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## The PLRA's Dividing Language: Statutory Interpretation and Applying the Attorney's Fees Cap at the Appellate Level

Maxwell Murtaugh  
mmurtaug@slu.edu

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**THE PLRA’S DIVIDING LANGUAGE: STATUTORY  
INTERPRETATION AND APPLYING THE ATTORNEY’S FEES CAP  
AT THE APPELLATE LEVEL**

INTRODUCTION

The Prisoner Litigation Reform Act (PLRA),<sup>1</sup> 42 U.S.C. § 1997e, was introduced to decrease the number of frivolous lawsuits being brought by prisoners.<sup>2</sup> The key aspect of the PLRA addressed in this paper is the attorney’s fees cap found in § 1997e(d)(2), which limits recoverable attorney’s fees to 150% of an awarded monetary judgment.<sup>3</sup> In July 2013, a Ninth Circuit decision created a circuit split with the Sixth Circuit over whether such a cap applied to fees generated while defending a monetary judgment on appeal.<sup>4</sup> The Sixth Circuit held that the cap applied,<sup>5</sup> while the Ninth Circuit held that it did not.<sup>6</sup>

This Note will examine the logic and reasoning used by both circuits in arriving at their conflicting conclusions. Ultimately, this Note proposes that § 1997e(d), although connected to § 1988, stands as its own attorney’s fees provision, in the end independent from § 1988’s general grant of attorney’s fees.<sup>7</sup> Section 1997e(d) narrows § 1988’s definitions to restrict the ability of a prisoner bringing a civil rights claim to receive an attorney’s fees award.<sup>8</sup> The reasoning for this restriction is to deter frivolous lawsuits, the PLRA’s main

1. For a full description of the Act when it was first passed, see Prisoner Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (codified as amended at 42 U.S.C. § 1997e (2006)).

2. Philip White, Jr., Annotation, *Construction and Application of Prison Litigation Reform Act—Supreme Court Cases*, 51 A.L.R. FED. 2d 143, 143 (2010).

3. 42 U.S.C. § 1997e(d)(2).

4. Compare *Woods v. Carey*, 722 F.3d 1177, 1183–84 (9th Cir. 2013), with *Riley v. Kurtz*, 361 F.3d 906, 917 (6th Cir. 2004).

5. *Riley*, 361 F.3d at 917.

6. *Woods*, 722 F.3d at 1183–84.

7. See 42 U.S.C. § 1997e(d). Section 1997e(d)(1) connects the provision to § 1988(b), § 1988’s attorney’s fees provision, but § 1997e(d)(1) also lays out the general rule that § 1997e(d) prohibits awarding attorney’s fees in contrast to § 1988(b)’s general grant of attorney’s fees. Compare *id.* § 1988(b) (granting attorney’s fees to prevailing parties generally), with *id.* § 1997e(d) (restricting the award of attorney’s fees). See also White, *supra* note 2 (noting that the PLRA was specifically aimed at prisoners and was not just another civil rights statute).

8. *Riley*, 361 F.3d at 914. As the court noted, “[Section 1997e(d)] narrows the judicially-created view of a ‘prevailing party’ so that a prisoner’s attorney will be reimbursed only for those fees reasonably and directly incurred in proving an actual violation of a federal right.” *Id.* (quoting H.R. REP. NO. 104-21, at 28 (1995)).

goal, by decreasing attorney compensation.<sup>9</sup> Applying the § 1997e(d)(2) attorney's fees cap to appellate attorney's fees may not seem like the fairest result, since the need to deter frivolous lawsuits no longer seems relevant when a lawsuit on appeal has been determined to be meritorious at trial. However, the language of the statute calls for such an application. A close reading of § 1997e(d) shows that its general rule is to prohibit fee awards, with limited exceptions, in contrast to § 1988's general grant of fee awards with almost no prohibition.<sup>10</sup> This supports the conclusion that § 1997e(d) is meant to limit fee awards, and, consequently, when the § 1997e(d)(2) cap applies, it applies to the entire action, limiting both appellate and trial fees.

### I. THE PLRA AND ITS ATTORNEY'S FEES PROVISION

The attorney's fees provision of the PLRA reads as follows:

(d) Attorney's fees

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, such fees shall not be awarded, except to the extent that—

(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 of this title; and

(B)

(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

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9. *Walker v. Bain*, 257 F.3d 660, 665 (6th Cir. 2001) (citing *Crawford-El v. Britton*, 523 U.S. 574, 596 (1998)).

10. Compare 42 U.S.C. § 1997e(d)(1) (“[F]ees shall not be awarded, except to the extent that . . .”), with *id.* § 1988(b) (“[T]he court . . . may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . .”). See also *Riley*, 361 F.3d at 914 (discussing the PLRA's limitations on the circumstances under which attorney's fees may be granted); *Walker*, 257 F.3d at 665 (“The PLRA modifies the application of 42 U.S.C. § 1988 to prevailing prisoners by providing stringent limitations on both the availability and the amount of attorney fee awards.”).

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18 for payment of court-appointed counsel.<sup>11</sup>

Section 1997e(d) is a multi-layered provision that can produce varying results depending on the circumstances. In general, the provision does not allow prevailing prisoner plaintiffs to recover attorney's fees unless certain requirements are met, and if they are met, the provision may limit the amount of fees that can be awarded.<sup>12</sup> The problematic issues concern when and how these limitations are applied. Before diving into the problems of application and interpretation, it is necessary to understand how all of the different sections interact at a basic level.

In order for § 1997e(d) to even apply, the action must meet two foundational requirements laid out in subsection (d)(1).<sup>13</sup> First, the action must have been brought by a prisoner who is subject to some sort of confinement.<sup>14</sup> Second, the action must be one "in which attorney's fees are authorized under section 1988 of this title."<sup>15</sup> Section 1988 provides that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs," in any action to enforce a right protected by a civil rights statute.<sup>16</sup> Therefore, § 1997e(d) is limited in scope by applying only to confined prisoners who are prevailing parties in civil rights lawsuits.<sup>17</sup>

11. 42 U.S.C. § 1997e(d)(1)–(3). Section 1997e(d)(4) is omitted and not discussed in this Note. Section 1997e(d)(4) grants plaintiffs the ability to use their own money to pay an attorney's fee in excess of the attorney's fees award authorized under the PLRA which the defendant must pay. *Id.* § 1997e(d)(4) ("Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 1988 of this title.").

12. *See id.* § 1997e(d)(1)–(3).

13. Deborah F. Buckman, Annotation, *Attorney's Fees Awards Under § 803(d) of Prison Litigation Reform Act (42 U.S.C.A. § 1997e(d))*, 165 A.L.R. FED. 551, 562 (2000).

14. 42 U.S.C. § 1997e(d)(1) ("In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility . . .").

15. *Id.*

16. *Id.* § 1988(b) (providing a list of the civil rights statutes to which it applies); *see also* Karen M. Klotz, Comment, *The Price of Civil Rights: The Prison Litigation Reform Act's Attorney's Fee-Cap Provision as a Violation of Equal Protection of the Laws*, 73 TEMP. L. REV. 759, 765 (2000) ("Congress responded . . . by enacting legislation explicitly granting the district courts discretion to award attorney's fees to prevailing civil rights litigants.").

17. *See* 42 U.S.C. §§ 1988(b), 1997e(d)(1). Civil rights actions account for a large portion of the lawsuits brought by prisoners, and consequently the attorney's fees provision is applied often. *See* Joseph Alvarado, Student Scholarship, *Keeping Jailers from Keeping the Keys to the Courthouse: The Prison Litigation Reform Act's Exhaustion Requirement and Section Five of the*

Finally, § 1997e(d)(1) concludes by laying out the general thrust of the provision: “such fees shall not be awarded, except to the extent that . . . .”<sup>18</sup> The placement of “shall not be awarded, except” dictates that the general rule under § 1997e(d) is to prohibit awards of attorney’s fees unless a certain set of requirements are met.<sup>19</sup> This indicates that for § 1997e(d) purposes, awarding attorney’s fees is an exception to the general rule of prohibition.<sup>20</sup>

The first requirement for an exception to apply is found in § 1997e(d)(1)(A), which states that the fees must have been directly and reasonably incurred in proving an actual violation of the prisoner’s rights.<sup>21</sup> More specifically, combining this requirement with the requirement under subsection (d)(1) that fees must be authorized under § 1988, fees will only be awarded if they directly relate to proving a civil rights violation.<sup>22</sup> Additionally, the second requirement, found in subsection (d)(1)(B), states that to be recoverable, the amount of the fee must be “proportionately related to the court ordered relief for the violation” or must have been “directly and reasonably incurred in enforcing the relief ordered for the violation.”<sup>23</sup> Finally, if fees are recoverable, subsection (d)(3) limits the hourly rate used to calculate the attorney’s fees.<sup>24</sup>

This lays out the basic framework for how § 1997e(d) functions. In a case brought by a confined prisoner who is a prevailing party in an action to enforce a provision of a civil rights statute, attorney’s fees are prohibited unless the fees have been directly incurred in proving a violation of the prisoner’s civil rights.<sup>25</sup> Even if the fees were directly incurred in proving a violation of the prisoner’s civil rights, the award must be limited by the hourly rate in subsection (d)(3), and it must be proportionately related to the court-ordered relief or directly and reasonably incurred in enforcing the relief.<sup>26</sup>

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*Fourteenth Amendment*, 8 SEATTLE J. FOR SOC. JUST. 323, 326 (2009) (“From the 1960s through the 1980s, prisoners and prisoners’ rights activists took advantage of the expanded availability of 42 U.S.C. § 1983 by filing more lawsuits.”); *Developments in the Law—The Prison Litigation Reform Act and the Antiterrorism and Effective Death Penalty Act: Implications for Federal District Judges*, 115 HARV. L. REV. 1846, 1849 (2002) (“From the 1960s through the 1980s, prisoners and their advocates employed § 1983 to bring a variety of claims in federal court, resulting in some meaningful reforms.”). Section 1983 is a civil rights statute.

18. 42 U.S.C. § 1997e(d)(1); see Buckman, *supra* note 13, at 561.

19. See 42 U.S.C. § 1997e(d)(1).

20. See *id.*

21. *Id.* § 1997e(d)(1)(A).

22. See *id.* § 1997e(d)(1).

23. *Id.* § 1997e(d)(1)(B)(i)–(ii).

24. 42 U.S.C. § 1997e(d)(3).

25. See *id.* § 1997e(d).

26. See *id.* § 1997e(d)(1)(B), (d)(3).

If the exception to the prohibition applies and an award of attorney's fees is permitted, § 1997e(d)(2) may still limit the amount of the award that is recoverable.<sup>27</sup> Section 1997e(d)(2)'s wording is confusing, but primarily the subsection limits the attorney's fee award when a plaintiff receives a monetary judgment to 150% of that monetary judgment.<sup>28</sup> The focus of this Note deals with dissecting the statute but ultimately aims to answer the question of whether the § 1997e(d)(2) cap should apply to attorney's fees incurred at the appellate level or only to attorney's fees for the trial proceedings.

## II. CURRENT CONTROVERSY: THE LIMITATION APPLIED AT THE APPELLATE LEVEL

### A. *Inception*

Between 1975 and 1994, the number of prisoner lawsuits rose from 6600 to more than 39,000.<sup>29</sup> In 1996, these findings led Congress to enact the PLRA as an attempt "to reduce the burdens on the federal courts from what was perceived as a tidal wave of lawsuits—many of them frivolous—brought by imprisoned individuals."<sup>30</sup> In addition to imposing attorney's fees limits, the PLRA attempts to decrease the number of frivolous claims finding their way into court through various reforms,<sup>31</sup> such as increasing pre-screening

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27. *See id.* § 1997e(d)(2).

28. *See id.* This provision states that "[w]henver a monetary judgment is awarded . . . a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant," and, "[i]f the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant." *Id.* The wording of subsection (d)(2) is somewhat confusing, but it is meant to do the following: (1) "limit defendants' liability for attorney fees [and thus the amount of attorney's fees recoverable] to 150% of the money judgment," twenty-five percent of which can come out the monetary award granted to the plaintiff; and (2) render "a defendant . . . liable for only the difference between the 150 percent limit and the amount of the judgment used to satisfy the fee award," which is up to twenty-five percent of the monetary award. *Walker v. Bain*, 257 F.3d 660, 666–67 (6th Cir. 2001). The second part of the analysis comes from the language of subsection (d)(2) stating that the defendant shall only pay the excess if the fees are not greater than 150% of the judgment. 42 U.S.C. § 1997e(d)(2). This is a strange way to state that the amount of attorney's fees is limited to 150% of the monetary judgment because the defendant will not have to pay for any amount in excess of 150% of the judgment. *See Walker*, 257 F.3d at 667.

29. *Alexander v. Hawk*, 159 F.3d 1321, 1324 (11th Cir. 1998); *see also* *Roller v. Gunn*, 107 F.3d 227, 230 (4th Cir. 1997) ("In 1995, prisoners brought over 25% of the civil cases filed in the federal district courts." (citing Administrative Office of the United States Courts, 1995 Federal Court Management Statistics 167 (1996))).

