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EXPERT WITNESS FEES IN FEDERAL DIVERSITY CASES

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I. INTRODUCTION

With the increasing complexity of litigation and the increased utilization of expert witnesses to provide expensive evidence on narrow scientific and technological issues, it is quite startling that Congress still limits compensation of expert witnesses to only forty dollars per day,[1] the same rate as that of ordinary fact witnesses.[2] The Supreme Court justified the low rate of compensation of lay witnesses by reasoning that the witness fee statute was not intended by Congress to compensate witnesses fully for their lost time and income.[3] Presumably, this same reasoning also applies to expert witnesses. The problem with the application of this reasoning to expert witnesses is that, unlike lay witnesses who may be compelled by subpoena to give factual testimony, the individual litigants must pay the fees charged by the experts. Furthermore, a plaintiff may not recoup all of his or her liti-

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1. 28 U.S.C.A. § 1821 (West Supp. 1992).

2. *Id.*

3. *See* Hurtado v. United States, 410 U.S. 578, 586 n.7 (1973) (reviewing legislative history of expert witness fee statutes), *reh. denied*, 411 U.S. 978 (1973).

gation expenses after prevailing at trial if the expert witnesses have cost more than the statutory rate of forty dollars per day.

Though this result seems inequitable, proponents of the American Rule[4] would quickly point out that in the converse situation a losing plaintiff is spared the costs of the defendant's expert witnesses. Thus, to a certain extent, the plaintiff is not discouraged from pursuing a claim that he could not otherwise afford to lose.

II. THE LIMITATION OF EXPERT WITNESS FEES TO FORTY DOLLARS PER DAY UNDER 28 U.S.C. SECTION 1821

The United States Supreme Court, in *Crawford Fitting Co. v. J. T. Gibbons, Inc.*,[5] reviewed 28 U.S.C. Section 1920(3)[6] and concluded that witness fees may be taxed as costs.[7] However, the amount of the fee was limited under 28 U.S.C. Section 1821 to thirty dollars.[8] This amount has since been raised to forty dollars.[9] The issue in *Crawford*

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4. Unlike the English Rule which grants a court discretion to award attorney's fees as an element of costs in order to make the prevailing party whole, the American Rule provides that attorney's fees are not generally allowed to the prevailing party. *See* Hensley v. Eckerhart, 461 U.S. 424, 429 (1983) (defining "American Rule"); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247-49 (1975) (discussing development of "American Rule"); Arthur L. Goodhart, *Costs*, 38 YALE L.J. 849, 873 (1929) (questioning cause of differences in American system and English common law practice). By analogy, the interdiction to recovery of attorney's fees as costs under the American Rule could be extended to bar recovery of expert witness fees.

5. 482 U.S. 437 (1987).

6. 28 U.S.C.A. § 1920 (West 1966 & Supp. 1991) provides:

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under § 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses and costs of special interpretation services under § 1828 of this title.

Id.

7. *Crawford*, 482 U.S. at 440-41.

8. *See id.* (quoting 28 U.S.C. § 1821).

9. 28 U.S.C.A. § 1821 (Supp. 1992). Section 1821 provides: "(a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States . . . shall be paid the fees and allowances provided by this section." *Id.* The provision further provides:

(b) A witness shall be paid an attendance fee of $40 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

was whether Federal Rule of Civil Procedure 54(d)[10] allowed the court an independent means to grant expert witness fees greater than that provided under 28 U.S.C. Section 1821.[11] The Court concluded that the rule did not provide such means and refused to allow federal courts the discretion to award expert witness fees in excess of the statutorily prescribed amount.[12] The decision in *Crawford* left open the issue of whether the application of state law in a diversity case could supersede the federal statute limiting witness fees.

Id.

10. FED. R. CIV. P. 54(d). Rule 54(d) provides in part: "Except when express provision therefore is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs." *Id.*

11. *Crawford*, 482 U.S. at 442. Prior to *Crawford*, some courts held that full expert witness fees could be awarded in excess of 28 U.S.C. Section 1821 limits if the experts were essential. *See* Crues v. KFC Corp., 768 F.2d 230, 234 (8th Cir. 1985) (remanding to determine issue of whether expert is "crucial" and thus justifying award of fees); Paschall v. Kansas City Star Co., 695 F.2d 322, 326 (8th Cir. 1982) (concluding that district court was justified in awarding expert fees after expert determined to be crucial); Roberts v. S. S. Kyria Koula D. Lemos, 651 F.2d 201, 206 (3d Cir. 1981) (affirming district court's award of expert fees because expert's testimony was indispensable); Fahey v. Carty, 102 F.R.D. 751, 753 (D.N.J. 1983) (finding that court may tax expert fees when testimony is indispensable); Heverly v. Lewis, 99 F.R.D. 135, 137 (D. Nev. 1983) (stating that central concern in awarding expert fees is showing of necessity of testimony). In view of the Supreme Court's limitation in *Crawford*, that courts cannot roam beyond the fee provision of 28 U.S.C. Section 1821, these cases no longer appear to be valid though they have not been directly overruled. *See* West Va. Univ. Hosp. Inc. v. Casey, 499 U.S. __, __, 111 S. Ct. 1138, 1141, 113 L. Ed. 2d 68, 75 (1991) (explicit statutory authority prerequisite to reimbursement of expert fees).

