

Protecting Winners: Why FRAP 7 Bonds Should Include Attorney Fees Note

Robert M. Belden

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Robert M. Belden, *Protecting Winners: Why FRAP 7 Bonds Should Include Attorney Fees Note*, 100 Cornell L. Rev. 953 (2015)
Available at: <http://scholarship.law.cornell.edu/clr/vol100/iss4/5>

This Note is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

NOTE

PROTECTING WINNERS: WHY FRAP 7 BONDS SHOULD INCLUDE ATTORNEY FEES

Robert M. Belden†

INTRODUCTION	953
I. APPEALS GENERALLY: A HIGH RATE OF AFFIRMANCE	958
II. HISTORY AND PURPOSE OF FRAP 7	960
A. Federal Rule of Appellate Procedure Seven: Bond for Costs on Appeal in a Civil Case	960
B. Fee-Shifting in American Litigation	963
C. Fee-Shifting Statutes	966
III. THE CIRCUIT SPLIT AND A BETTER APPROACH	969
A. The D.C. and Third Circuit Approaches: No Attorney Fees	969
1. <i>The Cases</i> : American President Lines <i>and</i> Hirschensohn....	969
2. <i>The Criticism</i> : American President Lines <i>and</i> Hirschensohn....	972
B. The First, Second, Sixth, Ninth, and Eleventh Circuit Approaches: Sometimes Attorney Fees	973
1. <i>The Cases</i> : Adsani <i>Through</i> International Floor Crafts	973
2. <i>The Criticism</i> : Adsani <i>Through</i> International Floor Crafts	980
C. A Better, More Automatic Approach	982
CONCLUSION	983

INTRODUCTION

You are reading a student note—for better or worse—so you are likely familiar with the concept of litigation. You probably are also familiar with the idea that litigation is expensive. Although statutorily-imposed costs of federal civil litigation are relatively small,¹

† B.S., Cornell University, 2012; J.D. Candidate, Cornell Law School, 2015; Articles Editor, *Cornell Law Review*, Volume 100. Thank you to my family for its enduring love and support and to Cornell for seven amazing years (excluding the winters).

¹ The filing fee for a federal lawsuit is a relatively low \$350 regardless of the controversy's size. See 28 U.S.C. § 1914(a) (2012). Further, courts can even waive a filing fee if an individual cannot afford it. See 28 U.S.C. § 1915(a)(1) (2012).

actual litigation costs tend to be much larger.² Undoubtedly, litigation costs affect an individual's decision-making process at every stage, including whether to sue in the first instance, settle an ongoing dispute, or appeal a negative decision.³

Suppose that you are one of the many fine Americans that enjoy numismatics—the study or collection of coins.⁴ Suppose further that you purchase what you believe to be genuine coins, but, unhappily, these coins turn out to be unmarked replicas. You now have a legal cause of action against the manufacturer under the Hobby Protection Act because the manufacturer failed to mark the coins as replicas.⁵ Although litigation costs are substantial, your attorney assures you that you have a fairly strong case and informs you that, if you win, the manufacturer will pay your attorney fees under the Hobby Protection Act.⁶

Although you could sue the manufacturer, there are several alternative courses of action available to you. You could, as most people do, simply accept this harm and move on.⁷ You could privately negotiate a settlement or engage in alternative dispute resolution with the manufacturer.⁸ Suppose that, relying on your attorney's representation that the manufacturer will cover your attorney fees should you win, you decide to sue the manufacturer.⁹

² Estimates place the cost of litigation somewhere between \$15,000 and \$20,000 in cases involving discovery. See Emery G. Lee & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 770 (2010) (“[W]e found median litigation costs, including attorneys’ fees, of \$15,000 for plaintiffs and \$20,000 for defendants.”). This, however, does not include nonpecuniary costs, such as time and psychological stress, which may be substantial. See *id.*

³ See Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1166 (2001) (“The central concerns [of bringing suit] are the costs to potential parties of their actions . . . and the effects of their behavior on other individuals”); James R. Maxeiner, *Cost and Fee Allocation in Civil Procedure*, 58 AM. J. COMP. L. 195, 212 (2010) (“Wise American lawyers advise against giving any prediction of what likely expenses will be on both sides. It is not rare for expenses to exceed the amount in controversy.”); MARIE GRYPHON, *GREATER JUSTICE, LOWER COST: HOW A “LOSER PAYS” RULE WOULD IMPROVE THE AMERICAN LEGAL SYSTEM*, MANHATTAN INST. CIV. JUSTICE REP. NO. 11, at 2 (2008) (“For small businesses, . . . litigation, and especially its associated legal fees, is a shock that can make it suddenly impossible for them to meet their ongoing financial obligations.”).

⁴ *Numismatics*, DICTIONARY.COM, <http://dictionary.reference.com/browse/numismatics> (last visited Mar. 23, 2015).

⁵ See Hobby Protection Act, 15 U.S.C. §§ 2101(b), 2102 (2012).

⁶ Although the traditional American rule on legal fees requires that each side pay his or her legal costs, the Hobby Protection Act allows a prevailing plaintiff to recover reasonable attorney fees. See 15 U.S.C. § 2102.

⁷ See Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1951 (2009) (“[M]ost disputes do not even become lawsuits in the first place. Injured persons abandon or settle the overwhelming majority of grievances at some point along the line.”).

⁸ See *id.* at 1951–52 (creating a “grievance pyramid” chart for private negotiation or settlement possibilities prior to litigation).

⁹ Suing would not be an altogether unusual result, however, as there were 278,442 case filings in 2012 alone. See *2012 Annual Report of the Director on Judicial Business of the*

If you win at trial, you will be entitled to your damages and the costs of the suit, including reasonable attorneys' fees because the Hobby Protection Act is a fee-shifting statute.¹⁰ If nothing else occurs, you can enforce your judgment after fourteen days and go home to enjoy your numismatic menagerie.¹¹ However, the manufacturer is entitled to make several post-verdict motions at this point, including motions for judgment as a matter of law,¹² a new trial,¹³ or relief from the judgment.¹⁴ Each of these would entail further delay for you. Regardless of whether the manufacturer makes any of the above motions, the manufacturer has the right to appeal the adverse decision.¹⁵ Although the manufacturer has the right to appeal—and this right is basically sacrosanct¹⁶—only about 20% of losing parties actually appeal an adverse ruling,¹⁷ so you may be on your way home.

Assume, however, that the manufacturer does decide to appeal. To initiate the appeal, the manufacturer must simply file a notice of appeal with the district clerk within thirty days after the district court enters judgment.¹⁸ The court may also require the manufacturer to pay a modest filing fee of \$500, regardless of the extent of your alleged damages.¹⁹ After such considerable delay, you may be asking yourself how the court plans to protect you and ensure the money is

United States Courts, U.S. COURTS, <http://www.uscourts.gov/statistics/judicialbusiness/2012.aspx> (last visited Mar. 23, 2015). Although you have sued, it is not certain that the court will reach a final determination in your case, as settlement or abandonment of the claim is still available. See Clermont, *supra* note 7, at 1951 (noting possible settlement options once litigation commences on grievance pyramid chart).

¹⁰ See 15 U.S.C. § 2102. Further, the Supreme Court has recognized that the district courts might award costs and attorney fees prior to final disposition at the district court level. See *Bradley v. Richmond Sch. Bd.*, 416 U.S. 696, 723 (1974) (“A district court must have discretion to award fees and costs incident to the final disposition of interim matters.”).

¹¹ See FED. R. CIV. P. 62(a).

¹² FED. R. CIV. P. 50(b).

¹³ FED. R. CIV. P. 59(a).

¹⁴ FED. R. CIV. P. 60(b).

¹⁵ See 28 U.S.C. § 1291 (2012).

¹⁶ The Federal Rules of Appellate Procedure state that a party's failure to take any step other than timely filing the notice of appeal does not affect the validity of the appeal. See FED. R. APP. P. 3(a)(2).

¹⁷ See Clermont, *supra* note 7, at 1971 n.242 (citing Kevin M. Clermont & Theodore Eisenberg, *Appeal from Jury or Judge Trial: Defendants' Advantage*, 3 AM. L. & ECON. REV. 123, 130–31 (2001)).

¹⁸ See FED. R. APP. P. 3(a)(1), 4(a)(1).

¹⁹ See JAMES R. MAXEINER ET AL., FAILURES OF AMERICAN CIVIL JUSTICE IN INTERNATIONAL PERSPECTIVE 224 (2011) (“Filing fees for appeals from the United States District Court to the Court of Appeals are modest: In 2010 the charge was \$450 without regard to the amount in controversy.”). The filing fee as of December 1, 2014 is \$500. See *Court of Appeals Miscellaneous Fee Schedule*, U.S. COURTS, <http://www.uscourts.gov/formsandfees/fees/courtofappealsmiscellaneousfeeschedule.aspx> (last visited Mar. 23, 2015).

available for recovery. After all, not only did you win the trial, but you are also overwhelmingly likely to win on appeal.²⁰

The federal civil litigation system protects your judgment during your opponent's appeal in several ways. First, unless the manufacturer makes any other motions, you may still enforce your judgment during the appeal.²¹ The court further protects your judgment by requiring the manufacturer to post a supersedeas bond in order to stay enforcement—a bond that must be large enough to cover the entire judgment.²² The court may also require the manufacturer to post some other kind of security, in lieu of a supersedeas bond, to protect your ability to collect on your judgment.²³ These mechanisms substantially protect your judgment and right to collect attorney fees under the Hobby Protection Act, but what about your costs, including attorney fees, incurred in defending the manufacturer's appeal?

The Federal Rules of Appellate Procedure (FRAP) protect you from several increased expenses going forward.²⁴ FRAP 7 is one such protection mechanism. Under FRAP 7, the district court may require an appellant—here, the coin manufacturer—to file a bond to ensure payment of your “costs on appeal.”²⁵ FRAP 39(e) defines “costs” as the costs of preparation and transmission of the record and transcript,

²⁰ See Clermont, *supra* note 7, at 1970–72 (finding that appellate courts agree with district courts in nearly 80% of cases).

