Plaintiff (Cox) brought a negligence action against defendants (Ubik and Winters) for injuries sustained in an automobile accident.¹⁷ At trial, Cox claimed that Ubik's automobile struck hers from the rear, thereby causing her collision with Winters' automobile and a retaining wall.¹⁸ There was evidence at trial that Cox acted in bad faith in failing to dismiss Ubik from the suit. Cox admitted that she could not recall ever telling anyone prior to trial that Ubik had hit her.¹⁹ Ubik introduced testimony by the police officer at the scene of the accident that Cox never mentioned being hit by Ubik and that the accident was caused when Cox hit a patch of ice and skidded into the retaining wall.²⁰ The appellate court concluded that it was within the trial court's discretion to assess Ubik's attorney's fees against Cox, based upon the above evidence that Cox maintained her claim against Ubik in bad faith.²¹

The federal bad faith exception to the American rule²² has been

¹²474 N.E.2d 503 (Ind. 1985).

¹³*Id.* at 505 (emphasis in original).

¹⁴*See, e.g., id.*; *Turnpaugh v. Wolf*, 482 N.E.2d 506, 510 (Ind. Ct. App. 1985); *Dotlich v. Dotlich*, 475 N.E.2d 331, 348 (Ind. Ct. App. 1985); *Cox v. Ubik*, 424 N.E.2d 127, 129 (Ind. Ct. App. 1981); *Umbreit v. Chester B. Stem, Inc.*, 373 N.E.2d 1116, 1120 (Ind. Ct. App. 1978).

¹⁵*St. Joseph College*, 158 Ind. App. at 280, 302 N.E.2d at 871.

¹⁶424 N.E.2d 127 (Ind. Ct. App. 1981).

¹⁷*Id.* at 128.

¹⁸*Id.*

¹⁹*Id.* at 130.

²⁰*Id.*

²¹*Id.*

²²A trial court has inherent authority to award attorney's fees to prevailing parties

broadly construed to apply to three types of behavior: prelitigation misconduct, assertion of frivolous claims, counterclaims and defenses; and misconduct during the course of the litigation.²³ The application of the bad faith exception to prelitigation conduct is based upon the notion that the costs of litigation ought to be shifted to prevent the unfairness of imposing costs on a party who should have been entitled to enjoy his rights.²⁴ In addition, where a defendant causes litigation by unjustifiably resisting a meritorious claim of right, he places unnecessary costs on the courts and the public.²⁵

The Indiana obdurate behavior exception has been held to apply only "at the time a party files a knowingly baseless claim or at the time a party discovers that the claim is baseless and fails to dismiss it."²⁶ The exception does not permit an award of attorney's fees for obdurate behavior that precedes or gives rise to a cause of action.²⁷ This is an important distinction from the bad faith exception to the American rule recognized by federal courts.

II. LEGISLATIVE RESPONSE

Indiana, along with several other states,²⁸ has codified the judicially created obdurate behavior exception to the general rule that each party

when a losing litigant has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y.*, 421 U.S. 240, 258-59 (1975) (quoting *F. D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974)). See, e.g., *Hall v. Cole*, 412 U.S. 1, 5 (1973); Annotation, *Award of Counsel Fees to Prevailing Party Based on Adversary's Bad Faith, Obduracy, or Other Misconduct*, 31 A.L.R. FED. 833 (1977) for a useful collection of cases construing the federal bad faith exception to the American rule.

²³See *Mallor*, *supra* note 4, at 636-61 for a useful summary of the three types of misconduct included in the federal bad faith exception. Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 661 (1974).

²⁴See, e.g., *Rolax v. Atlantic C.R.L. Co.*, 186 F.2d 473 (4th Cir. 1951) (as one justification for the award of attorney's fees, the court noted the pre-litigation oppressive and discriminatory conduct of the losing litigant); *Schlein v. Smith*, 160 F.2d 22 (D.C. Cir. 1947) (defendant properly ordered to pay attorney's fees to plaintiffs due to grossly fraudulent actions of defendant).