12. Exceptions to this general rule were recognized by the United States Supreme Court when the expert witness is court-appointed pursuant to 28 U.S.C. Section 1920(6) and when contract or explicit statutory authority provides for the expert's fees. *Crawford*, 482 U.S. at 442, 443-44. Lower courts had recognized that the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. Section 1988, provides special statutory authority for awarding full expert fees. *See, e.g.*, Fiedrich v. Chicago, 888 F.2d 511, 517-19 (7th Cir. 1989) (affirming district court's award of $10,000 incurred for hiring experts to advise and testify); Coleman v. City of Omaha, 714 F.2d 804, 809 (8th Cir. 1983) (awarding expert witness fees); Ramos v. Lamm, 713 F.2d 546, 559 (10th Cir. 1983) (awarding expert fees where testimony is reasonably necessary); Palmigiano v. Garraby, 707 F.2d 636, 637 (1st Cir. 1983) (awarding attorney's fees for out-of-pocket expenses after reviewing award of expert witness fees in prior precedent); Jones v. Diamond, 636 F.2d 1364, 1382 (5th Cir.) (en banc) (remanding to district court for determination of appropriate amount of expert witness fees to award), *cert. granted sub nom.* Ledbetter, Sheriff v. Jones, 452 U.S. 959, *and cert. dismissed*, 453 U.S. 950 (1981); *cf.* Wallace v. House, 377 F. Supp. 1192, 1206-07 (W.D. La. 1974) (awarding expert witness fees in suit to protect civil rights in at-large election), *modified*, 515 F.2d 619 (5th Cir. 1975), *and vacated on other grounds*, 425 U.S. 947 (1976). The *Crawford* opinion did not specifically address whether it applied to awards in civil rights actions but this was resolved in *West Va. Univ. Hosp.*, 499 U.S. at __, 111 S. Ct. at 1148, 113 L. Ed. 2d at 84-85 (1991) (holding that expert fees are not recoverable in civil rights actions).

III. STATE STATUTES—PROCEDURAL VS. SUBSTANTIVE ANALYSIS

Whether to apply a state statute awarding expert witness fees in a federal diversity case turns on the procedural or substantive nature of the state statute. There is no "litmus paper" test to apply in determining whether to use state or federal law. Rather, a court must refer to the constitutional policies of federalism underlying the rule developed in *Erie Railroad Co. v. Tompkins*.[13] *Erie* and its progeny provide the rule that in diversity cases, federal courts must apply state law as established by the state's highest court.[14] The *Erie* rule is rooted in the realization that it is unfair for litigation results to differ materially because suit is brought in federal court rather than state court.

The application of *Crawford* to diversity cases may cause parties who anticipate substantial expert fees to file suit in state court when the state has a statute awarding full expert witness fees. This result is contrary to the policy of *Erie* which aims to discourage forum shopping and "inequitable administration of the laws."[15] Moreover, the specter of a defendant removing suit from state court to federal court in an attempt to limit the plaintiff's recovery of expert fees should not be countenanced.

To decide whether a state statute awarding expert witness fees is substantive rather than procedural, a proper analysis under *Hanna v. Plumer*[16] is necessary. The Supreme Court in *Hanna* stated: "The test must be whether a rule really regulates procedure — the judicial

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13. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (requiring federal courts to apply state law in diversity cases).

14. *See* Hanna v. Plumer, 380 U.S. 460, 474 (1965) (explaining *Erie* rule); Guaranty Trust Co. of N.Y. v. York, 326 U.S. 99, 109 (1945) (explaining that outcome of litigation should be substantially same for both state and federal court where legal rules are determination of litigation's outcome). In *Erie*, before abandoning the established doctrine of allowing a federal common law, the court hesitated: "We should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear, and compels us to do so." *Erie*, 304 U.S. at 77. *See generally* CHARLES A. WRIGHT, FEDERAL COURTS § 56, at 359-64 (4th ed. 1983) (discussing constitutional basis of *Erie* doctrine).

15. *See* CHARLES A. WRIGHT, FEDERAL COURTS § 46, at 275-76 (4th ed. 1983) (finding that purpose of *Erie* doctrine is to prevent federal court exercising diversity jurisdiction from entertaining claims for litigants when applicable state laws prevent state courts from doing same); *but see* Chevalier v. Reliance Ins. Co. of Ill., 953 F.2d 877, 886 (5th Cir. 1992) (holding that twin aims of *Erie* not violated by applying federal procedural provisions to taxing of expert fees).

16. 380 U.S. 460 (1965).

process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[17] Therefore, under *Hanna*, the state law is procedural if it regulates how state courts enforce rights and administer redress.[18]

A statute providing for the recovery of expert witness fees does not regulate the judicial process but simply provides a substantive right to recover expert witness fees. An award of expert witness fees is a substantive provision under law because it operates directly to make the aggrieved party whole by payment of money. In other words, it repairs a loss suffered. This remedy is totally unrelated to procedural rules, which generally govern timing deadlines, forms of pleading, service of process, discovery, and trial procedure. Moreover, procedural rules are not ordinarily thought of as directing monetary compensation to a party, as does a substantive provision for the award of expert witness fees. Thus, a statute mandating full recovery of expert witness fees should generally be considered substantive.

Some federal district courts recognize that a state statute awarding expert witness fees represents a substantial enough policy to justify federal courts' awarding the fees.[19] Other district courts have not allowed state statutes to supersede the federal statute in diversity cases.[20] Inexplicably, some district courts limit expert witness fees without first addressing whether a state statute exists that conflicts with 28 U.S.C. Section 1821.[21] Appellate cases have generally held

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17. *Id.* at 464.