²¹ See *Fong v. United States*, 300 F.2d 400, 410 (9th Cir. 1962) (“[P]endency of an appeal of itself [does not] supersede[] the judgment.”). Although no rule explicitly states this proposition, Federal Rule of Civil Procedure 62 contemplates that the appellant must take some action in order to stay the enforcement of the judgment in addition to appealing. See FED. R. CIV. P. 62(a), (d).

²² See FED. R. CIV. P. 62(d); MICHAEL E. TIGAR & JANE B. TIGAR, *FEDERAL APPEALS: JURISDICTION AND PRACTICE* 373 (3d ed. 1999) (“If a party is appealing from a money judgment, and posts a supersedeas bond that fully secures the judgment creditor, Fed. R. Civ. P. 62(d) has been held to provide that it is entitled to stay of execution on the judgment pending appeal.”). Some authority suggests that the court may stay enforcement of the judgment regardless of whether the appellant posts a supersedeas bond. See *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 786 F.2d 794, 796 (7th Cir. 1986) (recognizing that “an inflexible requirement of a bond would be inappropriate in two sorts of case[s]”). It should be made clear, however, that failing to post the supersedeas bond in no way affects the manufacturer's ability to proceed with the appeal. See FED. R. APP. P. 3(a)(2) (“An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal”); TIGAR & TIGAR, *supra*, at 375 (“If a party ordered to post a supersedeas bond does not do so, its appeal may still proceed. It simply lacks protection against execution on the judgment pending appeal.”).

²³ See *Olympia Equip. Leasing*, 786 F.2d at 795–96 (allowing alternative security for a \$36 million judgment in the form of a pledge of \$10 million cash, \$10 million in accounts receivable, and a security interest in physical assets).

²⁴ See, e.g., FED. R. APP. P. 7 (requiring bond for costs on appeal in a civil case); FED. R. APP. P. 37 (providing that interest be charged against the appellant on the district court judgment); FED. R. APP. P. 38 (providing for damages and single or double costs if the court of appeals determines the appeal is frivolous); FED. R. APP. P. 39 (defining costs on appeal).

²⁵ See FED. R. APP. P. 7.

premiums paid for bonds, and the fee for filing the notice of appeal.²⁶ Appellate attorney fees, which may be considerably expensive for an individual numismatist like yourself, are conspicuously absent from FRAP 39's definition of costs. Consider these bonds to cover costs on appeal from some seminal cases: \$7,250,²⁷ \$10,000,²⁸ \$25,000,²⁹ \$35,000,³⁰ \$40,000,³¹ \$50,000,³² and \$180,000.³³ Conceivably, FRAP 7 and 39 leave you to defend the coin manufacturer's appeal without assurance that the coin manufacturer can reimburse these significant appellate attorney fees. Having relied on the Hobby Protection Act's fee-shifting provision when deciding to sue, would this uncertainty about your appellate attorney fees make you less likely to bring your meritorious claim in the first instance? Knowing that the FRAP 7 bond would not include your significant appellate attorney fees, would the coin manufacturer be more likely to appeal and delay your recovery? These considerations reveal that litigants need and want to know whether an FRAP 7 bond may include appellate attorney fees.

Unfortunately, the federal circuits disagree on whether FRAP 7 appellate bonds may include expected appellate attorney fees. The D.C. and Third Circuits suggest that FRAP 7 bonds do not include appellate attorney fees, so you would face the risk that the coin manufacturer could not reimburse you in these circuits. The First, Second, Sixth, Ninth, and Eleventh Circuits suggest that FRAP 7 bonds can include appellate attorney fees in some circumstances, particularly when the litigation involves a fee-shifting statute like the Hobby Protection Act.³⁴ The circuits, however, are not alone in creating uncertainty for you regarding your appellate attorney fees.

The Advisory Committee on Appellate Rules (Committee) has also taken conflicting stances regarding FRAP 7. In 2003, the Committee recommended an amendment to the rules to make clear

²⁶ See FED. R. APP. P. 39(e).

²⁷ See *Hirschensohn v. Lawyers Title Ins. Corp.*, No. 96-7312, 1997 U.S. App. LEXIS 13793, at *3 (3d Cir. June 10, 1997) (\$7,250 bond "included the defendants' estimate of attorneys' fees in prosecuting the appeal").

²⁸ *In re Am. President Lines, Inc.*, 779 F.2d 714, 715-16 (D.C. Cir. 1985) (holding that \$10,000 bond must be reduced to \$450 to reflect actual costs without estimated attorney fees).

²⁹ *Int'l Floor Crafts, Inc. v. Dziemit*, 420 F. App'x 6, 16 (1st Cir. 2011).

³⁰ See *Adsani v. Miller*, 139 F.3d 67, 69 (2d Cir. 1998) (\$35,000 bond intended to cover "costs and attorney's fees upon appeal").

³¹ *Azizian v. Federated Dep't Stores, Inc.*, 499 F.3d 950, 954 (9th Cir. 2007).

³² *In re Cardizem CD Antitrust Litig.*, 391 F.3d 812, 815 (6th Cir. 2004).

³³ See *Pedraza v. United Guar. Corp.*, 313 F.3d 1323, 1327-28 (11th Cir. 2002) (\$180,000 bond for six appellants included "approximately \$29,000 per appellant in anticipated attorneys' fees").

³⁴ See *Int'l Floor Crafts*, 420 F. App'x at 17 (holding that "a Rule 7 bond may include appellate attorneys' fees if the applicable statute underlying the litigation contains a fee-shifting provision" and citing support from the "Second, Sixth, Ninth, and Eleventh Circuits").

that FRAP 7 “costs on appeal” do not include appellate attorney fees.³⁵ In 2007, the Committee “decided that the proposed amendment warrant[ed] further review” based on the circuit split regarding FRAP 7.³⁶ Although the Committee recommended further empirical research to aid its decision making,³⁷ it has not addressed FRAP 7 and its relation to appellate attorney fees since.

In this Note, I first provide some background information about this issue. I discuss data regarding the frequency with which courts of appeals affirm district court decisions. I then review the history and purpose of FRAP 7. Next, I discuss the history and purpose of American fee-shifting statutes, which are exceptions to the traditional “American rule” on legal costs. Understanding some background on each of these three aspects of civil litigation sheds light on FRAP 7’s importance.

I then evaluate the circuit split regarding whether FRAP 7 bonds may include appellate attorney fees. I argue against the Advisory Committee and D.C. and Third Circuits’ conclusion that FRAP 7 bonds do not include appellate attorney fees because FRAP 39’s definition of “costs” does not include attorney fees. Instead, I contend that the First, Second, Sixth, Ninth, and Eleventh Circuits reached a partially correct result. These courts hold that FRAP 7 bonds *may* include attorney fees if the underlying statute provides for fee-shifting but need not include such fees.

Finally, I conclude that the high rate of affirmance on appeal, the purpose of FRAP 7, and the purpose of fee-shifting statutes dictate that FRAP 7 appellate bonds should always include attorney fees when the underlying statute provides for fee-shifting.

I

APPEALS GENERALLY: A HIGH RATE OF AFFIRMANCE

One cannot appreciate FRAP 7’s practical importance without understanding its place in the overall context of appeals. The United States Courts of Appeals have mandatory jurisdiction over final decisions of the United States District Courts³⁸ and have mixed mandatory and discretionary jurisdiction over some interlocutory decisions of the

³⁵ See Memorandum from Hon. Samuel A. Alito, Jr., Chair, Advisory Comm. on Appellate Rules, to Hon. David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure 2 (Dec. 2, 2003). Because of the Committee’s practice of “bundling” proposed amendments,” the Committee did not submit the amendment for approval by the Standing Committee on Rules of Practice and Procedure. See Memorandum from Hon. Carl E. Stewart, Chair, Advisory Comm. on Appellate Rules, to Hon. Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice and Procedure 5–6 (Dec. 12, 2007).

³⁶ See Memorandum from Hon. Carl E. Stewart, *supra* note 35, at 5–6.

³⁷ See *id.*

³⁸ See 28 U.S.C. § 1291 (2012).

United States District Courts.³⁹ For civil cases alone, the courts of appeals received over 30,000 appeals in 2012.⁴⁰ Of these 30,000 cases, over 12,000 involved only private litigants—like the numismatist described above.⁴¹

On appeal, the courts of appeals use a variety of standards to review a district court's decision.⁴² The standard of review determines "how certain the appellate court must be of error by the trial judge in order to overturn the original decision."⁴³ Although many varieties exist, courts of appeals generally apply one of three different standards: *de novo*, clear error, or abuse of discretion.⁴⁴

Courts of appeals review pure issues of law *de novo*, meaning that an appellate court will overturn a district court simply if the appellate court disagrees with the district court's conclusion.⁴⁵ Courts of appeals review judge-found facts for clear error, meaning that an appellate court will overturn a district court if the appellate court has "the definite and firm conviction that a mistake has been committed."⁴⁶ Finally, courts of appeals review some decisions for abuse of discretion, meaning the court of appeals will only overturn a district court if there is "almost-certain error."⁴⁷ *De novo* review requires less certainty than clear-error review, which, in turn, requires less certainty than abuse of discretion review to allow a court of appeals to overturn a district court's decision. Accordingly, one would probably expect the courts of appeals to overturn district court decisions more frequently when applying less deferential standards of review—like *de*

³⁹ See 28 U.S.C. § 1292 (2012). Section 1292(a) creates mandatory jurisdiction over interlocutory orders regarding injunctions and receiverships. See *id.* Section 1292(b) creates discretionary jurisdiction over questions essentially certified by the district court judge. See *id.* This Note focuses solely on civil litigation appeals from district courts. In addition, the courts of appeals hear appeals from bankruptcy courts and administrative agencies. See Table 2 *U.S. Courts of Appeals Sources of Appeals Fiscal Years 2011 and 2012*, U.S. COURTS, <http://www.uscourts.gov/statistics/judicialbusiness/2012/us-courts-of-appeals.aspx> (last visited Mar. 23, 2015) ("Seventy-seven percent of filings [in U.S. courts of appeals] were appeals of decisions by the district courts, and 15 percent were appeals of decisions by administrative agencies. Seven percent were original proceedings, and 1 percent were appeals of bankruptcy case decisions."). Further, this Note does not address appeals to the U.S. Court of Appeals for the Federal Circuit, which hears appeals involving customs, patents, veterans claims, and some federal administrative boards. See *U.S. Court of Appeals for the Federal Circuit*, U.S. COURTS, <http://www.uscourts.gov/Statistics/JudicialBusiness/2012/us-courts-of-appeals.aspx> (last visited Mar. 23, 2015).