30. White, *supra* note 2. These findings led Congress to conclude that "prisoners file more frivolous lawsuits than any other class of persons" and to pursue legislative action. *See Alexander*, 159 F.3d at 1324 (quoting *Rivera v. Allin*, 144 F.3d 719, 728 (11th Cir. 1998)).

31. *See Walker*, 257 F.3d at 665.

mechanisms and requiring the exhaustion of remedies within the prison system to give more opportunity for internal resolution.<sup>32</sup> One major challenge the PLRA faced and continues to face is ambiguity and the assurance that the language of the PLRA does not overextend prisoner litigation reform to the extent that prisoners' basic legal rights and guarantees are diminished.<sup>33</sup>

*B. The Grey Area: Fees on Appeal*

The PLRA does not explicitly address whether § 1997e(d)(2), the attorney's fees cap, applies on appeal. This topic has been of current importance because a 2013 decision by the Ninth Circuit created a direct split with a 2004 decision by the Sixth Circuit, which, until then, had been the only authoritative source on the question.<sup>34</sup>

1. *Riley v. Kurtz*, Sixth Circuit (2004):<sup>35</sup> The Fee Cap Applies at the Appellate Level

The Sixth Circuit held in *Riley* that the § 1997e(d)(2) cap was applicable to an entire action, which encompasses trial and appeals, and thus limited the entire amount of recoverable attorney's fees in that action, including both appellate and trial work, to 150% of the monetary award.<sup>36</sup>

In *Riley*, the prisoner plaintiff prevailed on all four of his claims at trial and was awarded \$25,003.00 in monetary damages.<sup>37</sup> The prisoner's court-appointed lawyer, Daniel Manville, then submitted a request for \$32,097.80 in attorney's fees for his work at trial.<sup>38</sup> While the defendant appealed the jury verdict, the request for trial attorney's fees was not challenged and was subsequently granted.<sup>39</sup>

On appeal, the court reversed the judgment on one of the four claims and gave the plaintiff the choice between a reduced award and a new trial.<sup>40</sup> The plaintiff selected the reduced award and received an amended judgment in the

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32. *See Woodford v. Ngo*, 548 U.S. 81, 93–95 (2006).

33. *See Walker*, 257 F.3d at 666–80 (discussing § 1997e(d)'s constitutionality and whether the PLRA infringes on prisoners' rights).

34. *Compare Woods v. Carey*, 722 F.3d 1177, 1183–84 (9th Cir. 2013) (holding that the PLRA's attorney's fees cap did not apply to appellate attorney's fees), *with Riley v. Kurtz*, 361 F.3d 906, 917 (6th Cir. 2004) (holding that the PLRA's attorney's fees cap applied to appellate attorney's fees).

35. *Riley*, 361 F.3d at 906.

36. *See id.* at 917.

37. *Id.* at 910.

38. *Id.*

39. *Id.*

40. *Riley*, 361 F.3d at 910.

amount of \$1,003.00.<sup>41</sup> Manville subsequently submitted a request for \$25,754.54 in appellate attorney's fees.<sup>42</sup> Following this request, the defendant challenged both the trial and appellate attorney's fees requests as being in excess of the PLRA's 150% cap.<sup>43</sup> The district court addressed these objections and found that the objection to the trial fees was untimely, entitling Manville to all \$32,097.80 in trial fees even though the award was in excess of the 150% cap.<sup>44</sup> The district court did not believe defending challenges of judgments on appeal involved proving that a violation of a prisoner's right had occurred, and thus rendered § 1997e(d) inapplicable to Manville's appellate attorney's fees.<sup>45</sup>

The defendant then appealed the district court's ruling on the attorney's fees.<sup>46</sup> The defendant argued the following: (1) there was no exception in § 1977e(d)'s general prohibition that allowed for appellate attorney's fees to be awarded; and (2) even if there was an exception for awarding appellate attorney's fees, those fees should have been viewed as part of the total attorney's fees award which is capped at 150% of the monetary judgment.<sup>47</sup> Manville argued that the PLRA's cap did not apply to appeals brought by non-prisoner defendants because § 1997e(d)(1) required that the action be "brought by a prisoner," and the appeal had been initiated by the defendant.<sup>48</sup>

In answering this question of § 1997e(d)'s application on appeal, the Sixth Circuit began with a text-focused approach to the meaning of "action" as used in § 1997e(d)(1)'s language "[i]n any action brought by a prisoner."<sup>49</sup> The court identified the issue as "whether the appeal filed by the defendant is part of the original action, or if, as argued by Mr. Manville, it is a completely separate action."<sup>50</sup> Because the PLRA failed to define "action," the court looked to *Black's Law Dictionary*, which defines action as "any judicial

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41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Riley*, 361 F.3d at 910. *See also* 42 U.S.C. § 1997e(d)(1)(A) (2006).

46. *Riley*, 361 F.3d at 910.

47. *Id.* at 913 ("[T]he defendant argues that the PLRA's fee cap applies to all work performed in a case, whether at trial, post-trial, or on appeal, so even if Mr. Manville was entitled to appellate fees, they should have been considered as part of Mr. Manville's overall fee award that is limited to 150 percent of the monetary judgment, or \$1,504.50").

48. *Id.*; *see also* 42 U.S.C. § 1997e(d)(1).

49. *Riley*, 361 F.3d at 914; *see also* 42 U.S.C. § 1997e(d)(1).

50. *Riley*, 361 F.3d at 914. If the appeal was considered part of the original action, it would qualify as part of an action brought by a prisoner, rendering § 1997e(d) applicable. If the appeal was considered a new action, it would qualify as an action brought by a non-prisoner, and thus § 1997e(d) would not apply, entitling the attorney to uncapped attorney's fees.



proceeding which . . . result[s] in a judgment or decree.”<sup>51</sup> From this, the Sixth Circuit reasoned that an appeal was a “continuation of the original action” since “[t]here is no final judgment or decree until the appeals process has ended.”<sup>52</sup>

The next condition that the Sixth Circuit examined was that the action must be one in which attorney’s fees are authorized under § 1988, which grants attorney’s fees to prevailing parties.<sup>53</sup> The Sixth Circuit’s approach to defining “prevailing party” under § 1997e(d) involved looking to both § 1988 precedent and legislative history.<sup>54</sup> Under § 1988, “prevailing” means successful in some fashion, regardless of whether one of the claims on appeal is reversed and damages are subsequently limited.<sup>55</sup> The defendant argued that § 1997e(d) restricts the definition of “prevailing party” used when applying § 1988.<sup>56</sup> Based on the PLRA’s legislative history, the Sixth Circuit agreed and concluded that Congress had intended to restrict § 1988’s definition of “prevailing party” under § 1997e(d) so that fewer parties would qualify as “prevailing parties” under the PLRA.<sup>57</sup>

Ultimately, the Sixth Circuit found that despite the restricted definition of “prevailing parties,” § 1997e(d) allowed for appellate attorney’s fees to be awarded.<sup>58</sup> However, the court concluded the appellate fees were limited because the PLRA cap applied to an entire action such that all attorney’s fees awards in that action, both at trial and on appeal, are limited by the cap to 150% of the total monetary judgment.<sup>59</sup>

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51. *Id.* (quoting BLACK’S LAW DICTIONARY 29 (7th ed. 1999)).

52. *Id.* at 914.

53. *Id.*; *see also* 42 U.S.C. § 1988(b).

54. *Riley*, 361 F.3d at 914–15.

55. *See id.* at 914.

56. *Id.* at 914.

57. *Id.* at 915 (“Thus, it appears that the defendant is correct in his assertion that with this legislation Congress intended to limit the definition of prevailing party.”). The court, quoting legislative history of the statute, noted: “[Section 1997e(d)] narrows the judicially-created view of a ‘prevailing party’ so that a prisoner’s attorney will be reimbursed only for those fees reasonably and directly incurred in proving an actual violation of a federal right.” *Id.* at 914 (quoting H.R. REP. NO. 104-21, at 28 (1995)).

58. *Id.* at 915–16.

59. *Riley*, 361 F.3d at 915–18. “[U]nder the unique facts of this case,” the trial attorney’s fees—\$32,097.80—had already been awarded in full without objection, “an amount well in excess of the 150 percent allowed by the PLRA.” *Id.* at 917. The court held that the excessive trial court attorney’s fees included the \$1,504.50 allowed under the PLRA for his appellate work, so no appellate fees were awarded. *Id.* at 917–18. If the trial court fees had been objected to in a timely fashion, the entirety of the attorney’s fees, the trial and appellate work together, would have been limited to 150% of the monetary award. *See id.* at 917. Due to the untimeliness of the objection, Manville had already been awarded trial fees in excess of what he should have been

This opinion leaves a lot to be desired in regards to explanations and a framework for application in future cases, but it seems the Sixth Circuit's decision was based on the following: (1) defining "action" to include trial and appeal; (2) finding that despite § 1997e(d)'s restricted definition of "prevailing parties," appellate attorney's fees were available under the PLRA; and, (3) that subsection (d)(2)'s 150% cap applied to the entire action, trial and appeal.<sup>60</sup> From this the Sixth Circuit concluded that although § 1997e(d) permitted appellate attorney's fees, those fees were limited by subsection (d)(2)'s cap.<sup>61</sup>

## 2. The Ninth Circuit Cases

The Sixth Circuit's reasoning and gaps in its reasoning will be examined and fleshed out below, following a discussion of the Ninth Circuit's conflicting decision from 2013.<sup>62</sup> This section begins, however, by discussing the Ninth Circuit's precedent-setting case, *Dannenberg v. Valadez*,<sup>63</sup> which greatly influenced the Ninth Circuit's 2013 decision.<sup>64</sup>

### a. *Dannenberg v. Valadez*, (9th Cir. 2003): The Cap Applies Only To Work Done in Connection with Obtaining a Monetary Judgment

The first of the two Ninth Circuit decisions, *Dannenberg*, examined whether the fee cap applied to attorney's fees incurred in obtaining a mixed award of monetary and injunctive relief at trial.<sup>65</sup> The case did not, however, reach the question of subsection (d)(2)'s applicability to appellate attorney's fees.<sup>66</sup>

In *Dannenberg*, the prisoner plaintiff was awarded \$9000 in monetary damages as well as injunctive relief.<sup>67</sup> Attorney's fees were awarded for all of the 511.7 hours spent proving a violation of the plaintiff's rights, totaling \$57,566.25.<sup>68</sup> The defendant appealed to limit the fees awarded, contending that the attorney's fees exceeded the cap of 150% of any monetary judgment.<sup>69</sup>

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given under the PLRA, so that amount was undisturbed but was found to include any appellate level work. *Id.*

60. *See id.* at 913–18.

61. *See id.* at 916–17.

62. *See Woods v. Carey*, 722 F.3d 1177 (9th Cir. 2013).

63. *Dannenberg v. Valadez*, 338 F.3d 1070 (9th Cir. 2003).

64. *See Woods*, 722 F.3d at 1180–84.

65. *Dannenberg*, 338 F.3d at 1073–74.

66. *See id.* at 1071.

67. *Id.*

68. *Id.* at 1072.

69. *Id.* at 1073. Thus, since the prisoner plaintiff received \$9000 in damages, the defendant argued that the attorney's fees award should have been no more than \$13,500. *Id.*

The district court disagreed and held “that the [150%] cap applies to cases in which the plaintiff obtains *only* monetary relief.”<sup>70</sup>

On appeal, the Ninth Circuit addressed whether the cap on attorney’s fees applied when a prisoner receives a mixed award of injunctive and monetary relief.<sup>71</sup> The court looked to § 1997e(d)(1)(B)(i), which provides that attorney’s fees, when applicable, are awarded in an amount “proportionately related to the court-ordered relief.”<sup>72</sup> The court held that it would be unfair, when a plaintiff recovers minimal monetary damages but massive injunctive relief, to limit the recoverable attorney’s fees on the sole basis of the minimal monetary damages, ignoring the significant injunctive relief that was awarded.<sup>73</sup> The court also found that the phrase “whenever a monetary judgment is awarded[ ]” capped attorney’s fees incurred for the *sole* purpose of securing the monetary judgment.<sup>74</sup> In examining this language, unlike the Sixth Circuit in *Riley*, the Ninth Circuit did not go into great detail about the principles or sources supporting its conclusion regarding the text’s meaning.<sup>75</sup>

The Ninth Circuit then held that “[b]y contrast, fees incurred to obtain injunctive relief, whether or not monetary relief was also obtained as a result of those fees, are not limited by this provision.”<sup>76</sup> Therefore, in order to be capped, attorney’s fees incurred solely to obtain monetary relief needed to be separated from fees incurred for injunctive relief. The court concluded there was insufficient evidence to show that “any portion of the attorney’s fees was incurred for the sole purpose of obtaining monetary relief,” and therefore affirmed the district court’s finding that “no portion of the [attorney’s] fees” was limited by the 150% cap.<sup>77</sup>

b. *Woods v. Carey*, (9th Cir. 2013): The Fee Cap Does Not Apply To Work Incurred Defending a Judgment on Appeal

In the 2013 case *Woods v. Carey*, the Ninth Circuit was faced with the question of whether subsection (d)(2) applied to fees incurred in defending a monetary judgment on appeal.<sup>78</sup> *Woods*, the plaintiff prisoner, was awarded

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70. *Dannenber*, 338 F.3d at 1073.