18. *Id.*

19. *See* Chemical Bank v. Kimmel, 68 F.R.D. 679, 681-82 (D. Del. 1975) (expert witness fees awarded in accordance with state law); DeThomas v. Delta S.S. Lines, 58 F.R.D. 335, 342-43 (D.D.C. 1973) (affirming lower court's expert fees award based on state law); Henlopin Hotel Corp. v. Aetna Ins. Co., 38 F.R.D. 155, 161 (D. Del. 1965) (stating, "A federal court, in a diversity case should, where proper, enforce an express state policy of taxing expert witness fees as part of costs."). The court in *Henlopin Hotel* found that awarding expert fees in diversity cases is appropriate. *Id.*

20. *See* Pizarro-de-Ramirez v. Grecomar Shipping Agency, 82 F.R.D. 327, 330 (D.P.R. 1976) (expressly rejecting Puerto Rican law allowing expert witness fees on grounds that rule was "procedural" under *Hanna*); Thorn v. Bryant, 52 F.R.D. 25, 26-27 (W.D.N.C. 1970) (refusing to follow North Carolina law, General Statutes § 6-52, which allowed expert witnesses fees only in court's discretion).

21. These cases do not report whether jurisdiction is based on diversity but the facts suggest that the suits are possibly based on diversity. *See* Davenport Grain Co. v. Michigan Millers Mut. Ins. Co., 125 F.R.D. 157, 158 (D. Neb. 1987) (limiting fees without stating whether there is applicable Nebraska statutes concerning witness fees); Walker v. Borden, Inc., 115 F.R.D. 471, 473 (S.D. Miss. 1986) (denying witness fees in excess of $30 per day); Warner

that if there is an express state mandate, the expert fees are recoverable in diversity cases.[22] However, the fees are not recoverable if there is no state statute addressing the issue[23] or if the state statute allows recovery on a discretionary basis.[24]

A. *Diversity Cases Awarding Expert Witness Fees Under State Statutes*

In *Henning v. Lake Charles Harbor & Terminal District*,[25] the United States Court of Appeals for the Fifth Circuit held that under a Louisiana statute[26] an award of expert fees in diversity litigation "is a substantive requirement of Louisiana law, a substantive right of the landowners, and binding upon this Court [under] *Erie*."[27] Recently, the United States Supreme Court cited this case with approval.[28] Though no analysis of *Hanna* was expressly undertaken in *Henning*, the Fifth Circuit viewed the statute as substantive regardless of how it was referred to, by stating: "This reimbursement, by whatever name

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Bros., Inc. v. Gay Toys, Inc., 598 F. Supp. 424, 432 (S.D.N.Y. 1984) (limiting witness fees in temporary restraining order case); Strong v. Ponder, 572 F. Supp. 129, 130 (N.D. Ga. 1983) (directing plaintiff to pay expert fees in amount provided for by § 1821); Murphy v. Amoco Prod. Co., 558 F. Supp. 591, 594 (N.D. 1983) (disallowing expert fees beyond statutory limit), *aff'd*, 729 F.2d 552 (8th Cir. 1984); George R. Hall, Inc. v. Superior Trucking Co., Inc., 532 F. Supp. 985, 996 (N.D. Ga. 1982) (limiting witness fees in accordance with § 1821); Neely v. General Elec. Co., 90 F.R.D. 627, 629-30 (N.D. Ga. 1981) (failing to state whether Georgia statute concerning witness fees exists); Sperry Rand Corp. v. A-T-O, Inc., 58 F.R.D. 132, 137 (E.D. Va. 1973) (denying expert witness fees).

22. *See* Bright v. Land O'Lakes, Inc., 844 F.2d 436, 443-44 (7th Cir. 1988) (awarding reasonable expert witness fees notwithstanding § 1821); Henning v. Lake Charles Harbor & Terminal Dist., 387 F.2d 264, 267 (5th Cir. 1968) (awarding expert witness fees).

23. *See generally* Miller v. Cudahy Co., 858 F.2d 1449 (10th Cir. 1988) (no mention by court whether Kansas statute exists on expert witness fees), *cert. denied*, 492 U.S. 926 (1989); Miller v. Cudahy Co., 656 F. Supp. 316 (D. Kan. 1987) (no mention whether Kansas statute exists on expert fees); Bosse v. Litton Unit Handling Sys., 646 F.2d 689 (1st Cir. 1981) (no mention by court whether New Hampshire statute exists on expert witness fees).

24. *See* Chaparral Resources, Inc. v. Monsanto Co., 849 F.2d 1286, 1292 (10th Cir. 1988) (limiting expert fees after determining that Colorado can allow only discretionary award); Kivi v. Nationwide Mut. Ins. Co., 695 F.2d 1285, 1289 (11th Cir. 1983) (denying witness fees beyond § 1821 because Florida statutes insufficient to make excess award substantive right).

25. 387 F.2d 264, 267 (5th Cir. 1968).

26. LA. REV. STAT. ANN. § 13:3666A (West 1991).

27. *See* International Woodworkers v. Champion Int'l Co., 790 F.2d 1174, 1181 (5th Cir. 1986) (en banc) (limiting holding concerning § 1821 to non-diversity cases); *cf.* Crawford Fitting Co. v. J. T. Gibbons, 482 U.S. 437, 439 (1987) (limiting recovery of expert fees under § 1821 in non-diversity cases).