⁴⁰ See Table 2 *U.S. Courts of Appeals Sources of Appeals Fiscal Years 2011 and 2012*, *supra* note 39.

⁴¹ See *id.*

⁴² See KEVIN M. CLERMONT, STANDARDS OF DECISION IN LAW: PSYCHOLOGICAL AND LOGICAL BASES FOR THE STANDARD OF PROOF, HERE AND ABROAD 42–45 (2013).

⁴³ *Id.* at 42.

⁴⁴ See *id.* at 42–43.

⁴⁵ See *id.* at 43.

⁴⁶ *Id.* at 44 (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

⁴⁷ *Id.* at 44.

novo—than when applying more deferential standards like abuse of discretion. This, however, has not traditionally been the case.

Although courts of appeals apply varying standards on review, research suggests that the courts of appeals affirm almost 80% of trial court decisions.⁴⁸ The high rate of affirmance on appeal suggests that appellate review undermines efficiency, increases costs,⁴⁹ and is not essential to dispute resolution in civil litigation.⁵⁰ Further, the “futility of appeal”⁵¹ in civil litigation creates opportunities for wealthy appellants—like the coin manufacturer above—to forestall an appellee of modest means—like the numismatist above—from recovering on a judgment.⁵² In fact, some scholars point to these pitfalls to argue that appellants should face a higher cost on appeal, thereby reducing the overall number of appeals.⁵³ Accordingly, FRAP 7 may play an important role in increasing an appellant’s cost of appeals and protecting appellees that must defend appeals.

II

HISTORY AND PURPOSE OF FRAP 7

A. Federal Rule of Appellate Procedure Seven: Bond for Costs on Appeal in a Civil Case

Congress adopted Federal Rule of Appellate Procedure (FRAP) 7 on July 1, 1968.⁵⁴ The Advisory Committee notes state that the

⁴⁸ See FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 97 (1994) (“Usually around 80 percent (plus or minus several points) of civil appeals . . . are unsuccessful, with most decisions being unanimous.”); Clermont, *supra* note 7, at 1970–72. The high rate of affirmance may be attributed to deferential review, but research further suggests that even de novo review yields high affirmance rates because experts frequently tend to agree. See *id.* at 1970–71 (“One may even expect a high affirmance rate when review is de novo, because of the tendency of experts to agree at about a 75% rate.”).

⁴⁹ See MAXEINER ET AL., *supra* note 19, at 226 (stating that the appellate system “is a system from which only lawyers profit”).

⁵⁰ See *id.* at 208 (“Although appeals are of intense interest to losing parties, they are not essential to dispute resolution. Indeed, were dispute resolution the only goal of civil justice systems, appeals might be dispensed with.”). However, Maxeiner recognizes that appellate review benefits the judicial system in several, important ways. See *id.*

⁵¹ See Chris Guthrie & Tracy E. George, *The Futility of Appeal: Disciplinary Insights into the “Affirmance Effect” on the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 357, 357 (2005).

⁵² See MAXEINER ET AL., *supra* note 19, at 224 (“In the United States where legal aid is not generally available, appeals provide opportunity for wealthy parties to prevent poor parties from ever succeeding to rights found in first instance.”).

⁵³ See Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379, 421 (1995) (recognizing that fees on appeal are low and unlikely to deter pointless appeals).

⁵⁴ For background see, Report, Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States (September 1967), at 30, available at <http://www.uscourts.gov/uscourts/rulesandpolicies/rules/reports/ST09-1967.pdf> [hereinafter Committee on Rules of Practice and Procedure Report]; see also *Current Rules of Practice & Procedure*, U.S. COURTS, <http://www.uscourts.gov/RulesAndPolicies/rules/current->

Committee derived FRAP 7 “from FRCP 73(c) without change in substance.”⁵⁵ Federal Rule of Civil Procedure (FRCP) 73(c) required an appellant to post a \$250 bond unless the court fixed another amount or the appellant had already posted a supersedeas bond or other security that covered potential costs on appeal.⁵⁶ FRAP 7 adopted FRCP 73(c)’s language largely without change.⁵⁷

On their face, both FRCP 73(c) and FRAP 7 seem to suggest that appellate bonds play a limited role in protecting appellees from burdensome costs moving forward. For example, even in 1968, \$250 was likely not a substantial amount in relation to total litigation costs. Also, both rules provided that when an appellant posted a supersedeas bond or other security covering costs on appeal, further security would not be necessary. However, other aspects of the rules’ lan-

rules.aspx (last visited Mar. 23, 2015). Congress’s approval came after the Supreme Court approved the rules in 1967. *See id.*

⁵⁵ Committee on Rules of Practice and Procedure Report, *supra* note 54, at 31.

⁵⁶ When Congress adopted FRAP 7, thereby replacing FRCP 73(c), FRCP 73(c) read:

(c) BOND ON APPEAL. Unless an appellant is exempted by law, *or has filed a supersedeas bond or other undertaking which includes security for the payment of costs on appeal*, he shall file a bond for such costs or deposit equivalent security therefor with the notice of appeal, but security shall not be required of an appellant who is not subject to costs. The bond or equivalent security shall be in the sum of *two hundred and fifty dollars, unless the court fixes a different amount*. The bond on appeal shall have sufficient surety and shall be conditioned to secure the payment of costs if the appeal is dismissed or the judgment affirmed, or of such costs as the court of appeals may award if the judgment is modified. If a bond on appeal or equivalent security in the sum of two hundred and fifty dollars is given, no approval thereof is necessary. After a bond on appeal is filed an appellee may raise objections to the form of the bond or to the sufficiency of the surety for determination by the clerk.

See Statement on Behalf of the Advisory Committee on Civil Rules 84 (June 10, 1965), available at <http://www.uscourts.gov/uscourts/rulesandpolicies/rules/reports/CV08-1965.pdf> (emphasis added).

⁵⁷ Original FRAP 7 read:

Rule 7. BOND FOR COSTS ON APPEAL IN CIVIL CASES. Unless an appellant is exempted by law, *or has filed a supersedeas bond or other undertaking which includes security for the payment of costs on appeal*, in civil cases a bond for costs on appeal or equivalent security shall be filed by the appellant in the district court with the notice of appeal; but security shall not be required of an appellant who is not subject to costs. *The bond or equivalent security shall be in the sum or value of \$250 unless the district court fixes a different amount*. A bond for costs on appeal shall have sufficient surety, and it or any equivalent security shall be conditioned to secure the payment of costs if the appeal is finally dismissed or the judgment affirmed, or of such costs as the court of appeals may direct if the judgment is modified. If a bond or equivalent security in the sum or value of \$250 is given, no approval thereof is necessary. After a bond for costs on appeal is filed, an appellee may raise for determination by the clerk of the district court objections to the form of the bond or to the sufficiency of the surety. The provisions of Rule 8(b) apply to a surety upon a bond given pursuant to this rule.

See Committee on Rules of Practice and Procedure Report, *supra* note 54, at 30 (emphasis added).

guage, subsequent amendments, Advisory Committee notes, and Supreme Court precedent suggest that FRAP 7 appellate bonds play a more expansive, pro-appellee role.

Although FRAP 7 and FRCP 73(c) only required an initial bond of \$250, both rules contemplated discretion to alter the amount.⁵⁸ The original language in both rules leaves open the possibility that the court might increase the bond amount to further protect an appellee on appeal.

Subsequent amendments to FRAP 7 further suggest that a broader, pro-appellee reading of “costs on appeal” is appropriate. In 1979, the Judicial Conference removed the initial requirement for a \$250 bond because it bore “no relationship to actual costs.”⁵⁹ The Advisory Committee notes to this amendment read:

The amendment would eliminate the provision of the present rule that requires the appellant to file a \$250 bond for costs on appeal at the time of filing his notice of appeal. The \$250 provision was carried forward in the F.R.App.P. from former Rule 73(c) of the F.R.Civ.P., and the \$250 figure has remained unchanged since the adoption of that rule in 1937. *Today it bears no relationship to actual costs.* The amended rule would leave the question of the need for a bond for costs *and its amount in the discretion of the court.*⁶⁰

Importantly, this amendment acknowledged that \$250 did not accurately reflect the growing costs to an appellee of defending an appeal. Also, the amendment again acknowledged that courts retain discretion in fixing the bond’s amount to protect an appellee. Ultimately, the Standing Committee on Rules of Practice and Procedure unanimously adopted the amendment in its entirety.⁶¹

Additionally, the Advisory Committee notes to FRCP 73(c) suggest that an appellant who had posted a supersedeas bond might avoid further appellate bonds in limited circumstances.⁶² Specifically, the Advisory Committee contemplated that appellants in *admiralty* cases frequently posted security for the *total cost of litigation* early in

⁵⁸ FRCP 73(c) required \$250 “unless the court fixe[d] a different amount.” See Statement on Behalf of the Advisory Committee on Civil Rules, *supra* note 56, at 84. Similarly, FRAP 7 required \$250 “unless the district court fixe[d] a different amount.” See Committee on Rules of Practice and Procedure Report, *supra* note 54, at 30.

⁵⁹ See FED. R. APP. P. 7 advisory committee’s note.

⁶⁰ *Id.* (emphasis added).

⁶¹ See Report of the Standing Committee on Rules of Practice and Procedure 1–2 (September 1978), available at <http://www.uscourts.gov/uscourts/rulesandpolicies/rules/reports/ST09-1978.pdf> (making only “technical and clarifying changes” to the proposed amendment before being “unanimously approved by the Standing Committee”).