²⁵*Haycroft v. Hollenback*, 606 F.2d 128, 133 (6th Cir. 1979).

²⁶*Kikkert*, 474 N.E.2d at 505.

²⁷"Intentional or illegal conduct that gives rise to a cause of action is not obdurate behavior, it is merely conduct that may form the basis of a potential lawsuit." *Id.* The obdurate behavior exception has been applied through Appellate Rule 15(G) of the Indiana Rules of Appellate Procedure to give appellate courts the discretion to award attorney's fees for appeals taken in bad faith or merely to harass or delay. See *Deetz v. McGowan*, 403 N.E.2d 1160, 1165 (Ind. 1980).

²⁸See, e.g., ARIZ. REV. STAT. ANN. § 12-341.01(C) (1982) (upon clear and convincing evidence that the claim or defense constitutes harassment, is groundless and not in good faith); CAL. CIV. PROC. CODE § 128.5 (West Supp. 1986) (tactics or actions not based on good faith which are frivolous or which cause unnecessary delay; frivolous is defined as "totally and completely without merit or . . . for the sole purpose of harassing an opposing

to a lawsuit bear his own attorney's fees. The Indiana legislature amended section 34-1-32-1, effective September 1, 1986, to provide

- (a) In all civil actions, the party recovering judgment shall recover costs, except in those cases in which a different provision is made by law.
- (b) In a civil action, the court may award attorney's fees as part of the cost to the prevailing party, if it finds that either party:
 - (1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless;
 - (2) continued to litigate the action or defense after the party's claim or defense clearly became frivolous, unreasonable, or groundless; or
 - (3) litigated the action in bad faith.
- (c) The award of attorney's fees under subsection (b) does not prevent the prevailing party from bringing an action against another party for abuse of process arising in any part on the same facts, but the prevailing party may not recover the same attorney's fees twice.²⁹

This statutory scheme is patterned after section 34-4-16.5-19,³⁰ providing for an award of attorney's fees to a governmental agency prevailing as a defendant to a tort claim, and section 34-4-16.7-2,³¹ providing for an award of attorney's fees to a governmental agency prevailing as a defendant in an action under the civil rights laws of the United States.

Amended subsection 34-1-32-1(b)(3) will probably be construed by the

party."); COLO. REV. STAT. § 13-17-101 (Supp. 1984) (action or defense, or any part thereof, which is determined to have been substantially frivolous, substantially groundless, or substantially vexatious); FLA. STAT. ANN. § 57.105 (West Supp. 1985) ("complete absence of a justiciable issue of either law or fact"); IDAHO CODE § 12-121 (1979), *limited by* IDAHO R. CIV. P. 54(e)(1) (case brought, pursued or defended frivolously, unreasonably or without foundation); MASS. ANN. LAWS ch. 231, § 6F (Michie/Law Co-op 1986) (all or substantially all the claims, defenses, frivolous and not in good faith); MINN. STAT. ANN. § 549.21 (West Supp. 1984) (bad faith claim, frivolous claim or defense, position asserted solely to harass or delay, or fraud upon the court); N.D. CENT. CODE § 28-26-01 (Supp. 1985) (claim for relief was frivolous); S.D. CODIFIED LAWS ANN. § 15-17-35 (1984) (cause of action was frivolous or brought for malicious purposes); UTAH CODE ANN. § 78-27-56 (Supp. 1986) (action or defense was without merit and not brought or asserted in good faith); WASH. REV. CODE ANN. § 4.84.185 (West Supp. 1986) (action, counterclaim . . . was frivolous and advanced without reasonable cause); WIS. STAT. ANN. § 814.025 (West Supp. 1985) (action . . . which is found to be frivolous, including both bad faith and meritless claims).