28. West Va. Univ. Hosp. v. Casey, 499 U.S. __, __, 111 S. Ct. 1138, 1144, 113 L. Ed. 2d 68, 79 (1991).

called or by whatever procedure handled in the state court system, is a substantive requirement of Louisiana law."[29] Though *Henning* involved the condemnation and taking of property by the state which required just compensation under the Louisiana Constitution,[30] as recently suggested in *Cates v. Sears Roebuck & Co.*[31] and its progeny, the holding of *Henning* should not be limited to its facts.[32]

Henning's conclusion that the award of expert fees is a matter of substantive state policy under the applicable state statute is correct even without this state constitutional dimension.[33] First, a state statute rather than a court rule or the Louisiana Code of Civil Procedure fixes the right to such compensation. Second, the language of the statute is mandatory.[34] The mandate of its language is further evidence of the importance of the policy established by the statute.[35] Third, Louisiana embraces the American Rule prohibiting the recovery of attorney's fees "unless provided for by law or by contract."[36] This prohibition can be contrasted to the policy awarding expert witness fees, a feature of Louisiana law since 1884.[37] For over a century, to compensate fully a successful litigant, the Louisiana Legislature has attached great importance to the litigant's ability to recover the cost of expert testimony. Finally, under *Hanna* analysis, the mandatory

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29. *Henning*, 387 F.2d at 267.

30. *See* State v. Barineau, 72 So. 2d 869, 872 (La. 1954) (stating Louisiana Constitution "clearly contemplates that . . . expenses . . . taxed as cost should be included as an element of . . . damages . . . where landowner's property has been taken").

31. 928 F.2d 679, 689 (5th Cir. 1991).

32. Seal v. Knorpp, 957 F.2d 1230, 1237 (5th Cir. 1992); Chevalier v. Reliance Ins. Co. of Ill., 953 F.2d 877, 886 (5th Cir. 1992). *Chevalier* and *Seal* are cases decided by an identical three-judge panel.

33. *See* Williams v. Aetna Ins. Co., 402 So. 2d 192, 195 (La. 1981) (concluding Louisiana expert witness fee statute is substantive in nature so as to make it non-retroactive); *but cf. Chevalier*, 953 F.2d at 886 (noting that holding in *Williams* is limited to purpose of determining retroactivity and is not indicative of substantive nature under *Erie*).

34. LA. REV. STAT. ANN. § 13:3666A (West 1991) provides:

> Witnesses called to testify in court only to an opinion founded on special study or experience in any branch of science, or to make scientific or professional examinations, and to state the results thereof, *shall* receive additional compensation, to be fixed by the court, with reference to the value of time employed and the degree of learning or skill required.

Id. (emphasis added).

35. *Cf.* People of Sioux County v. National Surety Co., 276 U.S. 238, 243 (1928) (noting state statute mandating recovery of attorney's fees).

36. Austin v. Parker, 672 F.2d 508, 518 (5th Cir. 1982); Chauvin v. La Hitte, 85 So. 2d 43, 45 (1956).

37. *See* LA. REV. STAT. ANN. § 13:3666, note (West 1991) (Historical and Statutory Notes).

award of expert fees does not regulate the procedural workings of the court, but provides a substantive remedy of a monetary award. This award is designed to return the aggrieved party to the financial position the party enjoyed before the lawsuit was filed.

The United States Court of Appeals for the Seventh Circuit reached a conclusion similar to *Henning* in *Bright v. Land O'Lakes, Inc.*[38] The appellate court affirmed an award of expert witness fees in a diversity case despite defendant's argument that the fees exceeded the federal statutory allowance set by 28 U.S.C. Sections 1821[39] and 1920.[40] In *Bright*, a dairy distributor brought suit against a dairy processor under the Wisconsin Fair Dealership Law[41] after the processor canceled his distribution contract.[42] Though the court did not employ a *Hanna* analysis to determine whether the statute represented a substantive requirement of state law, the court concluded that Section 135.06[43] of the Wisconsin statutes was a valid fee-shifting statute.[44]

B. *Diversity Cases Not Awarding Expert Witness Fees*

Citing *Crawford* and a series of other federal cases, some circuits seem to decree that expert witness fees in all federal court cases are controlled by the 28 U.S.C. Section 1821 fee limitations.[45] However,

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38. 844 F.2d 436 (7th Cir. 1988).

39. 28 U.S.C.A. § 1821 (West Supp. 1992).

40. 28 U.S.C.A. § 1920 (West 1966 & Supp. 1992).

41. WIS. STAT. ANN. §§ 135.01-.07 (West 1989 & West Supp. 1991-92).

42. *Bright*, 844 F.2d at 437-38.

43. WIS. STAT. ANN. § 135.06 (West 1974) provides:

> If any grantor violates this chapter, a dealer may bring an action against such grantor in any court of competent jurisdiction for damages sustained by him as a consequence of the grantor's violation, together with the actual costs of the action, including reasonable actual attorney fees, and the dealer also may be granted injunctive relief against unlawful termination, cancellation, nonrenewal or substantial change of competitive circumstances.

Id.