71. *Id.* at 1073–74.

72. *Id.* at 1074; *see also* 42 U.S.C. § 1997e(d)(1)(B)(i) (2006).

73. *Dannenber*, 338 F.3d at 1074.

74. *Id.* at 1074–75.

75. *Id.* at 1073–75.

76. *Id.* at 1075. The court noted that its interpretation of the fee cap allowed district courts to consider the entirety of § 1997e(d) and to award fees in an “amount proportional to the overall relief obtained while honoring the cap on fees incurred to obtain money damages.” *Id.*

77. *Id.*

78. *Woods v. Carey*, 722 F.3d 1177, 1180 (9th Cir. 2013).

\$1500 in monetary damages against a prison appeals coordinator.<sup>79</sup> Woods represented himself at the trial level and did not pursue attorney's fees in connection with the trial court's decision.<sup>80</sup> The defendant then challenged the verdict on appeal and Woods hired an attorney to represent him.<sup>81</sup> When the defendant's challenge was rejected, Woods made a request for \$16,800 in appellate attorney's fees under § 1988(b).<sup>82</sup>

The defendant objected, arguing that under § 1997e(d), he only had to pay attorney's fees up to 150% of the monetary judgment.<sup>83</sup> The court specifically looked to the language used in § 1997e(d)(2) and reasoned that the language "[w]henever a monetary judgment is awarded [in an action brought by a prisoner]"<sup>84</sup> was ambiguous because it yielded multiple reasonable interpretations.<sup>85</sup> The court observed that "[w]henever a monetary judgment is awarded" could be interpreted in two ways:

This section could be interpreted to mean either (1) the fee cap applies to attorney's fees awarded only in conjunction with the obtaining of a monetary judgment—an award that occurs only once in the course of an action, following summary judgment or trial before the district court, or (2) the fee cap applies to any attorney's fees that are awarded for any reason during the course of an action in which a monetary judgment has been awarded by the district court.<sup>86</sup>

The Ninth Circuit's perception of ambiguity seems to derive from trying to determine when the cap applies based on the statute's use of "whenever" and "is awarded"; is the cap general and thus controlled by the word "whenever," or is it singular and controlled by "is awarded"?<sup>87</sup>

In attempting to resolve this ambiguity, the Ninth Circuit relied heavily on its reasoning in *Dannenberg*.<sup>88</sup> *Dannenberg* stood for the importance of viewing § 1997e(d) as a whole and construing the fee cap limitation in subsection (d)(2) consistently with the proportionality requirement in subsection (d)(1)(B)(i), which requires the amount of attorney's fees to be proportionately related to the court-ordered relief.<sup>89</sup> In *Dannenberg*, the Ninth

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79. *Id.* at 1179.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Woods*, 722 F.3d at 1180 (\$2250 instead of the \$16,800 requested for appellate attorney's fees).

84. 42 U.S.C. § 1997e(d)(1)–(2) (2006).

85. *Woods*, 722 F.3d at 1181.

86. *Id.*

87. *See id.*; *see also* 42 U.S.C. § 1997e(d)(2).

88. *See Woods*, 722 F.3d at 1181–82.

89. *See id.* at 1181.

Circuit held it would be unfair and disproportionate to “ignore the attorney’s efforts in pursuing the non-monetary relief,” i.e. injunctive relief, by capping the total fee award at 150% of the monetary judgment, and consequently held that subsection (d)(2) only caps attorney’s fees “incurred for the sole purpose of securing a monetary judgment.”<sup>90</sup>

Following this precedent, the Ninth Circuit in *Woods* viewed appellate fees as analogous to fees incurred for injunctive relief.<sup>91</sup> To further support its reasoning that the cap only applied to attorney’s fees incurred in obtaining monetary awards at trial and not appellate fees, the Ninth Circuit emphasized the presence of “is” over “whenever.”<sup>92</sup> The court held that the use of the present tense in “[w]henever a monetary judgment *is* awarded” indicated a singular instance in a case when the monetary judgment is awarded, “rather than in any case in which a monetary judgment *has been* awarded.”<sup>93</sup> The court further explained that monetary judgments can only be awarded once and only by district courts.<sup>94</sup> Thus, the court concluded that subsection (d)(2) applies only to cap attorney’s fees that are awarded for securing solely a monetary judgment, which occurs once only at trial, and not to cap fees incurred for appellate services.<sup>95</sup>

The Ninth Circuit described this conclusion as aligned with the PLRA’s goals because the holding incentivized attorneys to defend prisoners in appellate cases by not limiting their recoverable fees, thus safeguarding prisoners’ ability to preserve successful judgments on meritorious claims at the district level.<sup>96</sup> The Ninth Circuit emphasized that the PLRA was meant to deter frivolous lawsuits from being filed, not to prevent the collection of attorney’s fees on meritorious claims.<sup>97</sup> The Ninth Circuit supported this idea by citing statistics that showed the number of actual appeals is relatively small

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90. *Id.* (citing *Dannenberg v. Valadez*, 338 F.3d 1070, 1074–75 (9th Cir. 2003)).

91. *See id.* at 1181–82. *Woods* is factually different from *Dannenberg* because it involves only a monetary judgment whereas *Dannenberg* involved a mixture of monetary and injunctive relief. *See id.* at 1179–81.

92. *Id.* at 1182.

93. *Woods*, 722 F.3d at 1182.

94. *Id.* (“[O]nly the district court awards ‘a monetary judgment’ and then only on one occasion—either after summary judgment or after a verdict in the prisoner’s favor.”).

95. *Id.*

96. *Id.* at 1182–83. In ascertaining the PLRA’s goals, the Ninth Circuit looked to a combination of case law, legislative history, and a report on the Criminal Incarceration Act of 1995. *Id.* The court held that case law and legislative history showed Congress meant for the PLRA to deter frivolous lawsuits. *Id.* at 1182. The court also noted that “[a] substantial portion of the judiciary’s costs related to these types of cases is incurred in the initial filing and review stage prior to any dismissal.” *Id.* (citing Judicial Impact Office, Violent Criminal Incarceration Act of 1995, H.R. 667 (1995)).

97. *Id.*

and thus would not have been a problematic area the PLRA was aimed to affect.<sup>98</sup>

The Ninth Circuit's idea that § 1997e(d), in the spirit of the PLRA's overarching purpose of deterring frivolous claims, only applies to the trial level due to the minimal number of appeals is in stark contrast with the Sixth Circuit's use of § 1988 precedent and legislative history to find that § 1997e(d)'s main focus is limiting those qualifying for the "prevailing parties" label and thus limiting prisoners' ability to recover attorney's fees.<sup>99</sup> Both circuits looked to legislative history and found that the PLRA was aimed at deterring frivolous lawsuits, but they drew different conclusions about how Congress implemented that deterrence; one circuit concluded the deterrence was implemented through a focus on the initial filing of suits, while the other circuit concluded it was implemented through a focus on the entire course of litigation that would be initiated by such a filing.<sup>100</sup>

The dissent in *Woods* agreed with the Sixth Circuit's adherence to the "plain meaning" of § 1997e(d) and disagreed with the majority's emphasis on the verb "is awarded."<sup>101</sup> The dissent felt that *Dannenberg* supported capping the fees in *Woods* because *Woods* dealt only with a monetary award, and, under *Dannenberg*, an award of only money deserves to be capped; *Dannenberg* did not address appeals.<sup>102</sup>

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98. See *Woods*, 722 F.3d at 1182 & n.5 ("The category of cases to which our holding applies is an extremely small percentage of the total number of prisoner suits filed. For example, out of the 55,376 prisoner suits that ended in 2000, only 10.5% went to trial, and of those, a total of 77 resulted in victories for the prisoner. That is a success rate of 0.1% of the total number of suits filed and a victory rate of 13% for those prisoner suits ending in trial." (citations omitted)). The Ninth Circuit seems to suggest that because the victory rate is so low, the number of appellate cases must also be very low. Another key factor for the Ninth Circuit was that it would be unfair if prisoners were unable to defend an award of damages on appeal and then subsequently unable to remedy their situation. See *id.* at 1183. The court also felt its interpretation would promote "judicial economy" by discouraging defendants from filing frivolous appeals. See *id.*

99. Compare *id.* at 1182–83, with *Riley v. Kurtz*, 361 F.3d 906, 914–16 (6th Cir. 2004).

100. Compare *Woods*, 722 F.3d at 1182–84 (finding the deterrence was implemented through a focus on the initial filing of suits), with *Riley*, 361 F.3d at 914–16 (finding the deterrence was implemented through a focus on the entire course of litigation that is initiated by an initial filing).

101. *Woods*, 722 F.3d at 1184–86 (Murguia, J., dissenting). The dissent held that there was no need to use the past tense because the cap applies to the entire "action," which includes appeals. *Id.* at 1184–85. The dissent argued that subsection (d)(1)'s use of "action" and subsection (d)(1)(B)(i)'s proportionality requirement should be read in conjunction with subsection (d)(2)'s limit on attorney's fees. *Id.* Under this theory the dissent held that "Congress has explicitly defined paragraph (d)(1)'s proportionality requirement to be 150% of the monetary judgment when the sole 'relief' obtained in an 'action' (*i.e.*, a trial and subsequent appeal) is monetary." *Id.* at 1185.

102. *Id.* at 1186.

*Woods*, like *Riley*, leaves a lot of unanswered questions and tailors its analysis to a limited set of facts without giving a more fleshed out analysis about further application. These gaps will be analyzed in the next section, which compares and analyzes the circuits' differing approaches.

### III. ANALYSIS OF DECISIONS AND DIFFERENT APPROACHES: COMPARING THE SIXTH AND NINTH CIRCUITS

The specific grey area at issue is whether § 1997e(d) is an exception to the general authorization of attorney's fees under § 1988 or whether it continues § 1988's grant of attorney's fees but adds specific limitations.<sup>103</sup> A closely tied question is whether § 1997 is its own distinct statute or is encompassed in § 1988's general scope. If § 1997e(d) is an extension of § 1988, it can be viewed as continuing the general grant of attorney's fees in a specific context, turning the focus away from limitation. On the other hand, if § 1997e(d) is its own statute using § 1988 only as a starting point to implement independent restrictions, then the focus would be on § 1997e(d)'s restriction of attorney's fees and its default rule of prohibition, in contrast to § 1988's general grant.

Answering this question requires deciphering the statute. The following analysis will break down the important parts of § 1997e(d): the scope in subsection (d)(1); the exceptions in subsections (d)(1)(A) and (d)(1)(B)(i); and the cap in subsection d(2).<sup>104</sup> Close attention will be paid to how the language in § 1997e(d) resembles § 1988 and how it breaks away to form its own independent provision.

Though both circuits address the question of § 1997e(d)'s relationship to § 1988, the Sixth Circuit does so more directly, while the Ninth Circuit does so in a more indirect fashion. The Sixth Circuit's close examination of § 1997e(d) and § 1988 is not perfect, but it allows the Sixth Circuit to reach the proper conclusion: the subsection (d)(2) cap applies to appellate work.

#### A. § 1997e(d)(1): *The Threshold Requirement and Defining § 1997e(d)'s Scope*

Any examination of § 1997e(d) must start with subsection (d)(1) and the words that make up the threshold requirement for § 1997e(d) to even apply to a lawsuit.<sup>105</sup> This includes an examination of the word "action," found in the statute;<sup>106</sup> the word "judgment," as it is used by the Sixth Circuit in defining "action";<sup>107</sup> and finally the term "prevailing party," which is alluded to by

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103. See 42 U.S.C. §§ 1988(b), 1997e(d)(2) (2006).

104. *Id.* § 1997e(d).

105. *Id.* § 1997e(d)(1).

106. *Id.*

107. *Riley v. Kurtz*, 361 F.3d 906, 914 (6th Cir. 2004).

§ 1997e(d)(1)'s requirement that fees be authorized under § 1988.<sup>108</sup> Although the two circuits differ in their approach to examining subsection (d)(1), both circuits generally agree that “action,” and thus § 1997e(d), encompasses an entire lawsuit, trial, and appeals.<sup>109</sup> It is in the level of importance that the circuits place on the examination and interpretation of “prevailing parties” and § 1997e(d)'s relationship to § 1988 that the two circuits diverge.<sup>110</sup>

1. § 1997e(d)'s Scope: The Difficulty in Defining “Action” and “Judgment” and the Headache of Legalese Variation

The first part of the threshold requirement that is susceptible to multiple interpretations is the word “action” as it is used in subsection (d)(1), which states that the § 1997e(d) attorney's fees provision is only applicable in an “action” brought by a prisoner subject to some form of confinement.<sup>111</sup> The interpretation of “action” presents a particularly interesting question, summarized well by the Sixth Circuit, when there is an appeal brought by a non-prisoner: the appeal can either be considered a continuation of the original lawsuit, and, therefore, part of an action brought by a prisoner, or it could mean a distinctly separate action, brought by the non-prisoner defendant, in which case the PLRA would be inapplicable.<sup>112</sup>

In *Riley*, the Sixth Circuit adopted the former reasoning.<sup>113</sup> The Sixth Circuit explained that since the PLRA failed to define “action,” the court had to look to *Black's Law Dictionary*, which defines action as “any judicial proceeding, which, if conducted to a determination, will result in a judgment or decree.”<sup>114</sup> Without giving much of an explanation the court then determined that there was no reason “an appeal brought by the losing party should not be considered . . . a continuation of the original action” because “[t]here is no final judgment or decree until the appeals process has ended.”<sup>115</sup> The reasoning makes sense, but the court's quick transition from the use of “final judgment”

108. 42 U.S.C. § 1997e(d)(1).