²⁹IND. CODE § 34-1-32-1 (Supp. 1986). Indiana recognizes an action for abuse of process based upon a showing of misuse or misapplication of the judicial process for an end other than that which it was designed to accomplish. *Display Fixtures Co. v. R.L. Hatcher, Inc.*, 438 N.E.2d 26, 31 (Ind. Ct. App. 1982).

³⁰IND. CODE § 34-4-16.5-19 (1983).

³¹IND. CODE § 34-4-16.7-2 (1983).

courts as a codification of the previously recognized obdurate behavior exception.³² This subsection will continue to be narrower in scope than the federal bad faith exception because its application is expressly limited to circumstances where a losing party litigated the action in bad faith.

The language of amended subsections (b)(1) and (2), however, shifts the court's inquiry from a search for the improper motives of the losing party to a review of the legal and factual basis of the losing party's claim or defense. This inquiry into whether a party "brought the action or defense" or "continued to litigate the action or defense after the party's claim or defense clearly became frivolous, unreasonable, or groundless," is both a legal and factual inquiry that goes to the very merits of a claim or defense. These subsections place an obligation on litigants to investigate the legal and factual basis of the claim when filing and to continuously evaluate the merits of claims and defenses asserted throughout litigation.

The obligation to review the merits of a party's legal position may be imposed on both the client and attorney. The statute provides for an award of attorney's fees to the prevailing party but is silent as to who is to pay the award. In *Owen v. Vaughn*,³³ the Indiana Court of Appeals for the Fourth District affirmed an award of attorney's fees against a plaintiff's attorneys under both the obdurate behavior exception and the Indiana Tort Claims Act.³⁴ The court relied on an early Indiana Supreme Court case, *Brown v. Brown*,³⁵ which upheld the discretionary power of the court to enter costs against a non-party attorney and stated that such an award will only be reversed for an abuse of discretion.³⁶

Another issue raised by this statute is whether a court can award partial attorney's fees on a finding that one of several claims or defenses is frivolous, unreasonable, or groundless. Section 34-1-32-1 provides that the court "may" award attorney's fees if the elements of the statute are satisfied.³⁷ As a matter of statutory interpretation, the use of the word "may" grants judicial discretion in applying a provision.³⁸ This suggests

³²See *supra* notes 10-21, 26-27 and accompanying text.

³³479 N.E.2d 83 (Ind. Ct. App. 1985).

³⁴*Id.* at 88. Indiana Tort Claims Act, 1974 Ind. Acts, P.L. 142, § 1 (codified as amended at IND. CODE § 34-4-16.5-1 *et seq.*) (1982)).

³⁵4 Ind. 627 (1853).

³⁶*Owen*, 479 N.E.2d at 88. An interesting circumstance could arise where a party seeks to avoid responsibility (or have responsibility shifted to his counsel) for an award of attorney's fees by asserting that the claim or defense at issue was taken on the advice of counsel. Although advice of counsel can serve as a defense against an action for malicious prosecution, *see, e.g., Barrow v. Weddle*, 161 Ind. App. 601, 605-06, 316 N.E.2d 845, 849 (1974), it is unlikely that it would prevent an award of attorney's fees for asserting a frivolous, unreasonable or groundless claim or defense.

³⁷IND. CODE § 34-1-32-1 (Supp. 1986).

³⁸See 82 C.J.S. *Statutes* § 380 (1953).

that the court's range of options is broad enough to allow a partial award of attorney's fees.³⁹

The statute leaves unclear the proper manner of determining the amount of the attorney's fee award. Although there are instances where a court has taken judicial notice of what a reasonable attorney's fee would be because of familiarity with the action,⁴⁰ it is the better rule that attorney's fees be proven reasonable⁴¹ with the opposing party having an opportunity to object.⁴² Indiana courts have held that a contingent fee arrangement cannot be used as a basis for determining a reasonable fee to be paid by a non-party to the fee agreement.⁴³ Instead courts have considered the following factors as evidence of a reasonable award of attorney's fees:

- (1) The time, labor, and skill required to perform the legal service properly,
- (2) The difficulty of the issues involved,
- (3) The fee customarily charged in the locality for similar legal services,
- (4) The amount involved, and
- (5) The time limitations imposed by the circumstances.⁴⁴

Factors such as these should continue to be guidelines to determine a reasonable award of attorney's fees under the statute.