44. *Bright*, 844 F.2d at 444. The court, relying on *Esch v. Yazoo Manufacturing Co.*, 510 F. Supp. 53, 59 (E.D. Wis. 1981), and *Kealy Pharmacy & Home Care Service Inc. v. Walgreen Co.*, 607 F. Supp. 155, 170 (W.D. Wis. 1984), *aff'd in part, vacated in part*, 761 F.2d 345 (7th Cir. 1985), deemed the "actual costs" language to include expert witness fees. *Bright*, 844 F.2d at 444.

45. *See, e.g.*, Miller v. Cudahy Co., 858 F.2d 1449, 1461 (10th Cir. 1988) (denying expert fees beyond limits of § 1821), *cert. denied*, 492 U.S. 926 (1989); Kivi v. Nationwide Mut. Ins. Co., 695 F.2d 1285, 1289 (11th Cir. 1983) (limiting expert fees); Bosse v. Litton Unit Handling Sys., 646 F.2d 689, 695 (1st Cir. 1981) (finding "no room" for expert fees above statutory amount).

closer analysis reveals that the *Crawford* limitation is not rigidly applicable because *Crawford* was not a diversity case.[46] When a federal court sits in a diversity case, a different situation is presented.[47] The Supreme Court in *Alyeska Pipeline Service v. Wilderness Society*[48] recognized that *Erie* still requires that substantive state law be applied in diversity cases.[49]

In a recent holding denying expert witness fees in excess of the Section 1821 fee limit, the Fifth Circuit specifically noted that its ruling was limited to nondiversity cases.[50] Earlier Fifth Circuit cases do not address this limitation and are distinguishable. For example, in *Burgess v. Williamson*,[51] the court held that unlike *Henning*, which reviewed a Louisiana statute,[52] the Alabama statute governing expert witness fees did not provide for such fees to be taxed as costs.[53] In *Baum v. United States*,[54] the court stated that *Henning* was not applicable because *Baum* arose under the Federal Suits in Admiralty Act.[55] Two other cases, *Green v. American Tobacco Co.*[56] and *United States v. Kolesar*,[57] arose prior to *Henning* and are also distinguishable because *Green* involved Florida law and *Kolesar* involved the Federal Torts Claims Act.[58]

The Fifth Circuit's recent digression in *Cates* and its progeny[59] fails to provide the appropriate analysis for resolution of the issue. In

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46. *See Crawford*, 482 U.S. at 438-39 (stating that case arose from violation of antitrust and civil rights laws).

47. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 259 n.31 (1975).

48. 421 U.S. 240 (1975).

49. *Alyeska*, 421 U.S. at 259 n.31.

50. *See* International Woodworkers v. Champion Int'l Co., 790 F.2d 1174, 1181 (5th Cir. 1986) (stating, "We hold that the fees of non-court appointed witnesses are taxable by federal courts in non-diversity cases only in the amount specified by § 1821.").

51. 506 F.2d 870 (5th Cir. 1975).

52. *See* Henning v. Lake Charles Harbor & Terminal Dist., 387 F.2d 264, 267 (5th Cir. 1968) (reviewing LA. REV. STAT. 13:3666 concerning expert witness fees).

53. *Burgess*, 506 F.2d at 879-80.

54. 432 F.2d 85 (5th Cir. 1970).

55. *Baum*, 432 F.2d at 86.

56. 304 F.2d 70 (5th Cir. 1962).

57. 313 F.2d 835 (5th Cir. 1963).

58. After the Fifth Circuit split in 1981, the Eleventh Circuit in *Kivi* pointed out that "the entitlement to expert witness fees under Florida statutes is not a substantive right." *Kivi*, 695 F.2d at 1289.

59. Seal v. Knorpp, 957 F.2d 1230, 1231 (5th Cir. 1992) (same panel as *Chevalier*); Chevalier v. Reliance Ins. Co. of Ill., 953 F.2d 877, 879 (5th Cir. 1992).

Cates, the court mentioned but did not follow the *Erie* rule.[60] It omitted a *Hanna* substantive versus procedural analysis and supported its holding by relying upon the pre-*Erie* decision of *Henkel v. Chicago, St. Paul, Minneapolis & Omaha Railway Co.*[61] *Henkel* cannot be read to provide a rigid rule limiting expert witness fees because the subsequent doctrine announced in *Erie* requires federal application of state substantive statutes in diversity cases. Moreover, the *Cates* court mistakenly viewed *Gerber v. Stoltenberg*[62] as binding precedent for the proposition that expert witness fees in diversity cases could not exceed statutory amounts.[63] A more detailed examination reveals that *Gerber* was a per curiam decision, naked of legal analysis, and based solely upon *Green*.[64] Reliance on *Green* is not helpful because although *Green* held that expert fees beyond the statutory amount were not recoverable in a Florida diversity case,[65] Florida did not have a substantive statute mandating an award of expert fees.[66]

The Tenth Circuit has addressed this issue in *Chaparral Resources Inc. v. Monsanto Co.*,[67] where the plaintiff, in a contract dispute based on diversity of citizenship, sued defendants who refused to pay for seismic data useful in exploration for oil and gas.[68] After trial, the federal district court awarded the full amount of the expert witness fees as costs on the judgment in favor of the plaintiff, but the United States Court of Appeals for the Tenth Circuit reversed the award.[69] The Tenth Circuit viewed 28 U.S.C. Section 1821 as limiting the expert compensation to thirty dollars per day, notwithstanding Colorado's statute that allowed expert witness fees at the discretion of the court.[70] The court of appeals concluded that because Colorado's stat-

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60. *Cates*, 928 F.2d at 689.