⁶² See Statement on Behalf of the Advisory Committee on Civil Rules 88 (June 10, 1965), available at <http://www.uscourts.gov/uscourts/rulesandpolicies/rules/reports/CV08-1965.pdf>.

proceedings.⁶³ By enumerating a specific subset of litigation, the Advisory Committee seems to contemplate a narrow reading for this aspect of FRCP 73(c) and, by extension, FRAP 7. Further, reading this language narrowly is appropriate because a party providing such security for the total cost of litigation would seem to be the exception, rather than the rule, in civil litigation.⁶⁴

Moreover, Supreme Court precedent, like *Bradley v. Richmond School Board*, suggests that courts should err on the side of protecting victorious parties.⁶⁵ In *Bradley*, the Court indicated that a district court might award costs even prior to final determination at the *trial level*.⁶⁶ The Court stated, “[t]o delay a fee award until the entire litigation is concluded would work substantial hardship on plaintiffs and their counsel”⁶⁷ The Court contemplated that district courts might protect a party likely to prevail by providing costs upon the “entry of any order that determines substantial rights of the parties.”⁶⁸ If an interim order in the district court “determines substantial rights” entitling a litigant to prejudgment costs,⁶⁹ a litigant who prevails on the merits in the district court would seem to be entitled to similarly favorable protection pending appeal. Given the Supreme Court’s pro-prevailing-party approach in *Bradley*, which simply relies on an “order that determines substantial rights of the parties,”⁷⁰ courts should read FRAP 7 broadly in favor of appellees who have already won their case on the merits.

B. Fee-Shifting in American Litigation

As early as 1278, English courts of equity provided that victorious plaintiffs could recover their attorney fees.⁷¹ By 1607, English courts allowed victorious defendants to recover attorney fees in some cases,

⁶³ See *id.* The Advisory Committee’s note to FRCP 73(c) stated:

Subdivision (c). The additions to the first sentence permit the deposit of security other than a bond and eliminate the requirement of security in cases in which the appellant has already given security covering the total cost of litigation at an earlier stage in the proceeding (a common occurrence in admiralty cases)

Id.

⁶⁴ See *infra* Part II.B (discussing fee-shifting in American civil litigation).

⁶⁵ 416 U.S. 696, 723 (1974).

⁶⁶ See *id.*

⁶⁷ *Id.*

⁶⁸ See *id.* at 723 n.28.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person’s Access to Justice*, 42 AM. U. L. REV. 1567, 1570 (1993) (“In 1278, the Statutes of Gloucester allowed only the victorious plaintiff to recover attorney’s fees in specified actions.”).

such as trespass and contract.⁷² Today, English courts systematically provide that the losing party must pay for the winning party's legal costs, including attorney fees.⁷³ Commentators frequently refer to this "loser-pays" practice as the "English rule."⁷⁴

In 1796, the Supreme Court of the United States adopted the "American rule," which provides that a prevailing party in a lawsuit generally may not recover its attorney fees from the losing side.⁷⁵ Later courts embraced the American rule more explicitly, stating, "in the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser."⁷⁶

Arguments for and against both the English and American rules abound.⁷⁷ David A. Root summarizes the critiques of both rules with two competing anecdotes in his article on attorney fee-shifting:

The headline in the *New York Times* read, "You Win but You Lose," as the author lamented about the money he had to pay out in successfully defending himself in a libel suit. While the amount was only \$5,134.80 (small fees in comparison to many lawsuits), the fact that frivolous lawsuits could be pursued by hasty plaintiffs without the threat of having to pay a successful defendant's legal costs inflamed the author as he was bitten by the "American rule." Like him, other commentators and judicial experts have clamored for

⁷² See Arthur L. Goodhart, *Costs*, 38 YALE L.J. 849, 853 (1929) ("In 1607 the final step was taken when it was provided that a defendant might recover costs in all cases in which the plaintiff would have had them if he had recovered.").

⁷³ See Vargo, *supra* note 71, at 1571.

⁷⁴ See Maxeiner, *supra* note 3, at 197-98.

⁷⁵ See *Arcambel v. Wiseman*, 3 U.S. 306, 306 (1796) (denying the prevailing party a recovery of \$1600 because "[t]he general practice of the United States [was] in opposition to it").

⁷⁶ *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975).

⁷⁷ See, e.g., *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967) (stating that the American rule avoids unfairly allocating the uncertainty of litigation costs); *Rodulfa v. United States*, 295 F. Supp. 28, 29 (D.D.C. 1969) (recognizing that the American rule might not make a prevailing party whole); W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why Is the United States the "Odd Man Out" in How It Pays Its Lawyers?*, 16 ARIZ. J. INT'L & COMP. L. 361, 430-32 (1999) (arguing that the English rule would reduce overall litigation and improve attorneys' reputations but recognizing that the English rule might reduce some meritorious claims); James W. Hughes & Edward A. Snyder, *Litigation and Settlement Under the English and American Rules: Theory and Evidence*, 38 J.L. & ECON. 225, 249 (1995) (discussing the English rule's potential to reduce non-meritorious claims but recognizing that the American rule may improve precedent development); Christopher R. McLennan, *The Price of Justice: Allocating Attorneys' Fees in Civil Litigation*, 12 FLA. COASTAL L. REV. 357, 386-87 (2011) (acknowledging that the American rule increases access to courts for parties with limited financial resources but also increases frivolous litigation and distrust between attorneys and clients); David A. Root, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule"*, 15 IND. INT'L & COMP. L. REV. 583, 616-17 (2005) (arguing that the American rule increases access to courts but ultimately concluding that American jurisprudence should adopt a combination of the American and English rules).

the adoption of the English “loser pays” rule in many areas of the law, hoping to decrease frivolous and unreasonable litigation.

However, it is not all a bed of roses on the other side of the Atlantic. In London, England, Pauline Hughes brought an action against the treating physicians following her late husband’s death caused by his gall bladder surgery. After an initial victory in the trial court and an award of \$396,000, the appellate court overturned Mrs. Hughes’ victory and, in accordance with the “loser pays” rule, ordered her to pay the successful doctors’ litigation expenses. These expenses totaled \$144,000, on top of her own legal fees of \$146,000, thus totaling \$290,000 in an attempt to sort out and make right the tragic events befallen her deceased husband.⁷⁸

Generally, proponents of the American rule argue that the American rule increases access to courts,⁷⁹ avoids penalizing parties for the uncertainty of litigation,⁸⁰ avoids the difficult question and expense of determining legal fees,⁸¹ increases the promulgation of novel legal theories and valuable precedent,⁸² and encourages settlement where legal fees exceed potential recovery.⁸³ Concurrently, proponents of the English rule argue that the English rule more fully compensates victorious plaintiffs and protects innocent defendants,⁸⁴ deters frivolous claims by increasing potential costs to plaintiffs,⁸⁵ potentially increases settlements,⁸⁶ and increases the amount of meritorious claims where legal fees may exceed recovery.⁸⁷ Although the American and English rules both provide certain benefits, they both have certain drawbacks.

Opponents of the English rule generally contend that the English rule deters reasonable claims that are not clear winners,⁸⁸ potentially decreases settlements because litigants have positive bias favoring the merits of their own case,⁸⁹ and potentially threatens development of

⁷⁸ Root, *supra* note 77, at 583 (citation omitted).

⁷⁹ *See id.* at 616.

⁸⁰ *See Fleischmann Distilling Corp.*, 386 U.S. at 718.

⁸¹ *See* HENRY COHEN, CONG. RESEARCH SERV., AWARDS OF ATTORNEYS’ FEES BY FEDERAL COURTS AND FEDERAL AGENCIES 62 (2008). While this is a potential benefit of the American rule, Cohen notes that Congress has indeed passed several statutes defining “reasonable attorney’s fees.” *See id.*

⁸² *See Hughes & Snyder, supra* note 77, at 249.

⁸³ *See* Root, *supra* note 77, at 609 (“[U]nder the ‘American rule,’ if both parties are certain of victory, they will still settle in cases where the cost of victory at trial is more than the cost of settling . . .”).

⁸⁴ *See id.* at 604.

⁸⁵ *See id.*

⁸⁶ *See* Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 428–29 (1973).

⁸⁷ *See* COHEN, *supra* note 81, at 61.

⁸⁸ *See* Root, *supra* note 77, at 607–08.

⁸⁹ *See id.* at 609–10.

law based on litigants arguing novel legal theories.⁹⁰ On the other hand, opponents of the American rule argue that the American rule increases court congestion,⁹¹ fails to make winning parties whole,⁹² and reduces the amount of meritorious claims where legal fees may exceed the plaintiff's expected recovery.⁹³

Due to these potential drawbacks, both the English and American rules have several exceptions.⁹⁴ The English rule has three primary exceptions: certain courts do not tax costs to the losing parties; litigants that receive "Legal Aid" do not bear the costs of privately funded opponents; and parties bear their own costs when the amount in dispute does not exceed a specific sum.⁹⁵ The American rule has six exceptions: contractual agreements, the "common fund" doctrine,⁹⁶ the "substantial benefit" doctrine,⁹⁷ contempt sanctions, bad faith sanctions, and fee-shifting statutes.⁹⁸ Fee-shifting statutes—like the Hobby Protection Act described above—present the most salient exception to the traditional American rule, as Congress has passed more than 200 federal fee-shifting statutes.⁹⁹

C. Fee-Shifting Statutes

Fee-shifting statutes generally come in one of two varieties: two-way and one-way. Two-way fee-shifting statutes operate much like the English rule and require the losing party to pay the prevailing party's legal costs.¹⁰⁰ One-way fee-shifting statutes allow only one, specific party to recover its legal costs in the event that party prevails.¹⁰¹ Although the schemes operate differently, Congress creates both

⁹⁰ See COHEN, *supra* note 81, at 62.

⁹¹ See Vargo, *supra* note 71, at 1591.

⁹² See Howard Greenberger, *The Cost of Justice: An American Problem, an English Solution*, 9 VILL. L. REV. 400, 414 (1964).

⁹³ See Albert A. Ehrenzweig, *Shall Counsel Fees Be Allowed?*, 26 CAL. ST. B.J. 107, 107 (1951); McLennan, *supra* note 77, at 357; Issachar Rosen-Zvi, *Just Fee Shifting*, 37 FLA. ST. U. L. REV. 717, 720–21 (2010).

⁹⁴ See Root, *supra* note 77, at 585–92 ("Like the 'American rule,' exceptions to the 'loser pays' rule have also surfaced in recent years." (citation omitted)).

⁹⁵ See *id.*

⁹⁶ The "common fund" doctrine allows a court to spread attorney fees across a benefitted group on behalf of litigants "who create or preserve a common fund for the benefit of others." Vargo, *supra* note 71, at 1579.