109. See *Woods v. Carey*, 722 F.3d 1177, 1181–82 (9th Cir. 2013); *Riley*, 361 F.3d at 914. The Ninth Circuit in *Woods* did not specifically examine “action.” But in examining whether subsection (d)(2) applied to appellate courts, the court referred to “the course of an action,” implying that an action is of duration. See *Woods*, 722 F.3d at 1181. Additionally, the Ninth Circuit never stated that an appeal is a separate action from the trial proceedings. See *id.*

110. *Riley*, 361 F.3d at 914–18. The Ninth Circuit in *Woods* did not directly discuss prevailing parties or § 1988.

111. 42 U.S.C. § 1997e(d)(1).

112. *Riley*, 361 F.3d at 914.

113. *Id.*

114. *Id.* (quoting BLACK'S LAW DICTIONARY 29 (7th ed. 1999)).

115. *Riley*, 361 F.3d at 914.



versus “judgment” without any explanation is a point of confusion.<sup>116</sup> *Black’s Law Dictionary* defines “action” as a judicial decision resulting in a “judgment,” but the court’s conclusion that “action” encompasses appeals is based on the concept that no “final judgment” has been issued, not on the fact that an appeal results in a judgment.<sup>117</sup>

In their law review article entitled *Prisoners’ Rights*, Eisinger, Manville, and Rimmer from Wayne State University critiqued the Sixth Circuit for this exact reasoning—that an appealed trial court decision is not a “final judgment . . . until the appeals process has ended.”<sup>118</sup> The article argued that Congress granted appellate courts jurisdiction over “all final decisions of the district courts,” thus rendering a trial court decision a “final judgment.”<sup>119</sup> It is somewhat misguided to criticize the Sixth Circuit’s argument that the trial court decision is not final. A quick look at the definitions of “judgment,” “decree,” “final judgment,” and “final decision” show how difficult distinguishing the words can be because each word uses one of the others in its own definition.<sup>120</sup> Additionally, courts use these terms interchangeably.<sup>121</sup> Therefore, it is difficult to give much weight to the Sixth Circuit’s usage of “final judgment” in regards to trial decisions not being appealable.

It is likely that instead, the Sixth Circuit’s use of “final judgment” has nothing to do with appealability. *Black’s Law Dictionary* defines “judgment” as the “court’s final determination of the rights and obligations of the parties in a case.”<sup>122</sup> This could happen both at the trial court and on appeal.<sup>123</sup> If actions

116. *See id.*

117. *See id.*

118. Erica M. Eisinger et al., *Prisoners’ Rights*, 52 WAYNE L. REV. 857, 924 (2006) (internal quotation marks omitted).

119. *Id.* at 924 (internal quotation marks omitted).

120. *See* BLACK’S LAW DICTIONARY (8th ed. 2004). In *Black’s Law Dictionary*, a “decision” is defined as a “judgment pronounced by a court when . . . disposing of a case.” *Id.* at 436. A “judgment” is defined as a “final determination of the rights and obligations of the parties in a case.” *Id.* at 858. A “decree” is defined as a “judicial decision.” *Id.* at 440. A “final judgment” is defined as “[a] court’s last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs (and, sometimes, attorney’s fees),” as well as a “final decision” and “final decree.” *Id.* at 859. And a “final decision” is defined as “see *final judgment*.” *Id.* at 436.

121. Michael D. Green, *From Here to Attorney’s Fees: Certainty, Efficiency, and Fairness in the Journey to the Appellate Courts*, 69 CORNELL L. REV. 207, 222 (1984) (“Indeed, many courts have used the term ‘judgment’ interchangeably with the term ‘final decision.’”).

122. *See* BLACK’S LAW DICTIONARY, *supra* note 120, at 859.

123. Both the appellate and trial courts issue their own judgments, which stand for that court’s, trial or appellate, “final determination” regarding the issues before them. While a trial court’s decision is reviewable, that decision still stands as the final determination made by that specific trial court during that phase of the lawsuit, at least until, if ever, the appellate court alters or remands the decision. The idea is that a judgment that is issued is final regarding the specific

were meant to be classified based on which court rendered which judgment, the appeals process would be a distinct and separate process.<sup>124</sup> Reality shows us that trial and appellate courts interact and influence each other, thus, the two are not wholly isolated and neither are their judgments. Therefore, when the Sixth Circuit wrote that “action” encompasses appeals because there is no “final judgment” until an appeal is determined,<sup>125</sup> “final judgment” was not being used as a legal term of art, as critiqued in *Prisoners' Rights*,<sup>126</sup> but rather in its layperson's sense to mean “conclusive.”<sup>127</sup> A final judgment may happen multiple times throughout a lawsuit, but a conclusive judgment, as meant by the Sixth Circuit, occurs once, at the end of the entire action, after both trial and appeals.<sup>128</sup> The conclusion reached by the Sixth Circuit is that since no conclusive judgment in an action occurs until after the appellate process, “action” encompasses appeals, and therefore § 1997e(d), applicable to an “action” brought by a prisoner, may be applied at the appellate level.<sup>129</sup> Unfortunately, much of this reasoning is implied rather than explicitly stated in the Sixth Circuit's analysis.<sup>130</sup>

In *Woods*, the Ninth Circuit did not directly examine the word “action,”<sup>131</sup> but regardless, the word is still a part of the provision setting out the threshold

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issues heard by the court at that specific time in the lawsuit. When the trial court gets the appellate court's final determination, and it involves a remand or a reversal, the trial court's previous final decision still stands. It is either just wrong or the trial court needs to revisit some issues and come up with another “final determination” regarding the issue specified by the appellate court on remand. The trial court, however, will not be able to completely address the case as it did before the case was heard on appeal and is instead limited to the scope of the remand. Whatever decision the trial court would reach on remand then stands as that court's new final determination for those issues at that specific time in the lawsuit.

124. For example, appellate courts sometimes remand a decision back to the trial court for further consideration. Appellate courts also limit their review to certain aspects of a case depending on the issues involved instead of looking at the entire suit with fresh eyes, giving deference to the trial courts' observations and decisions. This shows that the courts interact with each other instead of working in isolation.

125. *Riley v. Kurtz*, 361 F.3d 906, 914 (6th Cir. 2004).

126. *Eisinger et al.*, *supra* note 118, at 924–26.

127. *See Final Definition*, MERRIAM-WEBSTER'S DICTIONARY, <http://www.merriam-webster.com/dictionary/final> (last visited Sept. 30, 2014). *Merriam-Webster's Dictionary* defines “final” as “not to be altered or undone” and “coming at the end.” *Id.*

128. *See Riley*, 361 F.3d at 914.

129. *See id.* at 914.

130. *See id.* If § 1997e(d) applies to an “action” and an “action” includes appeals, then § 1997e(d) applies to appeals. This does not answer the question, however, of whether § 1997e(d) grants attorney's fees for appellate work, just that § 1997e(d) decides whether or not fees are permitted on appeal because it is part of an “action.”

131. *See Woods v. Carey*, 722 F.3d 1177, 1181–82 (9th Cir. 2013).

requirement that must be met in any § 1997e(d) application.<sup>132</sup> Strangely enough, although it reached a different conclusion than the Sixth Circuit, the Ninth Circuit in *Woods* also seemed to consider trial and appellate proceedings part of the same action.<sup>133</sup> The Ninth Circuit noted that “[t]hroughout the course of an action, courts may award fees on multiple occasions, but only the district court awards ‘a monetary judgment.’”<sup>134</sup> The Ninth Circuit’s reference to “the course of an action” suggests an assumption that the action includes multiple stages (i.e. the trial and appellate level stages).<sup>135</sup> Additionally, the court would not have examined the rest of § 1997e(d) in its opinion if the appeal had not met the threshold requirement of being part of the original prisoner’s “action.”<sup>136</sup> The dissent in *Woods* more explicitly argued that “action” encompasses an appeal and cited various cases in support of this conclusion, including both a Ninth Circuit case and a Supreme Court case.<sup>137</sup>

It seems clear that both circuits, although attributing different weight to the word “action,” found that an appeals process is still part of an original action brought by a prisoner.<sup>138</sup> The Sixth Circuit’s definition of “action” showed a willingness to extend § 1997e(d)’s applicability to the entire course of litigation.<sup>139</sup> In contrast, the Ninth Circuit offered minimal analysis in regards to the meaning of “action” and showed an unwillingness to take an all-encompassing approach toward § 1997e(d)’s scope.<sup>140</sup> This point plays a major role later on. For now, and in moving forward in this Note’s analysis, § 1997e(d)(1)’s “any action brought by a prisoner” language encompasses the entirety of the lawsuit (i.e. action) from the trial level to appellate level and beyond.<sup>141</sup>

## 2. Section 1997e(d)’s Scope: Defining Prevailing Parties—§ 1997e(d)’s Relationship with § 1988

After § 1997e(d)(1)’s preliminary “action” threshold requirement, the next condition is that the action must be one in which attorney’s fees are authorized

132. See 42 U.S.C. § 1997e(d)(1) (2006).

133. *Woods*, 722 F.3d at 1182.

134. *Id.*

135. See *id.*

136. See *id.* at 1181–82.

137. *Id.* at 1184 (Murguia, J., dissenting) (“An appeal is not a ‘supplementary proceeding.’ *It is a continuance of the same action.*” (quoting *Resolution Trust Corp. v. Bayside Developers*, 43 F.3d 1230, 1240 (9th Cir. 1994))).

138. See *Woods*, 722 F.3d at 1182; *Riley v. Kurtz*, 361 F.3d 906, 914 (6th Cir. 2004).

139. See *Riley*, 361 F.3d at 914.

140. See *Woods*, 722 F.3d at 1181–84.

141. See *id.* at 1182; *Riley*, 361 F.3d at 914.

under § 1988.<sup>142</sup> The Sixth Circuit, in its close reading of the statute, paid great attention to § 1988,<sup>143</sup> and rightly so—the connection between § 1997e and § 1988 is clearly spelled out in the language of § 1997e(d)(1).<sup>144</sup> The Sixth Circuit correctly determined that § 1997e(d)'s general rule is to limit the plaintiffs that qualify as “prevailing parties” entitled to attorney’s fees, in stark contrast with § 1988’s general grant of attorney’s fees to any prevailing party.<sup>145</sup> The Ninth Circuit, however, completely failed to directly address § 1988 and consequently started down a path of misguided analysis.<sup>146</sup>

The general rule under § 1988 is to grant attorney’s fees to parties who “prevail” on claims brought under one of the listed civil rights statutes.<sup>147</sup> The definition given by the Supreme Court in *Hensley v. Eckerhart* and referenced in *Riley* construes “prevailing party” under § 1988 quite broadly by stating that a party prevails if “[it] succeed[s] on any significant issue in litigation” that achieves a sought-after benefit.<sup>148</sup> However, as defined in *Hensley*, for attorney’s fees to be recoverable, the benefits must be sought-after by the person who brought the suit.<sup>149</sup> Section 1988 case law indicates that this means prevailing plaintiffs are entitled to attorney’s fees, but prevailing defendants are entitled to attorney’s fees only when a plaintiff’s underlying claim is frivolous, unreasonable, or groundless.<sup>150</sup>

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142. 42 U.S.C. § 1997e(d)(1) (2006) (“In any action . . . in which attorney’s fees are authorized under section 1988 . . .”).

143. *Riley*, 361 F.3d at 914–16.

144. 42 U.S.C. § 1997e(d)(1).

145. *See Riley*, 361 F.3d at 914–15; *see also* 42 U.S.C. § 1988(b).

146. *See Woods*, 722 F.3d at 1181–84.

147. 42 U.S.C. § 1988(b).

148. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Riley*, 361 F.3d at 914. This definition seems to leave open the question of whether both a plaintiff and defendant can be prevailing parties in the same suit. An example of this would be if a plaintiff sues on seven claims, and wins three of the seven. The plaintiff achieved sought-after benefits on three issues, while the defendant achieved sought-after benefits on four of the issues.

149. *Hensley*, 461 U.S. at 433.

150. *Id.* at 429 & n.2 (citing *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978)). “Hence, a plaintiff should not be assessed his opponent’s attorney’s fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.” *Christiansburg*, 434 U.S. at 422. Therefore, prevailing parties under § 1997e(d) are typically plaintiffs who prevail on any sought-after claim at trial or on appeal, unless the defendant can prove certain factors. Returning to the previous example, the defendant is not entitled to attorney’s fees for succeeding on four of the seven claims unless a claim was groundless.