61. 284 U.S. 444 (1932).

62. 394 F.2d 179 (5th Cir. 1968).

63. *Cates*, 928 F.2d at 689.

64. *Gerber*, 394 F.2d at 179.

65. *Green*, 304 F.2d at 77.

66. Florida allows expert fees at the discretion of the court. *See* Bystrom v. Mutual of Omaha Ins., 566 So. 2d 351, 352 (Fla. Dist. Ct. App. 1990) (noting that Florida statues "merely provide a mechanism" by which expert fees may be recoverable); *cf. Kivi*, 695 F.2d at 1289 (holding that "the entitlement to expert witness fees under the Florida statutes is not a substantive right").

67. 849 F.2d 1286, 1292 n.7 (10th Cir. 1988).

68. *Chaparral*, 849 F.2d at 1287-88.

69. *Id.* at 1291-93.

70. *Chaparral*, 849 F.2d at 1292. The Tenth Circuit held that "Colo. Rev. Stat. § 12-22-102(4) does provide for additional compensation for expert witnesses; however, the determina-

ute was discretionary rather than mandatory, the court was bound to the limit set by 28 U.S.C. Section 1821.[71] The Tenth Circuit left open the issue of how to resolve conflicts between 28 U.S.C. Section 1821 and mandatory state statutes in diversity cases.[72] The Tenth Circuit also questioned whether a federal court in diversity could decline to follow a state statute mandating recovery.[73]

The Tenth Circuit faced the issue again in *Miller v. Cudahy*.[74] This diversity action arose in Kansas where water wells of several farmers had been polluted by salt discharges that seeped into an aquifer.[75] Though the Tenth Circuit analyzed the statutes and case law pertaining to other issues in the case, the court omitted any mention of whether Kansas law provides for an award of expert witness fees.[76] Instead, relying on *Crawford* and *Chaparral Resources, Inc.*, the court concluded that the district court erred in awarding the expert witness fees.[77] Accordingly, *Miller* offers little help in resolving the question of whether federal courts in diversity should follow state statutes allowing recovery of expert witness fees.

The First and Eleventh Circuits have declined to award expert fees in diversity cases in excess of the forty dollars per day mandate of 28 U.S.C. Section 1821.[78] However, both courts have left open the question of how to resolve conflicts between substantive state statutes and 28 U.S.C. Section 1821 that develop in diversity cases. In *Kivi v. Na-*

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tion of whether such compensation is to be awarded as costs is committed to the sound discretion of the trial court." *Id.*

71. *Chaparral*, 849 F.2d at 1292.

72. *Id.*

73. *Id.* The court stated:

> In *Cleverock Energy Corp. v. Thepel*, 609 F.2d at 1363 n.3, the panel expressly did not consider whether a federal court sitting in diversity may, in the exercise of its discretion, enforce an expressed state policy of assessing expert witness fees as costs. Whether a federal court faced with a state statute authorizing the awarding of expert witness fees as costs would have discretion to decline to follow the statute is somewhat questionable; however, given the absence of an explicit statutory authorization in the instant case, we need not address either that question or the question left open in *Cleverock*.

Id.

74. 858 F.2d 1449 (10th Cir. 1988), *cert. denied*, 492 U.S. 926 (1989).

75. *Cudahy*, 858 F.2d at 1451.

76. *See also* Miller v. Cudahy Co., 656 F. Supp. 316, 337-39 (D. Kan. 1987) (not mentioning any Kansas law on which to base award of expert's fee), *aff'd in part, rev'd in part*, 858 F.2d 1449 (10th Cir. 1988), *and cert. denied*, 492 U.S. 926 (1989).

77. *Miller*, 858 F.2d at 1461.

78. *Kivi*, 695 F.2d at 1289; *Bosse*, 646 F.2d at 695. At the time of these decisions, the limit was thirty dollars per day.

tionwide Mutual Insurance Co.,[79] the district court awarded judgment to the plaintiff on his "bad faith" claim against his insurance company for failure to settle a suit.[80] However, the district court's award of expert witness fees in excess of 28 U.S.C. Section 1821 was reversed.[81] Though the court of appeals did not analyze the applicable Florida statute, the court concluded that the entitlement of expert witness fees under the Florida statute is not a substantive right.[82] The appellate court was careful to note that it was not departing from *Henning* but was merely distinguishing *Henning* as a case that addressed a substantive state statute.[83]

The United States Court of Appeals for the First Circuit, in *Bosse v. Litton Unit Handling Systems*,[84] also distinguished *Henning* by stating that *Henning* had been decided on special facts.[85] In *Bosse*, a worker at an Anheuser-Busch bottling plant in New Hampshire fell from a catwalk when a hanger bolt sheared and the section of the walk gave way.[86] The court of appeals reversed a jury verdict in favor of the plaintiff and remanded for a new trial on grounds that the district court had given deficient jury charges on the issue of negligence.[87] Though a new trial was ordered, the First Circuit nonetheless decided to "make some observations" about the district court's award of substantial expert witness fees.[88] The *Bosse* court omitted an analysis of the applicable New Hampshire law and did not consider whether New Hampshire had a substantive statute to award full expert witness fees. In dictum, the court stated that expert fees greater than the federal statute were not allowed.[89] The court saw "no reason for a different rule in diversity cases."[90] The court concluded that *Henning* was either decided on special facts or was decided incorrectly.[91] The court reasoned: "Variations between state and federal rules on costs 'do not