⁹⁷ The "substantial benefit" doctrine operates similarly to the "common fund" doctrine, but incorporates pecuniary as well as non-pecuniary benefits. See *id.* at 1581–83; Root, *supra* note 77, at 587.

⁹⁸ See Vargo, *supra* note 71, at 1578–90 (discussing the six exceptions to the American rule).

⁹⁹ See Root, *supra* note 77, at 588; Vargo, *supra* note 71, at 1588. In addition, there are close to 2000 fee-shifting statutes at the state level. See *id.*

¹⁰⁰ See Vargo, *supra* note 71, at 1590. The vast majority of fee-shifting statutes, however, are not two-way fee-shifting statutes. See *id.*

¹⁰¹ See Harold J. Krent, *Explaining One-Way Fee Shifting*, 79 VA. L. REV. 2039, 2040–41 (1993).

two-way and one-way fee-shifting statutes to vindicate important interests.

Two-way fee-shifting statutes include statutes like Title VII of the Civil Rights Act of 1964¹⁰² and the Copyright Act,¹⁰³ which allow either side to recover their attorney fees in the event they prevail. Such two-way fee-shifting statutes serve dual purposes. First, the statutes—when rewarding plaintiffs—encourage plaintiffs to bring meritorious claims.¹⁰⁴ Congress may better preserve enforcement resources by allowing private citizens to bring these suits, so Congress wants to encourage such suits. Second, when rewarding attorney fees to defendants, the statutes protect defendants from appeals that are likely frivolous and time-consuming.¹⁰⁵

The vast majority of Congress's fee-shifting statutes are one-way and favor plaintiffs.¹⁰⁶ In actions against the federal government, statutes like the Equal Access to Justice Act,¹⁰⁷ the Freedom of Information Act,¹⁰⁸ and the Privacy Act¹⁰⁹ provide that a prevailing plaintiff may recover its legal costs, including reasonable attorney fees. In actions against other private litigants, statutes like the Truth in Lending Act¹¹⁰ and Section 4 of the Clayton Act¹¹¹ provide that a prevailing plaintiff may recover its legal costs, including reasonable attorney fees. One-way fee-shifting statutes may shift fees automatically¹¹² or only after a showing that the losing party is at fault.¹¹³ Although some criticize one-way fee-shifting,¹¹⁴ one-way fee-shifting does provide benefits and may offer a useful compromise between the English and American rules addressing some shortcomings of the American rule.

¹⁰² 42 U.S.C. § 2000e-5(k) (2012). Title VII provides, “[i]n any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee . . . as part of the costs . . .” *Id.*

¹⁰³ 17 U.S.C. § 505 (2012). The Copyright Act “does not distinguish on its face between plaintiffs and defendants.” COHEN, *supra* note 81, at 14.

¹⁰⁴ See Vargo, *supra* note 71, at 1629.

¹⁰⁵ See *Azizian v. Federated Dep’t Stores, Inc.*, 499 F.3d 950, 958 (9th Cir. 2007).

¹⁰⁶ Vargo, *supra* note 71, at 1590.

¹⁰⁷ 28 U.S.C. § 2412 (2012).

¹⁰⁸ 5 U.S.C. § 552(a)(4)(E) (2012).

¹⁰⁹ 5 U.S.C. § 552a(g)(3)(B) (2012).

¹¹⁰ 15 U.S.C. § 1640(a) (2012).

¹¹¹ 15 U.S.C. § 15(a) (2012).

¹¹² See, e.g., 28 U.S.C. § 2412(d)(1)(A) (2012) (requiring that the plaintiff recover attorney fees if the government cannot prove that its position was “substantially justified”).

¹¹³ See, e.g., 42 U.S.C. § 2000e-5(k) (2012) (allowing payment of reasonable attorney fees to the “prevailing party”).

¹¹⁴ See Krent, *supra* note 101, at 2045 (stating that one-way fee shifting may over-deter legitimate activity by federal agencies and private corporations and be costly to administer); PRESIDENT’S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 9–11, 25 (1991) (urging abandonment of one-way fee shifting because it “may well increase the likelihood of frivolous litigation”).

For example, one-way fee-shifting statutes reduce Congress's monitoring costs by allowing private parties to police government and private conduct.¹¹⁵ Curing a potential defect in the American rule, Congress uses one-way fee-shifting statutes to increase a private plaintiff's incentive to bring meritorious claims that do not promise large recovery.¹¹⁶ Similar to the English rule, one-way fee-shifting makes complete compensation for prevailing plaintiffs more likely, as the prevailing plaintiff would recover its judgment and avoid liability for legal costs like attorney fees.¹¹⁷ Additionally, one-way fee-shifting statutes may serve to deter wrongful conduct by government agencies and private entities prior to litigation,¹¹⁸ as well as deter frivolous appeals.¹¹⁹ Finally, one-way fee-shifting statutes may provide a useful tool to increase access to courts for parties of modest means.¹²⁰

BACKGROUND SUMMARY

The high level of affirmance on appeal, the history of FRAP 7, and the development and purpose of fee-shifting statutes all explain the approach I take in the next section of this Note addressing the circuit split. The history of FRAP 7 and Supreme Court precedent suggest that the D.C. and Third Circuit approaches—denying inclusion of attorney fees in FRAP 7 bonds—are incorrect, as these circuits read FRAP 7's provisions too narrowly. The high level of affirmance on appeal, the purpose of fee-shifting statutes, and Supreme Court precedent suggest that the other circuits' approaches—allowing but not requiring FRAP 7 bonds to include attorney fees—are incorrect as

¹¹⁵ See Krent, *supra* note 101, at 2044 (“Congress might adopt one-way fee shifting devices, whether automatic or based on the opposing party’s fault, to minimize the cost of monitoring executive branch behavior.”); Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 678 (1982) (“[P]laintiffs vindicate polic[ies] that Congress considered of the highest priority.” (internal quotations omitted)).

¹¹⁶ See Krent, *supra* note 101, at 2050 (“In particular, public interest groups benefit from fee shifting because, when little material recovery is possible, there rarely is sufficient incentive for any one plaintiff to expend its own resources on behalf of the public.” (citation omitted)).

¹¹⁷ See *id.* at 2044–45 (“Congress, through fee shifting, may wish to ensure more complete compensation for parties injured by government wrongdoing or by the failure of private entities to comply with governmental directives.”).

¹¹⁸ See *id.* at 2044 (“[P]aying attorney fees may prompt agency officials to think twice before denying a meritorious claim or pursuing a questionable enforcement action.”).

¹¹⁹ See *Pedraza v. United Guar. Corp.*, 313 F.3d 1323, 1333 (11th Cir. 2002) (“Simply stated, an appellant is less likely to bring a frivolous appeal if he is required to post a sizable bond for anticipated attorneys’ fees prior to filing the appeal.”).

¹²⁰ See Krent, *supra* note 101, at 2050 (explaining that availability of fee recovery increases incentive for litigation by plaintiffs without a “well-stocked war chest”); Vargo, *supra* note 71, at 1629 (“Thus, the large number of fee-shifting statutes in the United States reflects neither criticism of the American Rule nor favor for the English Rule; instead, it reflects a desire to provide additional access to the courts.”).

they may frustrate Congress's purposes in enacting such fee-shifting statutes.

III

THE CIRCUIT SPLIT AND A BETTER APPROACH

Although the Supreme Court and academic literature has not addressed in-depth the circuit split regarding FRAP 7, lower courts continue to note and discuss whether attorney fees may appear in FRAP 7 bonds.¹²¹ Additionally, litigants continue to refer to the circuit split when briefing FRAP 7 arguments.¹²² Despite receiving some attention from lower courts and litigants, the circuit split does not create much uncertainty or controversy in practice, as the law on FRAP 7 appears relatively settled.¹²³ However, the circuit split offers the Supreme Court the opportunity to expand FRAP 7 to include attorney fees as a matter of course and, thereby, protect appellees from the burdensome costs of appeal.

A. The D.C. and Third Circuit Approaches: No Attorney Fees

1. *The Cases: American President Lines and Hirschensohn*

In 1985, the D.C. Circuit decided *In re American President Lines, Inc.*,¹²⁴ becoming the first federal court of appeals to address whether FRAP 7 bonds may include attorney fees.¹²⁵ The court concluded that FRAP 7 bonds could not include attorney fees because FRAP 39's list of taxable costs defined FRAP 7 "costs on appeal" and did not include attorney fees.¹²⁶

American President Lines dealt with American President Lines, Inc.'s (APL) bankruptcy proceeding.¹²⁷ A debtor, Marshall P. Safir, petitioned the bankruptcy court to enjoin APL from selling "ships,

¹²¹ See, e.g., *Noatex Corp. v. King Constr. of Hou.*, 732 F.3d 479, 489 n.8 (5th Cir. 2013) (noting the circuit split and assuming, but not deciding, that FRAP 7 may include attorney fees).

¹²² See, e.g., Reply Brief of Appellant Sikora Nelson at 5–6, *Tennille v. W. Union Co.*, No. 13–1378 (10th Cir. Nov. 6, 2013) (incidentally noting circuit split in arguing that the bond at issue should not include attorney fees or delay expenses); Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Appeal Bond at 4–5, *Saltzman v. Pella Corp.*, No. 1:06–CV–04481 (N.D. Ill. June 24, 2013), ECF No. 395 (noting that some circuits allow attorney fees based on underlying statute).

¹²³ See *infra* Part III.B.

¹²⁴ 779 F.2d 714 (D.C. Cir. 1985).

¹²⁵ See *id.* at 716–17. The D.C. Circuit cited to precedent throughout its decision, but the precedent dealt with other statutory bases for awarding "costs," not FRAP 7 specifically. See *id.* at 716 n.17.

¹²⁶ See *id.* at 716.