Section 1988(b) also does not define the amount of success a plaintiff must achieve under the *Hensley* rule in order to be considered prevailing.<sup>151</sup> In the Supreme Court case *Farrar v. Hobby*, the Court held that as long as the plaintiff succeeds in some manner, they will be considered a prevailing party and entitled to an award of attorney's fees under § 1988.<sup>152</sup> This can be characterized as a "general grant" of attorney's fees to any prevailing party.<sup>153</sup>

This lays out the basics on how § 1988's attorney's fees provision functions, but the PLRA imposes its own restrictions independent of § 1988.<sup>154</sup> In *Riley*, the defendant argued that, regardless of § 1988's general grant of attorney's fees to prevailing parties, the PLRA was intended by Congress to "limit the definition of prevailing party for attorney's fees purposes" in regards to prisoner litigation, excluding some prisoner plaintiffs, even if § 1988 prevailing parties ordinarily can recover attorney's fees on appeal.<sup>155</sup> The Sixth Circuit looked to the PLRA's legislative history for guidance, specifically at a House Committee on the Judiciary report addressing the attorney's fees section of the PLRA that stated that the PLRA was intended to "narrow[] the judicially-created view of a 'prevailing party' so that a prisoner's attorney will be reimbursed only for those fees reasonably and directly incurred in proving an actual violation of a federal right."<sup>156</sup> Drawing on this report, the Sixth Circuit agreed that the PLRA was intended to restrict the definition of prevailing party so that fewer parties would qualify for attorney's fees under § 1997e(d), compared to § 1988(b)'s general grant of attorney's fees.<sup>157</sup>

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151. See 42 U.S.C. § 1988(b); *Hensley*, 461 U.S. at 433 ("[One prevails] if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.").

152. *Farrar v. Hobby*, 506 U.S. 103, 114 (1992) ("[W]e hold that [under § 1988] the prevailing party inquiry does not turn on the magnitude of the relief obtained. We recognized [this] when we noted that 'the degree of the plaintiff's success' does not affect 'eligibility for a fee award.'" (quoting *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 790 (1989))). There is one exception, however, involving nominal damages, but it affects recoverability, not one's prevailing party status. As noted by the Court in *Farrar*:

Although the "technical" nature of a nominal damages award or any other judgment does not affect the prevailing party inquiry, it does bear on the propriety of fees awarded under § 1988. Once civil rights litigation materially alters the legal relationship between the parties, "the degree of the plaintiff's overall success goes to the reasonableness" of a fee award . . . . Indeed, "the most critical factor" in determining the reasonableness of a fee award "is the degree of success obtained."

*Id.* at 114 (citations omitted).

153. See 42 U.S.C. § 1988(b). In other words, under § 1988, attorney's fees are generally awarded to prevailing plaintiffs.

154. 42 U.S.C. § 1997e(d)(1)–(2).

155. *Riley v. Kurtz*, 361 F.3d 906, 914 (6th Cir. 2004).

156. *Id.* at 914 (quoting H.R. REP. NO. 104-21, at 28 (1995)).

157. See *id.* at 915.

Additional evidence of this intent to limit prevailing parties can be found at the end of § 1997e(d)(1) in the wording “[s]uch fees shall not be awarded, except.”<sup>158</sup> The starting point of the statute is that “fees shall not be awarded.”<sup>159</sup> This shows that the default rule under § 1997e(d), in contrast to § 1988’s general grant of attorney’s fees to prevailing parties, is to prohibit awards of attorney’s fees to prevailing parties unless a certain set of requirements are met.<sup>160</sup> Consequently, § 1997e(d) does indeed change the definition of “prevailing party.”<sup>161</sup> No longer is achieving a sought-after benefit on a significant issue the guidepost for identifying “prevailing parties,” as it was under § 1988.<sup>162</sup> Under § 1997e(d), to be a prevailing party entitled to attorney’s fees, a prisoner plaintiff must meet the requirements of subsections (d)(1)(A)–(B),<sup>163</sup> which are examined in the following section. Thus to determine whether § 1997e(d) prohibited attorney’s fees at the appellate level, the Sixth Circuit needed to see if appellate work met the exception laid out in subsections (d)(1)(A)–(B).

The Ninth Circuit, in contrast, did not even examine the term “prevailing party” or § 1997e(d)’s connection to § 1988(b).<sup>164</sup> In fact, in quoting subsection (d)(1), the Ninth Circuit deleted its specific reference to § 1988.<sup>165</sup> It is not clear why the Ninth Circuit chose to omit the phrase, but it may be because the defendant in *Woods* did not argue that § 1997e(d) prohibited appellate fees, but rather that subsection (d)(2) limited the amount of appellate fees, so the Ninth Circuit felt no need to examine subsection (d)(1).<sup>166</sup> The Ninth Circuit may have felt that the only relationship between § 1997e(d) and § 1988 was that the plaintiff must have been successful on a civil rights related claim, and since in *Woods* and *Dannenberg* both plaintiffs clearly were successful on civil rights claims,<sup>167</sup> the court could ignore a § 1988 analysis.

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158. 42 U.S.C. § 1997e(d)(1).

159. *See id.*

160. *Compare id.* § 1997e(d), with *id.* § 1988(b).

161. *See id.* § 1997e(d)(1).

162. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (“[One prevails] if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.”).

163. 42 U.S.C. § 1997e(d)(1)(A)–(B).

164. *Woods v. Carey*, 722 F.3d 1177, 1178–84 (9th Cir. 2013).

165. *Id.* at 1180. (“[I]n which attorney’s fees are authorized [ ], such fees shall not be awarded, except to the extent that . . .”). The “[ ]” omits “under section 1988,” as the full text should read “in which attorney’s fees are authorized under section 1988.” 42 U.S.C. § 1997e(d)(1).

166. *Woods*, 722 F.3d at 1178–84.

167. *See id.* at 1179; *Dannenberg v. Valadez*, 338 F.3d 1070, 1071 (9th Cir. 2003).

However, the reference to § 1988 in § 1997e(d) indicates a more complex relationship between the two statutes.<sup>168</sup>

Although they are connected, § 1988 and § 1997e(d) are distinctly different. The two statutes contain completely contrasting general rules: § 1988 is a general grant of attorney's fees while § 1997e(d) is a general prohibition.<sup>169</sup> The Sixth Circuit correctly aligned its analysis early on with § 1997e(d)'s main purpose of prohibiting awards of attorney's fees unless the requirements for the exception are met;<sup>170</sup> this helped guide it to the correct conclusion that the subsection (d)(2) cap applies at the appellate level.<sup>171</sup> On the other hand, the Ninth Circuit ignored the distinction between § 1988's general grant and § 1997e(d)'s general prohibition and bypassed any discussion of § 1988.<sup>172</sup> In doing so, the Ninth Circuit left a key aspect of § 1997e(d) out of its analysis and misinterpreted the overall purpose of § 1997e(d) as not one of limitation.<sup>173</sup> This misinterpretation caused it to later apply misguided logic in determining whether to implement the subsection (d)(2) fee cap at the appellate level.

*B. Section 1997e(d)(1)(A)–(B): The Exception Requirements—Do They Apply to Appellate Work?*

Section 1997e(d) lays out the general rule that attorney's fees are prohibited in prisoner's actions where attorney's fees are authorized under § 1988, but § 1997e(d)(1) ends with the phrase "except to the extent that."<sup>174</sup> The subsequent provisions, subsections (d)(1)(A)–(B), lay out the requirements that must be met for the exception to the general prohibition to apply and for attorney's fees to be recoverable.<sup>175</sup>

1. Subsection (d)(1)(A): Defining "Directly and Reasonably Incurred" and Mistaken Analogies

The key language of § 1997e(d)(1)(A) is the phrase "directly and reasonably incurred in proving an actual violation of the plaintiff's right,"<sup>176</sup> which presents the issue of whether or not defending a judgment on appeal is considered "proving an actual violation of the plaintiff's rights."<sup>177</sup> If

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168. See 42 U.S.C. § 1997e(d).

169. Compare *id.* § 1997e(d), with *id.* § 1988(b).

170. *Riley v. Kurtz*, 361 F.3d 906, 915 (6th Cir. 2004).

171. *Id.* at 917.

172. See *Woods*, 722 F.3d at 1178–84.

173. See *id.*

174. 42 U.S.C. § 1997e(d)(1).

175. See *id.* § 1997e(d)(1)–(2).

176. *Id.* § 1997e(d)(1)(A).

177. *Riley v. Kurtz*, 361 F.3d 906, 915 (6th Cir. 2004).

defending a judgment on appeal is not considered proving an actual violation of a right, then the exception will not apply to appellate attorney's fees and the fees will be prohibited under subsection (d)(1).<sup>178</sup>

In *Riley*, the defendant argued to the Sixth Circuit that attorney's fees for appellate work were prohibited because defending a judgment on appeal is not "directly proving an actual violation of the prisoner's rights."<sup>179</sup> Upon first glance, this appears to be a defensible argument. *Black's Law Dictionary* defines proof as "[t]he establishment or refutation of an alleged fact by evidence; the persuasive effect of evidence in the mind of a fact-finder."<sup>180</sup> At trial, facts are presented to a fact finder, and each side attempts to prove its party's case.<sup>181</sup> Establishing facts, and persuading a fact finder is something reserved only for trial courts.<sup>182</sup> Appellate courts review facts that have been proven, assess whether they have been actually proven, and assess whether the law was applied correctly to the facts.<sup>183</sup> It would seem that "proof" or "proving" lacks meaning at the appellate level.<sup>184</sup>

The Sixth Circuit did not follow the defendant's reasoning, but looked to § 1988 precedent, noting that traditionally § 1988 has been interpreted as including awards for attorney's fees incurred while successfully defending a judgment on appeal.<sup>185</sup> The Sixth Circuit reasoned that there was "no language in the PLRA that contradicts the traditional view that reasonable appellate fees may be awarded to prevailing parties."<sup>186</sup> The Sixth Circuit further cited a presumption "that Congress was aware when passing the PLRA that, under § 1988, fees are awarded to prevailing parties for work done by attorneys at trial, post-trial, and on appeal," making it likely that attorney's fees under § 1997e(d) were meant to encompass appellate fees as well.<sup>187</sup>

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178. See 42 U.S.C. § 1997e(d)(1).

179. *Riley*, 361 F.3d at 915.

180. See BLACK'S LAW DICTIONARY, *supra* note 120, at 1251.

181. PAUL C. GIANNELLI, UNDERSTANDING EVIDENCE 1-4 (4th ed. 2013).

182. Jeffrey C. Dobbins, *New Evidence on Appeal*, 96 MINN. L. REV. 2016, 2016-17 (2012) ("Appellate review is limited, almost by definition, to consideration of the factual record as established in the trial court. . . . The limitation also focuses appellate courts on their area of expertise—the resolution of questions of law—while recognizing the superior experience of trial courts (or, in some cases, agencies) in resolving questions of fact. Consistent with this traditional understanding of appellate review, appellate courts typically reject efforts by parties to introduce on appeal 'new evidence' that could have been, but was not, presented below.").

183. See Kevin Casey et al., *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIR. B.J. 279, 284-90 (2002).

184. See *id.*; see also Dobbins, *supra* note 182.

185. *Riley v. Kurtz*, 361 F.3d 906, 915 (6th Cir. 2004) (citing *Hutto v. Finney*, 437 U.S. 678, 693-98 (1979)).

186. *Id.*

187. See *id.*



However, as already examined, the attorney's fees provision in § 1988 is not identical to the one found in § 1997e(d); authorization under § 1988 is just a starting point, and, unless the exception is met, the stopping point is prohibition.<sup>188</sup> The first part of the exception requires that the fee must also have been "directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 of this title."<sup>189</sup> Section 1988 contains no explicit limitation such as "directly and reasonably incurred in proving an actual violation of the plaintiff's rights."<sup>190</sup> So although precedent under § 1988 holds that the statute allows for fee awards on appeal, it is not clear that this allowance means that appellate work involves fees "directly and reasonably incurred in proving an actual violation" as required for fees to be available under § 1997e(d).<sup>191</sup>

In addressing this issue, the Sixth Circuit again referred to *Hensley*, in which the Supreme Court held that under § 1988, attorney's fee should be awarded "for work 'expended in pursuit of the ultimate result achieved,' and not for work on claims unrelated to successful claims."<sup>192</sup> Only work related to successful claims is awarded with attorney's fees.<sup>193</sup> This restriction is referred to as the "related claim" limitation.<sup>194</sup> The Sixth Circuit believed that PLRA adopted this "related claim" limitation by providing that fees are only obtainable if "the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights."<sup>195</sup> The Sixth Circuit concluded that "an appeal by a defendant challenging a prisoner's success at trial is litigation related to the underlying suit, and attorney's fees would be allowed under § 1988 and *Hensley*."<sup>196</sup> Thus, the court is saying that defending a case on appeal is related to prevailing claims at trial, and just as fees would be authorized under § 1988, they are authorized under § 1997e(d).<sup>197</sup>

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188. See 42 U.S.C. § 1997e(d) (2006); see also *id.* § 1988(b) ("[T]he court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.").