79. 695 F.2d 1285 (11th Cir. 1983).
80. *Id.* at 1289.
81. *Id.*
82. *Id.*; *see also Bystrom*, 566 So. 2d at 352 (determining that award of expert fees discretionary with court).
83. *Kivi*, 695 F.2d at 1289.
84. 646 F.2d 689, 695 (1st Cir. 1981).
85. *Bosse*, 646 F.2d at 695.
86. *Id.* at 691.
87. *Id.* at 694.
88. *Id.* at 695.
89. *Bosse*, 646 F.2d at 695.
90. *Id.*
91. *Id.* The court stated, "If *Henning v. Lake Charles Harbor & Terminal District* . . .

appear likely to promote forum shopping or to affect' the outcome of the litigation 'in any significant way and therefore employing federal law does not violate the *Erie* principle.'. . . The federal statute must govern."[92]

Although the First Circuit states that expert witness fees are not likely to encourage a plaintiff to select a state court forum or a defendant to remove a case to federal court, in modern litigation, payment of expert fees may be a sufficient enough factor to promote forum shopping.[93]

IV. ANALOGY TO AWARDING ATTORNEY FEES IN DIVERSITY CASES

Expert witness fees should be fully recoverable in diversity litigation if one accepts the analogous reasoning by which the United States Supreme Court recognized the propriety of recovering attorney's fees in diversity cases despite federal statutes which otherwise would limit their recovery in federal court.[94] The analogy is appropriate because these statutes also originated in the Fee Bill of 1853.[95] The Supreme Court has not interpreted statutes emanating from the 1853 Fee Bill to prohibit awards of attorney's fees in diversity cases:

> A very different situation is presented when a federal court sits in a diversity case. "[I]n an ordinary diversity case where the state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed." Prior to the decision in *Erie* . . . this Court held that a state statute requiring an award of attorneys' fees should be applied in a case removed from the state courts to the federal courts. . . . *The limitations*

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holds any differently, which we doubt, rather than being decided on special facts, we do not follow it." *Id.*

92. *Id.* (citing 10 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2669, at 153 (1973)).

93. *See, e.g.*, Paschall v. Kansas City Star Co., 695 F.2d 322, 338 (8th Cir. 1982) ($312,932.28 expert witness fees awarded); Kaiser Ind. Corp. v. McLouth Steel Corp., 50 F.R.D. 5, 13 (E.D. Mich. 1970) ($66,316.51 expert fees not taxable in excess of statutory witness fees).

94. *See* 28 U.S.C. § 1923(a) (1966) (limiting recovery of expert witness fees).

95. *See* International Woodworkers v. Champion Int'l Corp., 790 F.2d 1174, 1177 (5th Cir. 1986) (en banc) (noting that 28 U.S.C. § 1821 originated in Fee Bill of 1853), *aff'd sub nom.* Crawford Fitting Co. v. J. T. Gibbons, Inc., 482 U.S. 437 (1987); *see also* Alyeska Pipeline Serv. v. Wilderness Soc'y, 421 U.S. 240, 255 (1975) (noting that 28 U.S.C. §§ 1920 and 1923(a) originated in Fee Bill of 1853).

> *on the awards of attorney's fees by federal courts deriving from the 1853 Act were found not to bar the award.* We see nothing after *Erie* requiring a departure from this result.[96]

Since the prohibitions concerning attorney's fees and expert fees both derive from the 1853 Fee Bill, 28 U.S.C. Section 1821 should not be likewise interpreted to prohibit awards of expert fees in diversity cases.[97]

It would be hard to overstate the importance of the distinction drawn in footnote thirty-one of *Alyeska* between federal question and diversity litigation. It must be remembered that one of the principal purposes of the 1853 Fee Bill "was to limit allowance for attorney's fees that were to be charged to losing parties."[98] For example, counsel fees collectible from the losing party were expressly limited to the amounts stated in the Act: ". . . in lieu of the compensation now allowed by law *to attorneys* . . . in the United States courts, to United States district attorneys, clerks . . . marshals, *witnesses* . . . the following and no other compensation shall be taxed and allowed."[99]

Although the Fee Bill has subsequently been carried forward as several different federal statutes,[100] the Supreme Court stated that the recodifications indicate no congressional intent to depart from the original rule.[101] Thus, the general rule is that "federal courts cannot award attorney's fees beyond the limits of 28 U.S.C. Section 1923."[102]

The Fifth Circuit acknowledged in *International Woodworkers v. Champion International Co.*[103] that the "American Rule of limited recovery [which] . . . is equally applicable in the context of excess expert witness fees" has the same doctrinal and statutory origin as the provisions limiting the recovery of attorney's fees.[104] All of these pro-

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96. *Alyeska*, 421 U.S. at 259 n.31 (emphasis added).

97. *Id.*; *see also International Woodworkers*, 790 F.2d at 1178 (emphasis added) (stating, "The Court's reasoning in *Alyeska* in the *analogous area* of attorney's fees further compels our conclusion that expert witness' fees are generally not recoverable beyond the amount specified by statute . . . . ").

98. *Alyeska*, 421 U.S. at 252.

99. *Id.* (emphasis added) (quoting 1853 Act that regulated awards of witness fees).