¹²⁷ See *id.* at 715.

stock, and other assets.”¹²⁸ Safir and APL had a long, contentious history prior to APL’s bankruptcy. Beginning in 1965, nearly twenty years before APL’s bankruptcy, Safir sued APL and other companies for damages arising from alleged unfair trade practices.¹²⁹ Safir claimed APL could not dispose of certain assets during bankruptcy because doing so would preclude Safir from recovering his “imminent” judgment.¹³⁰

Safir’s confidence was misplaced. Throughout the twenty years of litigation, courts gave Safir’s claims very little credence.¹³¹ In fact, the D.C. Circuit acknowledged that Safir failed to persuade any court that he held even a “cognizable claim” against APL.¹³² Further, the court noted that Safir repeatedly abused the litigation process to expose APL to twenty years of “irresponsible” and “frivolous” litigation causing APL undue delay and expense.¹³³

In the instant bankruptcy proceedings, the D.C. Bankruptcy and District Courts each ruled in APL’s favor and ordered Safir to pay APL’s attorney fees—\$14,000 and \$10,000 respectively.¹³⁴ The district court ordered Safir to post a \$10,000 FRAP 7 bond because Safir’s appeal appeared to be frivolous.¹³⁵ Despite the lower courts’ rulings and Safir’s abusive litigation practices, the D.C. Circuit refused to include attorney fees in Safir’s FRAP 7 bond.¹³⁶

The D.C. Circuit assessed FRAP 39’s “costs” definitions, concluded that FRAP 39 did not include attorney fees, and applied FRAP 39’s limited costs definition to FRAP 7.¹³⁷ As a result, Safir only needed to post a bond of \$450, rather than \$10,000.¹³⁸ The court reasoned that district courts might “impermissibly encumber” the right to appeal by requiring an “excessive bond” as a “precondition to an appeal.”¹³⁹

¹²⁸ See *In re Am. President Lines, Ltd.*, 804 F.2d 1307, 1308 (D.C. Cir. 1986) (reciting the procedural history of the same dispute at issue in the first *American President Lines* case in 1985).

¹²⁹ See *id.*

¹³⁰ See *id.*

¹³¹ See *id.* (noting that courts had never even “hinted” at Safir recovering a large judgment).

¹³² *Id.* at 1308–09.

¹³³ See *id.* at 1309–10 (“Safir’s propensity to relitigate the same issues over and over is without parallel.”).

¹³⁴ See *In re Am. President Lines, Inc.*, 779 F.2d 714, 715–16 (D.C. Cir. 1985). The bankruptcy court simply ordered Safir to pay APL’s attorney fees, while the district court included the fees in its FRAP 7 bond. *Id.*

¹³⁵ See *id.*

¹³⁶ See *id.* at 716.

¹³⁷ *Id.* at 716–17.

¹³⁸ *Id.* at 718–19.

¹³⁹ *Id.* at 717–18.

In reality, the court rewarded Safir's unremitting, and admittedly frivolous, litigation strategy. The court reduced the FRAP 7 bond by over 95% in a case that the court acknowledged to be frivolous. However, the court left APL in the lurch. APL remained unprotected with respect to appellate attorney fees. Practically, these costs could never be recouped, as Safir refused to pay the costs imposed by the lower courts and would later become insolvent.¹⁴⁰

Over a decade after *American President Lines*, the Third Circuit addressed FRAP 7 in *Hirschensohn v. Lawyers Title Insurance Corp.*¹⁴¹ In *Hirschensohn*, the plaintiff-appellant, Michael Hirschensohn, purchased a title insurance policy for property situated in the Virgin Islands from the defendant-appellee, Lawyers Title Insurance Company (Lawyers Title).¹⁴² Lawyers Title required Hirschensohn to provide a \$17,000 security on the policy because the property carried a \$28,000 lien.¹⁴³ Lawyers Title then used the security to clear the lien and sued Hirschensohn for reimbursement, prompting Hirschensohn to countersue Lawyers Title for fraud.¹⁴⁴

After dismissing Hirschensohn's claim for failure to satisfy diversity jurisdiction, the District Court of the Virgin Islands required Hirschensohn to post a \$7,250 FRAP 7 bond prior to appeal.¹⁴⁵ Hirschensohn never paid the \$7,250 bond, which included Lawyers Title's expected attorney fees on appeal.¹⁴⁶ Lawyers Title moved to dismiss the appeal because Hirschensohn failed to pay the FRAP 7 bond.¹⁴⁷ Upon hearing the appeal, the Third Circuit considered only whether anticipated appellate attorney fees, which were available under Virgin Islands law, fell within the "costs on appeal" of FRAP 7.¹⁴⁸

The Third Circuit held that FRAP 7 bonds could not include expected appellate attorney fees.¹⁴⁹ Similar to the D.C. Circuit in *American President Lines*, the Third Circuit concluded that Rule 39's limited cost definition governed FRAP 7's "costs" on appeal.¹⁵⁰ Unlike the

¹⁴⁰ See *In re Am. President Lines, Ltd.*, 804 F.2d 1307, 1310 n.6 (D.C. Cir. 1986) (noting Safir claimed to be "penniless and unemployed" and had not satisfied any judgments against him).

¹⁴¹ No. 96-7312, 1997 U.S. App. LEXIS 13793, at *3 (3d Cir. June 10, 1997).

¹⁴² *Id.* at *2.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at *2-3.

¹⁴⁶ *Id.* at *3.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ See *id.* at *7.

¹⁵⁰ *Id.* at *3.

D.C. Circuit, however, the Third Circuit also explained why FRAP 39 “costs” could not include attorney fees.¹⁵¹

The court relied on *Roadway Express, Inc. v. Piper*,¹⁵² a case in which the Supreme Court recognized 28 U.S.C. § 1920 as the origin of FRAP 39’s cost definition.¹⁵³ The Third Circuit noted that the *Roadway Express* Court assessed the “contemporaneous understanding” of the term costs as used in § 1920 in light of the traditional “American rule” governing attorney fees.¹⁵⁴ Because the American rule generally disfavors shifting attorney fees, and Congress did not indicate deviation from the American rule, the *Roadway Express* Court refused to expand “costs” absent an express modification by Congress.¹⁵⁵

Additionally, the Third Circuit rejected a comparison to *Marek v. Chesny*,¹⁵⁶ in which the Supreme Court held that FRCP 68 “costs” include attorney fees.¹⁵⁷ The Third Circuit distinguished *Marek* on the basis that FRCP 68 does not attempt to define “costs” at all, while FRAP 39 includes a list of taxable costs.¹⁵⁸

2. *The Criticism: American President Lines and Hirschensohn*

The courts in *American President Lines* and *Hirschensohn* each make several mistakes worthy of criticism. A common theme of criticism for both is the tendency with which the courts read FRAP 7 provisions narrowly.

First, the *Hirschensohn* court relied on the American rule to argue that allowing shifted attorney fees in a FRAP 7 bond would be somehow unusual.¹⁵⁹ However, *Marek* makes clear that Congress was aware of the many exceptions to the American rule when Congress drafted FRAP 7.¹⁶⁰ As a result, Congress intended the term “costs” to at least be informed by the statute underlying the litigation, which would likely be far more expansive than the limited list in FRAP 39.

Second, *Hirschensohn* distinguished *Marek* on the basis that FRCP 68 does not attempt to discretely define costs.¹⁶¹ However, in arguing that FRAP 39’s costs definition governs the entire FRAP—including

¹⁵¹ *Id.* at *3–4.

¹⁵² 447 U.S. 752 (1980).

¹⁵³ *See id.* at 760–61.

¹⁵⁴ *Hirschensohn*, 1997 U.S. App. LEXIS 13793, at *5 (quoting *Roadway Express*, 447 U.S. at 759).

¹⁵⁵ *Id.* at *4–5 (quoting *Roadway Express*, 447 U.S. at 760–61).

¹⁵⁶ *See id.* at *6 (citing *Marek v. Chesny*, 473 U.S. 1, 9 (1985)).

¹⁵⁷ *Marek*, 473 U.S. at 11–12.

¹⁵⁸ *See Hirschensohn*, 1997 U.S. App. LEXIS 13793, at *6.

¹⁵⁹ *See id.* at *5.

¹⁶⁰ Congress adopted FRAP 7 on July 1, 1968. *See supra* note 54 and accompanying text. *Marek* gives several examples of statutes in which Congress made exceptions to the American rule before that date. *See Marek*, 473 U.S. at 8–9.

¹⁶¹ *See Hirschensohn*, 1997 U.S. App. LEXIS 13793, at *6.

FRAP 7—the courts ignore a similar defining rule in FRCP 54(d). Thus, it is logically inconsistent to find that FRAP 39’s cost definition transfuses through the rest of the FRAP, while FRCP 54(d) has no effect on FRCP 68.¹⁶²

Finally, the court in *American President Lines* worried that FRAP 7 bonds with potentially large attorney fees will impermissibly burden the right to appeal.¹⁶³ However, this ignores the practical reality that most appeals fail—nearly eighty percent.¹⁶⁴ Further, it ignores Supreme Court precedent in *Bradley v. Richmond School Board*, which provided that courts should protect appellees from losses—including attorney fees—even before final disposition at the district court level.¹⁶⁵ If a district court may provide a party with protection even before final disposition, it would be incongruous to deny such protection after final disposition.

B. The First, Second, Sixth, Ninth, and Eleventh Circuit Approaches: Sometimes Attorney Fees

Only a year after *Hirschensohn*, in 1998, the other circuits started to diverge from the Third and D.C. Circuits on FRAP 7. Beginning with the 1998 Second Circuit decision in *Adsani*¹⁶⁶ and extending through the 2011 First Circuit decision in *International Floor Crafts*,¹⁶⁷ these circuits have taken a more expansive view of FRAP 7’s content. Because these circuits took roughly similar approaches to FRAP 7, I will explain *Adsani* relatively in depth—as it is the first case in this line—and explain the other circuits’ incremental contributions more cursorily.

1. *The Cases: Adsani Through International Floor Crafts*

In *Adsani*, the Second Circuit addressed a copyright infringement dispute between a resident of the United Kingdom, Friederike Adsani, and her literary agent, her book publisher, and others (Defendants).¹⁶⁸ After granting summary judgment for the Defendants because Adsani’s claim was “objectively unreasonable,” the District Court for the Southern District of New York required Adsani to pay

¹⁶² See *Adsani v. Miller*, 139 F.3d 67, 74 (2d Cir. 1998) (finding that FRAP 39 did not mean FRAP 7 had a “preexisting definition of costs” any more than FRCP 54(d) meant that FRCP 68 had such a preexisting definition).