Another issue raised by the statute is the relationship between section 34-1-32-1 and Rules 3.1 and 3.2 of the Indiana Rules of Professional Conduct.⁴⁵ It is unclear whether an award of attorney's fees under this statute will provide a basis for disciplinary action under Indiana's Rules of Professional Conduct.⁴⁶

³⁹Where a party prevails as to only one issue and fails on other issues, the party is entitled to only a partial award of costs. *Steele v. Epson*, 142 Ind. 397, 404, 41 N.E. 822, 825 (1895).

⁴⁰*Gerberin v. Gerberin*, 172 Ind. App. 255, 262, 360 N.E.2d 41, 47 (1977).

⁴¹*See Lystarczyk v. Smits*, 435 N.E.2d 1011, 1017 (Ind. Ct. App. 1982). "A lesser standard would undermine the confidence of the public in the bench and the bar." *Id.* at n.11.

⁴²*See, e.g., In Re Marriage of Gray*, 422 N.E.2d 696, 703 (Ind. Ct. App. 1981); *Belcher v. Buesking*, 371 N.E.2d 417, 420 (Ind. Ct. App. 1978).

⁴³Contingent fee agreements are subject "to abuse if enforceable against non-agreeing promisors on notes and contracts . . ." *Leibowitz v. Moore*, 477 N.E.2d 946, 947, *modified*, 480 N.E.2d 607 (Ind. Ct. App. 1985) (discussing *Waxman Industries, Inc. v. Trustco Dev. Co.*, 455 N.E.2d 376 (Ind. Ct. App. 1983) and *Berkemeier v. Rushville Nat'l Bank*, 459 N.E.2d 1194 (Ind. Ct. App. 1984)).

⁴⁴*Lystarczyk*, 435 N.E.2d at 1017 (citing *Fox v. Galvin*, 381 N.E.2d 103, 108 (Ind. Ct. App. 1978)).

⁴⁵IND. RULES OF PROFESSIONAL CONDUCT Rules 3.1 and 3.2. On November 25, 1986, the Indiana Supreme Court adopted the new Rules of Professional Conduct, effective January 1, 1987.

⁴⁶Certainly one difference between an award of attorney's fees under this statute and a finding of probable cause for maintaining a disciplinary proceeding is the requirement

Under Rule 3.1, an attorney is subject to discipline if he shall "bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."⁴⁷ Thus, an attorney who asserts a claim or defense for which there is a frivolous basis, could be subject to both an award of attorney's fees under section 34-1-32-1(b)(1) or (2) and a disciplinary proceeding under Rule 3.1. Where an attorney maintains a good faith argument for a change in existing law, he may still be subject to an award of attorney's fees for what may be deemed a frivolous, unreasonable, or groundless claim or defense.⁴⁸

In addition, if bad faith conduct during the litigation results in an award of attorney's fees, the attorney might, under some circumstances, be subject to discipline under Rule 3.2, which requires that "[a] lawyer make reasonable efforts to expedite litigation consistent with the interests of his client."⁴⁹ Upon an award of attorney's fees for asserting a frivolous, unreasonable, or groundless claim or defense or litigating an action in bad faith, it may be difficult to show that such actions were not undertaken for the purpose of frustrating an opposing party's attempt to obtain rightful redress.