100. *Id.* at 253-57.

101. *Id.* at 255-56 n.29.

102. *Alyeska*, 421 U.S. at 269.

103. 790 F.2d 1174 (5th Cir. 1986), *aff'd sub nom.* Crawford Fitting Co. v. J. T. Gibbons, Inc., 482 U.S. 437 (1987).

104. *International Woodworkers*, 790 F.2d at 1177.

visions find their origins in the Fee Bill of 1853.[105]

Furthermore, in *Crawford*, Chief Justice Rehnquist wrote with specific reference to *Alyeska* that the analysis of attorney and expert fees under the 1853 Fee Bill is "similar":

> The comprehensive scope of the Act and the particularity with which it was drafted demonstrated to us that Congress meant to impose rigid controls on cost-shifting in federal courts. Thus, [in *Alyeska*] we rejected an argument *similar* to the one posited by petitioners today: "Nor has [Congress] extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted."[106]

Though often cited in *Crawford* and *International Woodworkers* for the proposition that the federal courts have no "roving authority" to shift costs, *Alyeska* also stated expressly that "[a] very different situation is presented when a federal court sits in a diversity case."[107] Importantly, in *Alyeska*, the Court reasoned that *Hanna* did not require a "departure from this result." Rather, a substantial state rule on fee-shifting may be applied in diversity litigation.[108]

The *Alyeska* Court's analysis of the 1853 Fee Bill and its legislative history shows that Congress intended to impose as rigid controls on the awarding of attorney's fees as those imposed on the costs of witnesses. It is likely that in 1853 Congress was more concerned with the awarding of attorney's fees than with witness fees because Congress was not faced with the substantial fees of modern expert witnesses.[109] In view of *Alyeska's* footnote thirty-one, which recognizes that the federal court limitations on both attorney's and expert witness fees emanated from the same source, there is no principled basis for having one rule in diversity litigation for attorney's fees and an altogether different rule for expert fees.

There is another ground for awarding full expert fees in a diversity case if a state statute makes such a provision. Expert witness fees are not regarded as the usual small costs of court but, like attorney's fees,

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105. *Id.*

106. *Crawford*, 482 U.S. at 439 (emphasis added) (quoting *Alyeska*, 421 U.S. at 260).

107. *Alyeska*, 421 U.S. at 259 n.31.

108. *See id.* (stating, "We see nothing after *Erie* requiring a departure from this result."); Hanna v. Plumer, 380 U.S. 460, 467-68 (1965).

109. *See Alyeska*, 421 U.S. at 251 n.24 (quoting Senator Bradbury's remarks during Senate debate on Fee Bill). The Senator reasoned, "The abuses that have grown up in the taxation of attorney's fees have been a matter of serious complaint." *Id.*

are more substantial. In *People of Sioux County v. National Surety Company*,[110] a diversity case involving the recovery of attorney's fees in federal court, the Supreme Court held that an award of attorney's fees under a Nebraska statute,

> to be added to the judgment as costs are added does not make it costs in the ordinary sense of the traditional, arbitrary and small fees of court . . . allowed to counsel by [the federal costs statutes]. The present allowance, since it is not costs in the ordinary sense, is not within the field of costs legislation covered by [the federal statutes].[111]

Expert fees are no more "costs in the ordinary sense" than attorney's fees were in *People of Sioux County*. Therefore, expert fees are "not within the field of costs legislation covered by [the federal statutes]."[112]

The need for experts is critical in many of today's trials. As Judge Rubin observed in *Jones v. Diamond*:[113] "Counsel must have the assistance of experts to furnish effective and competent representation. . . . [E]xpert testimony is a vital ingredient in the proper presentation and decision of a case."[114] That being so, it is difficult to see any justifiable basis to distinguish, for the purposes of *Erie*, between a mandatory requirement concerning attorney's fees and an analogous requirement concerning the compensation of experts.[115] Both requirements should be enforced so long as the threshold requirement of substantiality is satisfied.

V. CONCLUSION

The award in diversity cases of expert witness fees over the forty dollars per day allowed by federal statute presents a classic *Erie* problem and requires *Hanna* analysis for proper resolution. If a substan-

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110. 276 U.S. 238 (1928).

111. *Id.* at 243-44.

112. *Id.*

113. 636 F.2d 1364 (5th Cir. 1981).

114. *Id.* at 1382.

115. *See People of Sioux County*, 276 U.S. at 242-43 (finding that state statutory awards of attorney's fees should not be thwarted because of removal to federal court); *cf.* Chaparral Resources Inc. v. Monsanto Co., 849 F.2d 1286, 1292 n.7 (10th Cir. 1988) (suggesting that because expert fees are discretionary in Colorado, state statute is "not tantamount to an express statutory mandate" and does not present problems under *Erie*). The court implied, however, that a different result may occur in cases involving "expressed state policy of assessing expert witness fees as costs." *Id.*; *see also* Bright v. Land O'Lakes, Inc., 844 F.2d 436, 444 (7th Cir. 1988) (applying Wisconsin law to award full expert fees).

tive state statute exists, it must be applied. The appellate courts addressing this issue have generally held that if a state expressly mandates the award of full expert witness fees, the fees will be recoverable unless the state statute is merely discretionary. Award of these expert witness fees is consonant with the United States Supreme Court's analogous policy in *Alyeska* which would allow attorney's fees in diversity cases.