189. *Id.* § 1997e(d)(1)(A).

190. See *id.* § 1988(b).

191. See *Riley*, 361 F.3d at 915–16; see also 42 U.S.C. § 1997e(d)(1)(A).

192. *Riley*, 361 F.3d at 916 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983)).

193. *Id.*

194. *Id.*

195. *Id.*; see also 42 U.S.C. § 1997e(d)(1)(A).

196. *Riley*, 361 F.3d at 916.

197. See *id.*

The Sixth Circuit also cited a case from the Eastern District of Michigan, *Sallier v. Scott*, which was the only case the court found instructive on § 1997e(d)'s applicability to post-trial attorney's fees.<sup>198</sup> *Sallier* concerned fees incurred in preparing for and defending defendants' post-trial motions.<sup>199</sup> Like the prisoner plaintiff in *Riley*, the plaintiff argued that hours spent on post-trial work "were not directly and reasonably incurred in proving an actual violation of the plaintiff's rights."<sup>200</sup> Relying on *Black's Law Dictionary's* definition of "prove," the court held that post-trial work, just like pre-trial work, involves proving that a violation occurred, and, consistent with *Black's* definition, "making certain" the verdict is not changed or reversed.<sup>201</sup>

The court in *Riley* followed this reasoning, holding that "if the prisoner's favorable verdict is being challenged on appeal, he is having to prove or establish his violation again, this time to a higher court."<sup>202</sup> *Black's Law Dictionary's* definition for "prove" contains two different definitions.<sup>203</sup> One is the definition, "to establish or make certain," which the Sixth Circuit stressed; the other is to establish the truth of a fact by evidence, the term of art, which the defendant stressed.<sup>204</sup> As it did with "final judgment," the court looked again towards the ordinary meaning of a word.<sup>205</sup>

One problematic area of the Sixth Circuit's analysis is the analogy it draws between § 1988's "related claim" limitation and § 1997e(d)(1)(A)'s "directly and reasonably incurred in proving . . . a violation" limitation.<sup>206</sup> The analogy is problematic for three reasons: (1) it disregards the narrower language of § 1997e(d); (2) it is unworkable given the court's previous findings; and (3) it disregards the PLRA's existence as its own unique statute.

First, such an analogy is somewhat inaccurate. Section 1988's "related to" limitation is supposed to prevent awards of attorney's fees for work on

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198. *See id.*

199. *Sallier v. Scott*, 151 F. Supp. 2d 836, 838 (E.D. Mich. 2001).

200. *Id.* (internal quotation marks omitted).

201. *Id.* at 839 ("Thus, the attorney fee cap mandated by the PLRA does apply, in this case, to the attorney fees incurred in defending Plaintiff Sallier's verdict on the defendant's motion for judgment as a matter of law."). *See also* BLACK'S LAW DICTIONARY, *supra* note 120, at 1261 (defining "prove" as "[t]o establish or make certain," or "to establish the truth (of a fact or hypothesis) by satisfactory evidence").

202. *Riley*, 361 F.3d at 916.

203. BLACK'S LAW DICTIONARY, *supra* note 120, at 1261; *see also Prove Definition*, MERRIAM-WEBSTER'S DICTIONARY, <http://www.merriam-webster.com/dictionary/prove?show=0&t=1415054257> (last visited Sept. 30, 2014) (defining "prove" as "to compare against a standard" and "to establish the existence, truth or validity").

204. BLACK'S LAW DICTIONARY, *supra* note 120, at 1261.

205. *See Riley*, 361 F.3d at 914–16.

206. *Id.* at 916.

unsuccessful claims.<sup>207</sup> It is true that § 1997e(d)'s "directly and reasonably incurred in proving" language encompasses only work on successful claims, thus in a way adopting the "related claim" limitation.<sup>208</sup> However, § 1997e(d)'s language is much more specific than § 1988's "related claim" limit.<sup>209</sup> Under § 1997e(d), not only must the work be related to the successful claim, it must also have been "directly and reasonably incurred in proving" that violation.<sup>210</sup> The restriction in § 1997e(d)(1)(A) is not entirely the same as the "related claim" limitation.<sup>211</sup>

The legislative history relied on by the Sixth Circuit also supports this reading; it states that the statute was drafted to "eliminat[e] fees for litigation other than that necessary to prove a violation of a federal right."<sup>212</sup> Under § 1988, attorney's fees are granted in "action(s) to enforce listed civil rights laws."<sup>213</sup> Theoretically, although unlikely, in an action to prove a civil rights violation, an attorney could perform work only indirectly related to proving the violation. Under § 1997e(d), that work would not qualify for fees, even though it was performed in an action to prove a civil rights violation.<sup>214</sup> It is likely, however, that in most instances work performed in an action to prove a civil rights violation will be work used to directly prove such a violation, so that attorney's fees would be available under both § 1988 and § 1997e(d).<sup>215</sup> Still, as § 1997e(d) adopted a restricted version of § 1988's "prevailing party" definition, § 1997e(d)(1)(A) introduces a narrower definition of the type of work that qualifies for attorney's fees under the PLRA.<sup>216</sup>

Second, in addition to ignoring § 1997e(d)'s narrower language of what work qualifies for fees, the analogy introduces an unworkable concept given the court's previous findings about prevailing parties under the PLRA. The Sixth Circuit held in its opinion that § 1997e(d)'s "directly and reasonably incurred" language introduced a restricted version of who qualified as prevailing parties under § 1988.<sup>217</sup> Section 1997e(d)'s language was uniquely restrictive.<sup>218</sup> However, in holding that "directly and reasonably incurred" is

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207. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

208. *See* 42 U.S.C. § 1997e(d)(1)(A) (2006).

209. *See id.*

210. *See id.*

211. *See id.*

212. *Riley v. Kurtz*, 361 F.3d 906, 914 (6th Cir. 2004) (quoting H.R. REP. NO. 104-21, at 28 (1995)).

213. *N.C. Dep't of Transp. v. Crest St. Cmty. Council, Inc.*, 479 U.S. 6, 12 (1986).

214. *See* 42 U.S.C. § 1997e(d)(1)(A).

215. *See id.* §§ 1988(b), 1997e(d)(1)(A).

216. *See Riley*, 361 F.3d at 915; *see also* 42 U.S.C. § 1997e(d)(1)(A).

217. *See Riley*, 361 F.3d at 915.

218. *See id.*

the embodiment of § 1988's "related claim" limitation, § 1997e(d)'s supposed more restrictive definition of "prevailing parties" was then reduced to being as restrictive as § 1988's language.<sup>219</sup> The Sixth Circuit's analogy between § 1997e(d)(1)(A) and § 1988's "related claim" limitation removes any of the previous restrictions that the court went to great lengths to discuss and uphold<sup>220</sup> and now simply means the claims must be related to a successful claim.<sup>221</sup> This reasoning is not consistent, and perhaps was an effort to continue to align its reasoning with § 1988 precedent.<sup>222</sup> This discussion leads into the final issue: considering § 1997e(d) as not independent from § 1988.

The third problem is that the Sixth Circuit's analogy suggests that the PLRA codified *Hensley's* "related to" limitation and that § 1997(e) is an extension of § 1988 rather than its own separate statute which just happens to refer to an aspect of § 1988.<sup>223</sup> But if Congress had intended to codify the "related to" limitation, then why didn't Congress use the language of *Hensley* instead of the narrowing language found in § 1997e(d)?<sup>224</sup> It is true that both § 1997e(d) and § 1988 deal with civil rights, and that § 1997e(d) incorporates part of § 1988(b)'s definitions.<sup>225</sup> But § 1997e(d) is part of its own statute, the PLRA, aimed specifically to reduce frivolous lawsuits brought by prisoners.<sup>226</sup> This justification and specific goal makes it likely that § 1997e(d), although relating to civil rights, is not an extension of § 1988. It incorporates § 1988's attorney's fee provision, but in a sense only to limit or narrow it.<sup>227</sup> Section 1997e(d) applies only to prisoners, while § 1988 applies to almost everyone.<sup>228</sup> Section 1997e(d) issues a general prohibition, subject to an exception, while § 1988 issues a general grant of fees.<sup>229</sup> Section 1997e(d) narrows the definition of "prevailing party" and the type of activity that can yield recoverable attorney's fees.<sup>230</sup>

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219. *See id.* at 915–16.

220. *See id.*

221. *See id.* at 916.

222. *See Riley*, 361 F.3d at 914–16. The Sixth Circuit looked to prior cases that had dealt with interpreting § 1988 and aligned its analysis with the reasoning found in those cases. *See id.* Specifically, the court adopted § 1988's definition of prevailing party and the view that appellate attorney's fees are recoverable under the PLRA just as they are recoverable under § 1988. *Id.*

223. *See id.*

224. *See* 42 U.S.C. § 1997e(d)(1)(A) (2006).

225. *See id.* §§ 1988, 1997e(d).

226. White, *supra* note 2 (noting that the PLRA was specifically aimed at prisoners and was not just another civil rights statute).

227. *See* 42 U.S.C. § 1997e(d)(1).

228. *See id.* §§ 1988, 1997e(d).

229. *Compare id.* § 1997e(d), *with id.* § 1988(b).

230. *See id.* § 1997e(d); *see also Riley v. Kurtz*, 361 F.3d 906, 914–16 (6th Cir. 2004).

The Sixth Circuit could have reached the same conclusion, that appeals involve proving a violation, simply by extending its precise focus on certain words to “directly and reasonably incurred.”<sup>231</sup> Instead, the Sixth Circuit looked to an analogous phrase found in § 1988 precedent and to a district court decision that examined the definition of “prove.”<sup>232</sup> The Sixth Circuit adopted this definition of “prove” but swept the rest of the text in § 1997e(d)(1)(A) under § 1988 precedent, giving no attention to the modifier “reasonably” and the verb “incurred.”<sup>233</sup> “Reasonably,” intuitively and in *Black’s Law Dictionary*, is defined as “fair, proper, or moderate under the circumstances,” meaning that the fees should not be outlandish.<sup>234</sup> *Black’s Law Dictionary* defines “incur” as “[t]o suffer or bring on oneself (a liability or expense).”<sup>235</sup> Therefore, even if the Sixth Circuit had analyzed the text of § 1997e(d)(1)(A), it could have found support for its conclusions that appellate work involves proving a violation and that fees are recoverable on appeal. There was no need to stretch § 1997e(d)’s meaning to fit into § 1988’s precedent when the text of the statute supported the same conclusion.<sup>236</sup>

As with defining “action” and “prevailing parties,” the Ninth Circuit in *Woods* did not offer any examination, textual or otherwise, of what “directly and reasonably incurred in proving” means.<sup>237</sup> The Ninth Circuit’s main focus was on the subsection (d)(2) limitation and the proportionality requirement.<sup>238</sup> It would seem that for the subsection (d)(2) cap to apply, fees would first need to be authorized under the exception.<sup>239</sup> So, the Ninth Circuit must have concluded that appellate work satisfied the “proving a violation” requirement found in subsection (d)(1)(A). Although their logic was faulty (in the case of the Sixth Circuit) or nonexistent (the Ninth Circuit), the circuits agreed that appellate work can involve “directly and reasonably . . . proving a violation.”<sup>240</sup>

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231. See 42 U.S.C. § 1997e(d)(1)(A).

232. *Riley*, 361 F.3d at 916.

233. See *id.*

234. See BLACK’S LAW DICTIONARY, *supra* note 120, at 1293; see also *Reasonable Definition*, MERRIAM-WEBSTER’S DICTIONARY, <http://www.merriam-webster.com/dictionary/reasonably> (last visited Sept. 30, 2014) (defining “reasonable” as “not extreme or excessive”).

235. See BLACK’S LAW DICTIONARY, *supra* note 120, at 782; see also *Incur Definition*, MERRIAM-WEBSTER’S DICTIONARY, <http://www.merriam-webster.com/dictionary/incur?show=0&t=1415057726> (last visited Sept. 30, 2014) (defining “incur” as to “bring down upon oneself” expenses).