¹⁶³ See *In re Am. President Lines, Inc.*, 779 F.2d 714, 718 (D.C. Cir. 1985).

¹⁶⁴ See Clermont, *supra* note 7, at 1970–72 (finding that appellate courts agree with courts in nearly eighty percent of cases).

¹⁶⁵ See 416 U.S. 696, 723–24 (1974) (“To delay a fee award until the entire litigation is concluded would work substantial hardship on plaintiffs and their counsel . . .”).

¹⁶⁶ 139 F.3d 67.

¹⁶⁷ *Int’l Floor Crafts, Inc. v. Dziemit*, 420 F. App’x 6 (1st Cir. 2011).

¹⁶⁸ See 139 F.3d at 69.

\$107,993.39 in attorney fees, pursuant to the Copyright Act.¹⁶⁹ Because Adsani had “no assets in the United States,” the district court required her to post a \$35,000 FRAP 7 bond securing the Defendants’ costs on appeal and a “possible award of attorney’s fees.”¹⁷⁰

The Second Circuit upheld the bond, concluding that FRAP 39’s cost definition did not limit FRAP 7’s costs on appeal.¹⁷¹ Instead, consistent with Supreme Court precedent in *Marek*, the court held that FRAP 7 “costs on appeal” include “all costs properly awardable under the relevant substantive statute.”¹⁷² In *Marek*, the Supreme Court reasoned that Congress was aware of the many exceptions to the American rule when Congress drafted FRCP 68, so Congress intentionally left FRCP 68 “costs” undefined, leaving the courts to find meaning in the underlying statute.¹⁷³ In the instant case, the Copyright Act provided for attorney fees for victorious parties, the Copyright Act specifically entitled the appellee to attorney fees, and the district court already granted attorney fees to Defendants, so including attorney fees in the FRAP 7 bond would be proper.¹⁷⁴ Given the court’s expansive reading of FRAP 7, the discussion which followed the ruling on the relationship between FRAP 39 and FRAP 7 comes as a slight surprise.

Adsani further argued that the FRAP 7 bond constituted an “impermissible barrier to appeal.”¹⁷⁵ The court acknowledged that the Government may limit the right to appeal “by statute requiring . . . the posting of security for ‘expenses, including counsel fees, which may be incurred’ on appeal.”¹⁷⁶ However, such a security must be “reasonably tailored to [preserve an award already made or protect appellees from loss on appeal] and uniformly and nondiscriminatorily applied.”¹⁷⁷ In *Adsani*, the FRAP 7 bond did not impermissibly burden

¹⁶⁹ *Id.* at 70.

¹⁷⁰ *Id.* (citation omitted).

¹⁷¹ *See id.* at 74–75.

¹⁷² *See id.* at 72 (citing *Marek v. Chesny*, 473 U.S. 1, 8–9 (1985)). In *Marek*, the Supreme Court held that FRCP 68 could include attorney fees as “costs” even though FRCP 54(d) defined “costs” without reference to attorney fees. *See id.* at 74. Similarly, here, the Second Circuit held that FRAP 39’s definition of “costs” should not define “costs” for the entire FRAP. *Id.* at 74–75.

¹⁷³ *See Marek*, 473 U.S. at 8–9.

¹⁷⁴ *See Adsani*, 139 F.3d at 75. The court also rejected Adsani’s argument that FRAP 7’s legislative history—originally requiring only a \$250 bond—implicitly precluded attorney fees, reasoning that \$250 in 1937 might well reflect flexibility in the rule to cover attorney fees. *See id.* at 75–76. The court reasoned that \$250 would be higher than regular administrative costs for an appeal when Congress enacted FRCP 73(c)—FRAP 7’s predecessor—so Adsani’s argument, although plausible, was “equivocal at best.” *See id.* at 76.

¹⁷⁵ *Id.* at 76.

¹⁷⁶ *Id.* at 77 (quoting *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 551–52 (1949)).

¹⁷⁷ *See id.* at 78 (quoting *Lindsey v. Normet*, 405 U.S. 56, 78 (1972)).

Adsani's right to appeal because the district court did not impose the bond automatically, and the bond was not a "double bond."¹⁷⁸

Although the *Adsani* court asserted that an automatic bond would be discriminatory, it does not explain why such a bond is discriminatory. In fact, the *Adsani* court merely cites *Lindsey* for the proposition that FRAP 7 bonds "should never be automatically assessed because this will undoubtedly discriminate against those litigants who cannot afford to post a bond" and moves on.¹⁷⁹ However, the *Adsani* court gives short shrift to *Lindsey*'s reasoning. Rather than prohibiting *all* automatically imposed bonds, *Lindsey* more accurately prohibits only automatically imposing a bond that is not "reasonably tailored" to protecting an appellee on appeal.¹⁸⁰ In *Lindsey*, although the court automatically imposed the bond for twice the plaintiff's rental value, the bond fell because it bore no reasonable relationship to the landlord's potential costs or losses on appeal rather than because the court imposed the bond automatically.¹⁸¹ As a result, courts should not balk at automatically—albeit tentatively—assessing an FRAP 7 bond as long as the court reasonably tailors the bond to protecting the appellee from losses on appeal.

Four years after *Adsani*, the Eleventh Circuit similarly held that FRAP 7 bonds may include attorney fees in *Pedraza v. United Guaranty Corp.*¹⁸² Although the Eleventh Circuit largely adopted *Adsani*'s reasoning regarding *Marek* and Congress's awareness of fee-shifting statutes when drafting FRAP 7,¹⁸³ the court introduced a few considerations relevant to FRAP 7 bonds.

First, the court acknowledged that fee-shifting statutes' underlying purposes—to ensure effective prosecution of meritorious claims and protect defendants from meritless appeals¹⁸⁴—align with the purposes of FRAP 7 bonds—to protect the rights of appellees.¹⁸⁵ The court further stated that district courts may further these purposes by requiring that shiftable attorney fees be available "*ab initio*."¹⁸⁶ However, the court maintained that regardless of how FRAP 7 bonds affect

¹⁷⁸ See *id.* A "double bond" refers to a bond similar to the bond in *Lindsey*, where the court required a property lessee to post a bond of twice the property's rental value. See *Lindsey*, 405 U.S. at 77. The Court struck down the bond in *Lindsey* because it bore no reasonable relationship to the award already granted or the potential costs on appeal. See *id.* at 78–79.

¹⁷⁹ See *Adsani*, 139 F.3d at 78 (citing *Lindsey*, 405 U.S. at 79).

¹⁸⁰ See *Lindsey*, 405 U.S. at 77–79 (reasoning that a plaintiff could still pay their rent during their appeals, so automatically assessing this double-rental-value bond served only to bar plaintiffs from appeal).

¹⁸¹ See *id.*

¹⁸² 313 F.3d 1323, 1333 (11th Cir. 2002).

¹⁸³ See *id.* at 1329–30.

¹⁸⁴ See *id.* at 1332.

¹⁸⁵ See *id.* at 1333.

¹⁸⁶ *Id.*

appeals, the courts of appeals can dismiss frivolous claims at the outset, thereby saving appellees from significant expense.¹⁸⁷

Second, the court took a relatively restrictive view of whether the underlying statute would authorize attorney fees in FRAP 7 bonds. The *Pedraza* court dealt with the Real Estate Settlement Procedure Act's (RESPA) fee-shifting provision, which stated, "the court may award to the prevailing party the court costs of the action *together with* reasonable attorneys fees."¹⁸⁸ Unlike RESPA, the statutes at issue in *Adsani* and *Marek* provided that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee *as part of the costs*."¹⁸⁹ The court reasoned that Congress distinguished between "costs" and "attorney fees" in RESPA by eschewing the language found in the Copyright and Civil Rights Acts.¹⁹⁰ As a result, the court decided to treat the two separately for FRAP 7 purposes. Thus, despite endorsing a broad purpose and interpretation of FRAP 7 "costs on appeal" earlier in the opinion, the court narrowed FRAP 7's application by seizing on this textual distinction to reject an FRAP 7 bond including attorney fees.¹⁹¹

Following *Pedraza*, in 2004, the Sixth Circuit addressed FRAP 7 bonds for the first time in *In re Cardizem CD Antitrust Litigation*.¹⁹² In *Cardizem*, Eugenia Sams—a class member in a nationwide antitrust class action suit—objected to and appealed from a district court order approving a preliminary settlement.¹⁹³ In December 2003, Sams also appealed a district court order assessing a FRAP 7 bond against her, which included \$50,000 in projected attorney fees.¹⁹⁴ The plaintiffs moved for an expedited appeal, but the court still did not reach its decision for over a year—issuing its opinion on December 14, 2004.¹⁹⁵ Following the reasoning in *Adsani* and *Pedraza*, the Sixth Circuit held that FRAP 7 bonds could include attorney fees if the statute underlying the plaintiff's action made attorney fees available to a victorious party.¹⁹⁶

¹⁸⁷ See *id.* at 1333 n.14.

¹⁸⁸ *Id.* at 1333–34 (quoting 12 U.S.C. § 2607(d)(5) (2012)).

¹⁸⁹ See *id.* at 1333 (citing 17 U.S.C. § 505 (2012) and 42 U.S.C. § 1988(b) (2012)).

¹⁹⁰ See *id.* at 1333–34.

¹⁹¹ See *id.* at 1333–35.

¹⁹² See 391 F.3d 812, 815–16 (6th Cir. 2004).

¹⁹³ See *id.* at 814–15. Although the instant case only involves one of Sams's appeals, the district court, the Tennessee attorney general, and the Judicial Multidistrict Panel on Litigation all rejected Sams's theories and arguments on several occasions. See *id.*

¹⁹⁴ See *id.* at 815.

¹⁹⁵ See *id.* at 812, 815 n.2.

¹⁹⁶ See *id.* at 817–18 ("Accordingly, under the underlying statute, not only was the district court entitled to include in the bond amount attorney's fees, but it was entitled to include any other damages incurred, presumably including administrative costs.").