Finally, it is unclear whether the statute is applicable in federal diversity cases applying Indiana law under the *Erie* doctrine.⁵⁰ To the extent that section 34-1-32-1 is consistent with the federal bad faith exception, the question may be academic. In *Alyeska Pipeline Service Co. v. Wilderness Society*,⁵¹ the United States Supreme Court, in dicta, noted that in an ordinary diversity case, where state law does not run counter to a valid federal statute or rule of court, a state law denying or granting the right to attorney's fees that reflects a substantial state policy should be followed.⁵² Later federal diversity cases have awarded attorney's fees under applied state statutes that provided for an award of attorney's fees for failure to disclose a product flaw in a products liability action,⁵³ and

that attorney misconduct be shown by clear and convincing evidence before sanctions are appropriate. See, e.g., *In Re Allen*, 470 N.E.2d 1312, 1315 (Ind. 1984); *In Re Sekerez*, 458 N.E.2d 229, 234 (Ind.), cert. denied, 105 S. Ct. 182 (1984).

⁴⁷IND. RULES OF PROFESSIONAL CONDUCT Rule 3.1. This rule provides an exception in criminal proceedings that states: "A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established." *Id.*

⁴⁸IND. CODE § 34-1-32-1(b)(1) and (2) (Supp. 1986).

⁴⁹IND. RULES OF PROFESSIONAL CONDUCT Rule 3.2 (1987).

⁵⁰"Except in matters governed by the Federal Constitution or by action of Congress, the law to be applied in any case is the law of the state." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

⁵¹421 U.S. 240 (1975).

⁵²*Id.* at 259 n.31 (quoting 6 J. MOORE, FEDERAL PRACTICE ¶ 54.77[2] (2d ed. 1974)).

⁵³*Woods v. International Harvester Co.*, 697 F.2d 635, 640-41 (5th Cir. 1983) (applying LA. CIV. CODE ANN. art. 2545 (West 1952)).

an award to an insured party that obtains a judgment against an insurer.⁵⁴

Because section 32-1-34-1 reflects a substantial state policy and does not run counter to federal statutes or rules of court, it can be argued that it should be applied when a federal court sits in diversity jurisdiction and applies Indiana law. Alternatively, it is arguable that the statute does not grant a party a substantive right but is procedural in nature, permitting Indiana courts to exercise their discretion to supervise the litigation process. Because the court "may" award attorney's fees, it is difficult to argue that a party has a substantive right to an award.

In *Hanna v. Plumer*,⁵⁵ the United States Supreme Court noted that *Erie* questions must be resolved by considering the dual policies of discouraging forum shopping and avoiding inequitable administration of the laws.⁵⁶ The question of whether the application of section 34-1-32-1 will achieve these policies depends in part on how Indiana courts choose to implement the statute. If the courts apply the statute in such a manner that it fails to differ substantially from the federal bad faith exception,⁵⁷ then the justification for applying the statute in federal diversity actions may be unpersuasive. Absent significant change in the application of the statute, it may not be viewed as creating a substantial state interest sufficient to justify the threat to consistency, uniformity and equity resulting from federal application of state law.

III. CONCLUSION

Indiana Code Section 34-1-32-1 is a narrow exception to the American rule that attorney's fees cannot be awarded to a prevailing party absent

⁵⁴*Fritz v. Standard Security Life Ins. Co.*, 676 F.2d 1356, 1359 (11th Cir. 1982) (applying FLA. STAT. § 627.428 (1984)).

⁵⁵380 U.S. 460 (1965).

⁵⁶*Id.* at 468.

⁵⁷In addition, Rule 11 of the Federal Rules of Civil Procedure provides for an award of attorney's fees for unmeritorious or dilatory pleadings practice. The rule provides in relevant part:

The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper, that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

a specific statutory provision or an agreement between the parties. Under the statute, the court may award attorney's fees to the prevailing party if it finds that the opposing party has asserted or maintained a frivolous, unreasonable, or groundless claim or defense or otherwise litigated the action in bad faith. The statute permits the exercise of judicial discretion and is flexible enough to provide either a partial or complete award of attorney's fees against opposing counsel as well as the opposing party. Through judicial enforcement of this statute, attorneys will be compelled to carefully scrutinize the merits of positions adopted in all stages of litigation or risk an award of attorney's fees.