236. See *Riley*, 361 F.3d at 916.

237. See *Woods v. Carey*, 722 F.3d 1177, 1177–84 (9th Cir. 2013).

238. See *id.*

239. See 42 U.S.C. § 1997e(d) (2006).

240. See *Woods*, 722 F.3d at 1180–84; *Riley*, 361 F.3d at 916–18.

2. Subsections (d)(2) and (d)(1)(B)(i): The Relationship Between the Fee Cap and “Proportionality”

The exception to the general prohibition has two parts.<sup>241</sup> The first, found in subsection (d)(1)(A), requires that the fees have been incurred in proving a violation.<sup>242</sup> The second, referred to from now as the proportionality requirement, is found in subsection (d)(1)(B)(i) and reads, “the amount of the fee [must be] proportionately related to the court ordered relief for the violation.”<sup>243</sup> Therefore, to be recoverable under the exception, the attorney’s fees must have been incurred in proving a violation under subsection (d)(1)(A) and, under subsection (d)(1)(B)(i), must be proportionate to the court ordered relief.<sup>244</sup>

If a fee meets the requirements of subsections (d)(1)(A) and (d)(1)(B)(i), it may still be subject to the fee cap in subsection (d)(2).<sup>245</sup> The Ninth Circuit devoted a lot of analysis to the relationship between these two provisions and held that the subsection (d)(1)(B)(i) proportionality requirement limited the effect of subsection (d)(2)’s fee cap.<sup>246</sup> In doing so, the Ninth Circuit relied heavily on its decision in *Dannenberg*.<sup>247</sup> The court overemphasized the analogy with *Dannenberg* and did not clearly explain how that case related to the question of fees for appellate work.<sup>248</sup> In contrast, the Sixth Circuit reached its conclusion about the proportionality requirement and the subsection (d)(2) fee cap without clearly connecting the dots between its in-depth analysis and how it specifically arrived at such a conclusion.<sup>249</sup>

Approaching the last two significant parts of § 1997e(d), it is easier to look at the two subsections together, partially because it is how the Ninth Circuit examines them, but also because separating their analyses could be very confusing.<sup>250</sup>

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241. See 42 U.S.C. § 1997e(d)(1)(A)–(B).

242. *Id.* § 1997e(d)(1)(A).

243. *Id.* § 1997e(d)(1)(B)(i).

244. See *id.* § 1997e(d).

245. See *id.* § 1997e(d)(2).

246. See *Woods v. Carey*, 722 F.3d 1177, 1180–84 (9th Cir. 2013).

247. See *id.* at 1180–82.

248. See *id.*

249. *Riley v. Kurtz*, 361 F.3d 906, 916–18 (6th Cir. 2004). The court gave detailed reasoning for justifying that fees are available under the PLRA and that the PLRA applies on appeal. *Id.* The court did not, however, give a clear explanation for how subsection (d)(2) applies in applying the PLRA on appeal. *Id.* It seems that, in the eyes of the court, since this involved a monetary judgment, there was no question about applying subsection (d)(2) once it was determined that the PLRA applied on appeal and allowed for attorney’s fees. See *id.*

250. See *Woods*, 722 F.3d at 1180–84.

a. The Sixth Circuit and the Proportionality Requirement Under Subsection (d)(1)(B)(i)<sup>251</sup>

In *Riley*, the Sixth Circuit only mentioned the proportionality requirement when it quoted from the PLRA's legislative history.<sup>252</sup> The legislative history stated that current law allowed for attorney's fees to be awarded in great excess of the actual relief obtained by the prisoner.<sup>253</sup> The purpose of § 1997e(d)(1)(B)(i)'s proportionality requirement, according to the legislative history, was to:

[D]iscourage burdensome litigation of insubstantial claims where the prisoner can establish a technical violation of a federal right but he suffered no real harm from the violation. The proportionality requirement appropriately reminds courts that the size of the attorney fee award must not unreasonably exceed the damages awarded for the proven violation.<sup>254</sup>

It seems from this reasoning that the proportionality requirement is meant to act as a guidepost to ensure that excessive attorney's fees are not awarded in a drawn-out lawsuit where only nominal damages are recovered.<sup>255</sup> This could circumvent the PLRA's goal of deterring frivolous lawsuits, so it makes sense

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251. Subsection (d)(1)(B)(ii) is not examined in this Note. Subsection (d)(1)(B)(ii) comes into play when the attorney's work is not related to obtaining a judgment, as in subsection (d)(1)(B)(i), but for work related to enforcing such a judgment after it has been ordered by the court. *See* 42 U.S.C. § 1997e(d)(1)(B)(i)–(ii) (2006). These are two different scenarios, but given the “or” found in subsection (d)(1)(B), under the attorney's fee provision, one or the other must happen for fees to be granted. *See id.* The two subsections occur at different time periods. Subsection (d)(1)(B)(i) applies to work performed in first getting court ordered relief, while subsection (d)(1)(B)(ii) applies to work performed enforcing that relief ordered by the court, if such work occurs. *See id.* This Note focuses on fees incurred obtaining a judgment in court, subsection (d)(1)(B)(i), but regardless, the same statutory analysis as examined in this Note would occur up until reaching subsection (d)(1)(B). Under subsection (d)(1)(B)(ii), the analysis would then inquire whether the fee was directly and reasonably incurred in enforcing court ordered relief rather than whether the fee was proportionate to the court ordered relief. *See id.*; *see also* *Cody v. Hillard*, 304 F.3d 767, 777 (8th Cir. 2002) (“The implication of the provision . . . is that only services calculated to *enforce*, by noncompliance or contempt motion, for example, the judgment and not merely to monitor the defendant's compliance with it, may be compensable under § 1988 . . . but note that noncompliance and contempt motions are not the only types of work compensable under § 1997e(d)(1)(B)(ii). We hold that the class's effort to prolong the efficacy of the remedial decree was time spent ‘enforcing’ that decree, and is fully compensable. Whether a plaintiff is pressing a contempt motion or defending against a motion to vacate, in both cases the point is to give effect to an existing remedy, suggesting that the two circumstances should be treated alike.” (quoting 2 MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION § 2.8, at 39 (3d ed. 1997))).

252. *See Riley*, 361 F.3d at 914–15.

253. *Id.*

254. *Id.* at 915 (quoting H.R. REP. NO. 104-21, at 28 (1995)).

255. *See id.*

that the proportionality requirement is included to discourage excessive fees.<sup>256</sup> This reasoning is not discussed directly by the Sixth Circuit, but the court seems to adopt it through quoting the legislative history and using it as support for its decision.<sup>257</sup>

The Sixth Circuit does not directly examine the proportionality requirement or the fee cap for two reasons. First, the court determined that subsection (d)(2) applies to appellate fees because the subsection (d)(2) cap applies to any “action,” encompassing trial and appeals, in which a monetary award has been issued.<sup>258</sup> Therefore, since a monetary award had been issued at trial, the subsection (d)(2) 150% cap applied to the entire action and limited all attorney’s fees incurred therein.<sup>259</sup> Since the cap applied, the court did not address how the proportionality requirement factored into the fee award because such an award was already limited to 150% of the monetary judgment.<sup>260</sup> Although the Sixth Circuit held that subsection (d)(2) was applicable at the appellate level, there was nothing to apply it to because under the unique facts of *Riley*, trial fees had already been issued in excess of subsection (d)(2)’s cap, and consequently, the plaintiff’s attorney was not entitled to any more attorney’s fees at the appellate level.<sup>261</sup>

b. The Ninth Circuit: Connecting Subsections (d)(2) and (d)(1)(B)(i) and More Mistaken Analogies

In contrast, the Ninth Circuit in *Woods* based a good portion of its decision on its interpretation of the proportionality requirement in subsection (d)(1)(B)(i).<sup>262</sup> In doing so, the Ninth Circuit relied heavily on its earlier decision in *Dannenberg*.<sup>263</sup> In *Dannenberg*, the Ninth Circuit examined how subsection (d)(2)’s cap on monetary awards related to subsection (d)(1)(B)(i)’s proportionality requirement in the context of a mixed award of monetary and injunctive relief.<sup>264</sup> The Ninth Circuit held that the subsection (d)(2) cap applied only to legal work that resulted in monetary awards and not to work

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256. See *Woodford v. Ngo*, 548 U.S. 81, 93–95 (2006) (noting that the PLRA is meant to deter frivolous lawsuits filed by prisoners).

257. See *Riley*, 361 F.3d at 914–15.

258. *Id.* at 917.

259. See *id.*

260. See *id.* at 917–18. It seems the Sixth Circuit, through their application of subsection (d)(2), felt that when subsection (d)(2) applies it substitutes the 150% limit for the proportionality requirement in subsection (d)(1)(B)(i). See *id.*

261. *Id.*

262. *Woods v. Carey*, 722 F.3d 1177, 1180–82 (9th Cir. 2013).

263. See *id.*

264. *Dannenberg v. Valadez*, 338 F.3d 1070, 1073–75 (9th Cir. 2003).



that resulted in injunctive relief.<sup>265</sup> In coming to this conclusion, the Ninth Circuit first relied on the proportionality requirement, reasoning that it would be unfair to ignore an attorney's work performed pursuing injunctive relief by limiting attorney's fees to 150% of the monetary relief, especially where the injunctive relief was sweeping and the monetary relief was minimal.<sup>266</sup> Second, the court concluded that "'whenever a monetary judgment is awarded,' subsection (d)(2) caps attorneys' fees incurred for the sole purpose of securing the monetary judgment."<sup>267</sup> The Ninth Circuit thus laid down a bright-line rule that only fees for work performed in obtaining solely monetary awards will be capped, not fees for work performed for injunctive relief.<sup>268</sup>

The court used this rule for support in *Woods*,<sup>269</sup> but the rule is problematic in two ways. First, it is much broader than it needs to be, and it conflicts with the proportionality requirement in subsection (d)(1)(B)(i).<sup>270</sup> The proportionality requirement is both a reminder that attorney's fees should not greatly exceed the court-awarded relief and a grant of discretion to the courts to award proportional attorney's fees as they see fit.<sup>271</sup> The Ninth Circuit's bright-line rule removes some of this discretion by forcing courts to adhere to a predetermined formula.<sup>272</sup> Second, this rule forces the court to determine what attorney work was conducted for the *sole purpose* of obtaining monetary damages and not for obtaining injunctive relief.<sup>273</sup> This is very difficult to do, and it is unlikely that monetary work will ever be completely separable from work done for injunctive relief. Under this rule, when a mixed award is obtained, it is likely the 150% cap will not be applied.<sup>274</sup>

A better reading of § 1997e(d) would construe subsections (d)(1)(B)(i) and (d)(2) together in a more cohesive way. If only injunctive relief is awarded, then the proportionality requirement in subsection (d)(1)(B)(i) requires the court in its discretion to award fees proportionate to the court-ordered relief.<sup>275</sup>

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265. *Id.* at 1074–75.

266. *Id.* at 1074.

267. *Id.* at 1074–75.

268. *See id.*

269. *Woods v. Carey*, 722 F.3d 1177, 1180–82 (9th Cir. 2013).

270. *See* 42 U.S.C. § 1997e(d)(1)(B)(i) (2006).

271. *See id.*; *see also* *Riley v. Kurtz*, 361 F.3d 906, 915 (6th Cir. 2004) ("The proportionality requirement appropriately reminds courts that the size of the attorney fee award must not unreasonably exceed the damages awarded for the proven violation." (quoting H.R. REP. NO. 104-21, at 28 (1995))).

272. *See Dannenberg*, 338 F.3d at 1074–75.

273. *Id.* at 1075.

274. *See id.* (holding that because there was no showing that any of the fees were incurred solely in conjunction with obtaining the monetary relief, the fee cap did not apply to any portion of the attorney's fee award).

275. *See* 42 U.S.C. § 1997e(d)(1)(B)(i).

If a monetary award is the only relief, then subsection (d)(2) instructs the court to cap the fees award at 150% of the damages.<sup>276</sup> A close reading of subsection (d)(2) reveals that it says: “[w]henver a monetary judgment is awarded in an action described in paragraph (1).”<sup>277</sup> This means that the action must fit into subsection (d)(1)’s exception, meaning the attorney’s fees must have been incurred in proving a violation and the fees must be proportionate to the relief.<sup>278</sup> Thus, subsection (d)(2) limits the court’s discretion in making its proportionality assessment when it is dealing with an award of solely monetary relief.<sup>279</sup> In making this determination, the court is now given a stopping point: 150% of the award at most, not more. The court still retains discretion, but that discretion is placed in a limited framework.

This leads to the question of what happens when both injunctive and monetary relief are awarded. Which provision prevails, subsection (d)(2)’s cap or subsection (d)(1)(B)(i)’s broader proportionality requirement?<sup>280</sup> In *Dannenberg*, the Ninth Circuit examined both rules at once and held that unless one can show that the fees were incurred solely for obtaining monetary relief, the cap would not apply to any of the work, and therefore the proportionality rule would prevail.<sup>281</sup> As noted, making such a showing would be challenging because it is likely that damages and injunctive relief claims and the work performed on them overlap or are related.<sup>282</sup> This seems to go against § 1997e(d)’s purpose of limiting those who qualify for attorney’s fees<sup>283</sup> and encourages plaintiffs to bring mixed suits in hopes the fee cap will not apply. A better reading would hold that the court has at its disposal both subsection (d)(1)(B)(i), the proportionality requirement, and the subsection (d)(2) cap, and that it can in its discretion administer a fee award using both rules.<sup>284</sup> This would allow the court to cap fees for work primarily performed for monetary relief and to proportionally balance fees incurred primarily for injunctive relief.

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276. *See id.* § 1997e(d)(2).

277. *See id.*

278. *See id.* § 1997e(d)(1)–(2).

279. *See id.*

280. *See* 42 U.S.C. § 1997e(d).

281. *Dannenberg v. Valadez*, 338 F.3d 1070, 1074–75 (9th Cir. 2003).

282. *See id.* at 1075 (holding that Ninth Circuit held that because there was no showing that any of the fees were incurred solely in conjunction with obtaining the monetary relief, the fee cap did not apply to any portion of the attorney’s fee award).

283. *See* 42 U.S.C. § 1997e(d); *see also* *Riley v. Kurtz*, 361 F.3d 906, 915 (6th Cir. 2004) (holding that § 1997e(d) intended to limit the definition of “prevailing parties”).

284. *See* 42 U.S.C. § 1997e(d).

In *Woods* the Ninth Circuit reapplied this misguided logic to the issue of fee awards at the appellate level.<sup>285</sup> Again relying on the proportionality requirement, the court found that “it would . . . be inconsistent with § (d)(1) to apply the fee cap to attorney’s fees that are awarded, not in connection with securing the monetary judgment, but for services performed in the court of appeals to defeat the defendant’s attempt to overturn the district court’s verdict.”<sup>286</sup> The Ninth Circuit implicitly equated an attorney’s work for injunctive relief and an attorney’s work on appeal.<sup>287</sup> The analogy is not a particularly strong one, given that work for injunctive relief occurs at trial and involves the proving and arguing of facts, while appeals deal with arguing for or against the trial court’s determination.<sup>288</sup> Moreover, the award in *Woods* was only monetary, and in order for the subsection (d)(2) cap to apply, the fees must have met the subsection (d)(1)(A) exception and have been incurred in proving a violation.<sup>289</sup> It would follow that the appellate work would be viewed as work “in connection with securing [a] monetary judgment,”<sup>290</sup> i.e., work performed so that the monetary award is not reduced or reversed. Under the *Dannenberg* precedent, the cap should then apply in *Woods*, because the appellate work was performed to secure the monetary relief awarded at trial.<sup>291</sup>

A major argument in *Woods* supporting a possible critique of the *Riley* analysis is the presence of “is” in the phrase “[w]henver a monetary judgment is awarded.”<sup>292</sup> The Ninth Circuit in *Woods* held that the language used in § 1997e(d)(2) was ambiguous, especially “with respect to the circumstances under which the fee cap is applicable.”<sup>293</sup> The Ninth Circuit found that the phrase could be interpreted in two ways: first, the fee cap might apply to attorney’s fees awarded for work related to securing a monetary judgment, “an award that occurs only once in the course of an action, following summary judgment or trial before the district court,” or second, the cap might apply to any attorney’s fees “that are awarded for any reason during the course of an action in which a monetary judgment has been awarded by the district court.”<sup>294</sup> The Ninth Circuit chose the first interpretation, noting that a monetary judgment is awarded only once and by the district court; “the use of ‘is’” directs the court to apply the cap at the point in time when the monetary

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285. *Woods v. Carey*, 722 F.3d 1177, 1181–82 (9th Cir. 2013).

286. *Id.* at 1182.

287. *See id.*

288. Dobbins, *supra* note 182.

289. *See* 42 U.S.C. § 1997e(d).

290. *Woods*, 722 F.3d at 1182.

291. *Id.* at 1186 (Murguia, J., dissenting).

292. *Id.* at 1182; *see* Eisinger et al., *supra* note 118, at 924–26.

293. *Woods*, 722 F.3d at 1181.

294. *Id.*

judgment is awarded, as opposed to any time in a lawsuit in which a monetary judgment has been awarded.”<sup>295</sup>

The Ninth Circuit’s argument overemphasized the word “is.” If each word carried as much weight as *Woods* attributes to “is,” why is “is” the only word the Ninth Circuit gave such importance? Why, for example, did the Ninth Circuit fail to consider the significance of Congress’s decisions to use “whenever” instead of “when” in § 1997e(d)(2)?<sup>296</sup> “When” carries the meaning of a singular instance, while “whenever” suggests occurring more than once.<sup>297</sup> Moreover, the Ninth Circuit’s analysis forgot that § 1997e(d) is applicable to an “action.”<sup>298</sup> This action is the action brought by the confined prisoner in subsection (d)(1) and the same action that encompasses trial and appeals.<sup>299</sup> If subsection (d)(2) applies to a prisoner’s “action,” it applies to both trial and appellate work in that action, thus limiting the entire award of attorney’s fees to 150% of the monetary award. This was the conclusion reached by the Sixth Circuit in *Riley* and by the dissent in *Woods*.<sup>300</sup>

The Ninth Circuit instead held that fees for appellate work would not be capped even if it involved defending a monetary judgment, even though fees for trial work performed for securing that monetary judgment would be capped.<sup>301</sup> In *Woods*, the prisoner had represented himself at trial, so he did not seek any attorney’s fees; it was only on appeal that he hired a lawyer.<sup>302</sup> If he had had a lawyer at trial, that lawyer’s trial fees would have been capped, but the appellate fees would not have been.<sup>303</sup> This very narrow reading of § 1997e(d) ignores the all-encompassing definition of “action” in

295. *Id.* at 1182.

296. *See* 42 U.S.C. § 1997e(d)(2) (2006).

297. *Merriam-Webster’s Dictionary* defines “when” as “at what time.” *When Definition*, MERRIAM-WEBSTER’S DICTIONARY, <http://www.merriam-webster.com/dictionary/when> (last visited Sept. 30, 2014). It defines “whenever” as “at any or every time that.” *Whenever Definition*, MERRIAM-WEBSTER’S DICTIONARY, <http://www.merriam-webster.com/dictionary/whenever?show=0&t=1415117316> (last visited Sept. 30, 2014). It is hard to give precise meaning to “at what time,” but the phrase definitely indicates a single point in time, unlike “at any or every time,” which could refer to something occurring more than once.

298. *See Woods*, 722 F.3d at 1180–84; *see also* 42 U.S.C. § 1997e(d)(1)–(2). When the subsection (d)(2) fee cap states, “[w]henever a monetary judgment is awarded in an action described in paragraph (1),” it is referencing applying the fee cap to an action. *See id.*

299. *Woods*, 722 F.3d at 1181–82. The Ninth Circuit did not specifically examine “action.” But in examining whether subsection (d)(2) applied to appellate courts, the court noted “the course of an action,” inferring that an action is of duration. *See id.* at 1181. Additionally, the Ninth Circuit never stated that an appeal is a separate action from trial proceedings. *See id.*; *see also Riley v. Kurtz*, 361 F.3d 906, 914 (6th Cir. 2004).

300. *See Woods*, 722 F.3d at 1184–86 (Murguia, J., dissenting); *Riley*, 361 F.3d at 917.

301. *See Woods*, 722 F.3d at 1182.

302. *Id.* at 1179.

303. *See id.* at 1185–86 (Murguia, M., dissenting).

§ 1997e(d)(1).<sup>304</sup> Additionally, monetary judgments are not fixed in amount after the trial is over as they may be altered or reversed, and consequently, attorney's fees awards can be altered or reversed post-trial.<sup>305</sup> It follows, then, that the notion that awards of monetary relief occur only once is not entirely accurate.

Overall, the Ninth Circuit based its decision on a faulty analogy to *Dannenberg* and ignored a closer reading of § 1997e(d)'s text.<sup>306</sup> The Sixth Circuit, although relying on § 1988 precedent a bit too much, arrived at the proper conclusion that subsection (d)(2) applies to the entire action if a monetary award has been issued, and therefore to appellate work.<sup>307</sup>

### CONCLUSION

Placed in the larger context of the PLRA's overarching goals to reduce frivolous lawsuits, applying the attorney's fees cap at the appellate level can be viewed as another way subsection (d)(2) is "intended to discourage prisoners from filing claims that are unlikely to succeed."<sup>308</sup> However, for many this may be an uncomfortable conclusion to reach because the PLRA is meant to deter and filter out frivolous lawsuits, not to prevent prisoner plaintiffs from recovering on meritorious claims.<sup>309</sup> As pointed out by the Ninth Circuit, and perhaps a major factor in the lengths the court goes to align its reasoning so that fees are not limited on appeal, once a prisoner has prevailed at trial, the need to deter frivolous lawsuits no longer seems applicable and applying subsection (d)(2) to appellate work would potentially deprive prevailing prisoners of a successful monetary judgment because they cannot secure counsel to defend them on appeal.<sup>310</sup>

This criticism is fair, but its moral weight misguided the Ninth Circuit's analysis as to what the statute actually says. Despite the Ninth Circuit's reasoning, § 1997e(d)'s language is one of limitation and specifically applies subsection (d)(2) to the entire "action" brought by the prisoner.<sup>311</sup> This

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304. *See supra* notes 133, 140 and accompanying text.

305. *See* 2 CIVIL ACTIONS AGAINST STATE & LOCAL GOVERNMENT § 14:29 (2014); *see also* *Clark v. Twp. of Falls*, 890 F.2d 625, 626 (3d Cir. 1989); *Ladnier v. Murray*, 769 F.2d 195, 196 (4th Cir. 1985); *Harris v. Pirch*, 677 F.2d 681, 689 (8th Cir. 1982); *Royal Bus. Machines, Inc. v. Lorraine Corp.*, 633 F.2d 34, 49–50 (7th Cir. 1980).

306. *See Woods*, 722 F.3d at 1181–84.

307. *See Riley v. Kurtz*, 361 F.3d 906, 913–18 (6th Cir. 2004).

308. *Walker v. Bain*, 257 F.3d 660, 665 (6th Cir. 2001) (citing *Crawford-El v. Britton*, 523 U.S. 574, 596 (1998)).

309. *See id.*

310. *See Woods*, 722 F.3d at 1183.

311. *See* 42 U.S.C. § 1997e(d) (2006). Subsection (d)(1) states "[i]n any action brought by a prisoner," and subsection (d)(2) states "[w]henver a monetary judgment is awarded in an action

reference to “action” means both trial and appellate work fall under subsection (d)(2)’s reach, limiting all recoverable fees to 150% of a monetary award.<sup>312</sup> As the Sixth Circuit pointed out, such a limitation is similar to a fixed contingency fee, and defending a successful judgment is just one of many factors a lawyer must consider before taking a case.<sup>313</sup> The Ninth Circuit’s reasoning focused solely on subsection (d)(2) limiting prevailing parties from recovering fees on meritorious claims on appeal instead of also considering whether subsection (d)(2)’s application on appeal may actually deter the initial filing of frivolous lawsuits as it is intended.<sup>314</sup> Applying subsection (d)(2) on appeal might encourage lawyers to demand “a more meritorious claim to make the representation worthwhile,” further discouraging the filing of numerous trivial lawsuits in hopes that one may succeed.<sup>315</sup>

All of this is sound support for subsection (d)(2)’s application on appeal, but it does not lessen the blow of unfairness that this application involves. Perhaps the best response to this criticism comes from *Hadix v. Johnson*, a Sixth Circuit case that dealt with § 1997e(d) and Equal Protection: “While plaintiff has raised some well founded criticisms of the methods Congress employed to achieve its purpose, it is not our province to judge the wisdom, fairness, or logic of Congress’s decision to enact the legislation at issue.”<sup>316</sup> While the conclusion this Note reaches may seem unfair, it is the duty of the courts to properly interpret the laws handed down by Congress, not to rewrite them.<sup>317</sup> Although the Ninth Circuit may have reached an intuitively more

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described in paragraph (1).” *Id.* This shows that the subsection (d)(2) cap applies to the entire action as described in subsection (d)(1).

312. *See id.*

313. *Riley v. Kurtz*, 361 F.3d 906, 917 (6th Cir. 2004).

314. *See Woods*, 722 F.3d at 1182–83 (“Congress, therefore, sought to have frivolous prisoner actions dismissed ‘at an earlier part in the process’ and enacted disincentives to litigating frivolous claims, such as filing fees and caps on attorney’s fees, that would ‘affect a prisoner’s decision to file the action’ in the first place. Congress did not, however, intend to discourage the collection of awards in those comparatively few meritorious cases in which the district court had found that the prisoner’s constitutional rights had been violated and that the prisoner was entitled to collect damages for that violation.”). The Ninth Circuit focused on prisoners’ limited ability to recover appellate fees even if their claim was determined to be meritorious at trial, but the court did not consider whether a cap on appellate fees may also deter the initial frivolous filing as intended. *See id.*

315. *Hadix v. Johnson*, 230 F.3d 840, 845 (6th Cir. 2000); *see also* *Minn. v. Clover Leaf Creamery Co.*, 449 U.S. 456, 469 (1981) (“The Minnesota Supreme Court may be correct that the Act is not a sensible means of conserving energy. But we reiterate that ‘it is up to legislatures, not courts, to decide on the wisdom and utility of legislation.’ Since in view of the evidence before the legislature, the question clearly is “at least debatable,” the Minnesota Supreme Court erred in substituting its judgment for that of the legislature.” (citations omitted)).

316. *Hadix*, 230 F.3d at 846 (citing *Heller v. Doe*, 509 U.S. 312, 321 (1993)).

317. *See id.*; *see also* *Clover Leaf Creamery Co.*, 449 U.S. at 469.

appealing result, subsection (d)(2)'s application on appeal is the result § 1997e(d) calls for.

MAXWELL MURTAUGH\*

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