Despite largely reproducing the reasoning from prior FRAP 7 cases, the *Cardizem* court altered FRAP 7 doctrine in two important ways. First, *Cardizem* expanded the FRAP 7 “costs on appeal” to encompass costs enumerated in an underlying state statute, whereas each previous FRAP 7 case dealt with federal statutes.¹⁹⁷ While not analytically significant, this expansion is consistent with the broad approach Congress intended for FRAP 7. Second, *Cardizem* expanded the *Pedraza* court’s narrow interpretive technique when deciding whether Tennessee’s statute authorized attorney fees in a FRAP 7 bond. The language of the Tennessee statute before the court in *Cardizem* stated, “the court may require the person instituting the action to indemnify the defendant for any damages incurred, including reasonable attorney’s fees and costs.”¹⁹⁸ Similar to the statutes in *Marek* and *Pedraza*, the Tennessee statute clearly distinguished between “costs” and attorney fees, albeit including them under the umbrella term “damages.” Despite this linguistic similarity, the Sixth Circuit correctly interpreted the Tennessee statute more broadly. The court reasoned that *Marek* did not require the underlying statute to provide a “definition” of costs, but rather the statute only needed to assist the court in defining the term.¹⁹⁹ Accordingly, the court only assessed whether “the underlying statute was sufficient to inform the definition of ‘costs’” under FRAP 7.²⁰⁰ Although the state legislature had distinguished the terms “costs” and “attorney fees,” the court concluded the statute was “sufficient to inform” FRAP 7’s cost definition.²⁰¹

In addition, the *Cardizem* court considered whether to dismiss Sams’s appeal for her failure to post the FRAP 7 bond and succinctly stated the factors governing such a dismissal.²⁰² The court considered three factors: prejudice to other parties, justification for failing to post the bond, and the merits of the underlying appeal.²⁰³ The court dismissed Sams’s appeal for failure to post the FRAP 7 bond because her appeal would prejudice the other class members and defendants through added expense and delay, her appeal offered no justification for failing to pay the bond, and her appeal simply “lack[ed] merit.”²⁰⁴

In 2007, the Ninth Circuit entered the fray with *Azizian v. Federated Department Stores, Inc.*²⁰⁵ In *Azizian*, certain class members—including Kamela Wilkinson—objected to a proposed class action

197 *Cardizem* involved section 47–18–109 of the Tennessee Code. See *id.* at 817.

198 TENN. CODE ANN. § 47–18–109(e)(2) (2011) (emphasis added).

199 See *Cardizem*, 391 F.3d at 817 n.4.

200 See *id.* at 818 (emphasis added).

201 *Id.*

202 *Id.*

203 *Id.*

204 *Id.*

205 499 F.3d 950, 953 (9th Cir. 2007).

settlement in an antitrust suit arising under the Clayton Act.²⁰⁶ The nonobjecting class members moved to require the objectors to post a FRAP 7 bond, including \$300,000 in appellate attorney fees and \$6,540 in administration costs; the court ordered Wilkinson to post a FRAP 7 bond including \$40,000 in appellate attorney fees and \$2,000 in administrative costs.²⁰⁷ Wilkinson appealed the district court's bond order and attempted to tender a FRAP 7 bond of \$2,000, but never paid the full bond of \$42,000.²⁰⁸ Although the District Court for the Northern District of California approved the settlement on March 30, 2005, the Ninth Circuit did not even rule on the FRAP 7 bond, which predates an appeal on the merits, until August 23, 2007—a delay of over two-and-a-half years.²⁰⁹ When the court did rule, however, it found that FRAP 7 bonds could include attorney fees, but the class-member appellees here were not entitled to attorney fees.²¹⁰

The *Azizian* court held that FRAP 7 bonds could include attorney fees if the underlying statute had such a provision for four reasons.²¹¹ First, Congress did not define “costs on appeal” in FRAP 7, so they intended to incorporate the “cost” definition from underlying statutes.²¹² Second, Congress did not indicate that FRAP 39 creates a blanket definition of “costs” for the FRAP.²¹³ Third, including attorney fees in the FRAP 7 bond most effectively gives meaning to each word of the underlying fee-shifting statutes.²¹⁴ Finally, such a definition best comports with FRAP 7's purpose to tax the full range of costs on appeal.²¹⁵

The *Azizian* court, however, refused to approve the bond as applied against Wilkinson because including attorney fees would not further the purposes of the Clayton Act's fee-shifting provision.²¹⁶ As a one-way fee-shifting statute, section 4 of the Clayton Act²¹⁷ served to encourage private enforcement of antitrust laws and deter antitrust

²⁰⁶ See *id.* at 954. Interestingly, the nonobjecting plaintiffs originally requested over \$300,000 for appellate attorney fees. *Id.*

²⁰⁷ *Id.*

²⁰⁸ See *id.*

²⁰⁹ See *id.* at 950, 954 (discussing the case's prior proceedings).

²¹⁰ See *id.* at 958–59.

²¹¹ See *id.*

²¹² See *id.* at 958 (relying on *Marek v. Chesny*, 473 U.S. 1, 8–9 (1985)).

²¹³ See *id.*

²¹⁴ See *id.* at 959. The court does not address whether the *Cardizem* court furthered this same purpose when it interpreted the Tennessee statute in that case according to a “sufficient to inform” standard.

²¹⁵ See *id.*

²¹⁶ See *id.* at 959–60.

²¹⁷ 15 U.S.C. § 15(a) (2012). The statute states, “any person who shall be injured . . . by reason of anything forbidden in the antitrust laws . . . shall recover . . . the cost of suit, including a reasonable attorney's fee.” *Id.*

violations by defendants.²¹⁸ Here, Wilkinson was a coplaintiff with the class members seeking the FRAP 7 bond.²¹⁹ The class members' suit was not against Wilkinson—a fellow victim—so the FRAP 7 bond would not have the effect of encouraging future, meritorious litigation against antitrust violators. Furthermore, Wilkinson was not a defendant, so she need not be deterred from future wrongdoing.

Accordingly, the Ninth Circuit, in *Azizian*, implicitly introduced two separate assessments for a FRAP 7 bond. First, the text of the statute must actually authorize the appellee to recover attorney fees. Second, the inclusion of attorney fees in the FRAP 7 bond must further the *purposes* of the underlying statute.

Finally, in the 2011 case *International Floor Crafts, Inc. v. Dziemit*,²²⁰ the First Circuit spoke the most recent word on FRAP 7 bonds and attorney fees.²²¹ In its holding, the *International Floor Crafts* court nicely summarized the FRAP 7 doctrine—essentially the FRAP 7 attorney fee “rule,” if you will—following the previous cases. The court held that FRAP 7 bonds could include attorney fees if “the applicable statute underlying the litigation contains a fee-shifting provision that accounts for such fees in its definition of recoverable costs *and* the appellee is eligible to recover them.”²²² The First Circuit also ruled on the appellant’s motion to stay the FRAP 7 bond, requiring that the appellant show “irreparable harm,” which exceeds claims of being in “poor financial shape.”²²³ The appellant in *International Floor Crafts* failed to prove irreparable harm, in part, because she vowed to post the bond if she lost the motion and did eventually post the bond.²²⁴

These cases—from *Adsani* through *International Floor Crafts*—all allow for FRAP 7 bonds to include appellate attorney fees. One can summarize the basic doctrine underlying these cases in a few key principles. First, the underlying statute—state or federal—defines the term “costs on appeal” for FRAP 7. Second, the applicable statute will define “costs on appeal” as including attorney fees either by explicitly equating attorney fees and costs or simply by being “sufficient to

²¹⁸ *Azizian*, 499 F.3d at 959–60.

²¹⁹ *Id.* at 954, 960.

²²⁰ 420 F. App’x 6 (1st Cir. 2011).

²²¹ *See id.* at 16–19. I use the term “most recent” to refer to the courts of appeals. Various district courts have recently ruled on FRAP 7 bonds and acknowledged the circuit split described here. *See, e.g.*, *Star Pac. Corp. v. Star Atl. Corp.*, No. 08–04957, 2013 U.S. Dist. LEXIS 22644, at *4 n.3 (D.N.J. Feb. 20, 2013) (recognizing the circuit split on FRAP 7 in denying a bond); *In re Pharm. Indus. Average Wholesale Price Litig.*, No. 01–12257–PBS, 2012 U.S. Dist. LEXIS 901, at *50 (D. Mass. Jan. 4, 2012) (noting that there was no applicable fee-shifting statute in declining to include attorney fees in a FRAP 7 bond).

²²² *Int’l Floor Crafts*, 420 F. App’x at 17 (emphasis added).

²²³ *See id.* at 19.

²²⁴ *Id.*

inform” the court of “costs on appeal.” Third, the appellee—by a plain reading of the statute—must be entitled to recover attorney fees. Fourth, providing the specific appellee with expected appellate attorney fees in the FRAP 7 bond must further the purposes of the underlying statute. Fifth, the bond must be “reasonably tailored” to protect the appellee on appeal, and not be a “double bond” or automatically assessed. Sixth, the court may dismiss for failure to post a bond if the appeal will prejudice other parties, the appellant cannot justify the failure to post the bond, or the merits of the appeal are lacking. Seventh, and finally, the appellant may stay a bond by showing “irreparable harm.”

2. *The Criticism: Adsani Through International Floor Crafts*

Largely, the aforementioned courts have reached the desirable end result that FRAP 7 bonds may include appellate attorney fees. Doing so protects appellees from unjustified costs and uncertainties on appeal. However, there are a few aspects of the doctrine and cases that are deserving of criticism.

Adsani's interpretation of an automatic bond's propriety is erroneous. The Supreme Court in *Lindsey* did not explain why an automatically assessed bond would unfairly discriminate against those who could not afford the bond; at least, not why this bond would be any more discriminatory than a bond imposed only after a motion by the appellee. The reasoning is especially suspect when one considers the fact that an appellant could avoid the automatically imposed bond by showing irreparable harm.

Pedraza is vulnerable to two stark criticisms. First, the court demonstrated a blasé attitude toward FRAP 7's appellee-protection function by indicating that, even absent an FRAP 7 bond, a motion to dismiss for frivolous appeal would protect appellees from undue delay.²²⁵ This ignores economic reality. The parties would still face the attorney costs of briefing the motion. The parties would still face significant time delay, as the expedited appeals on FRAP 7 bond motions alone take at least six months.²²⁶ Significantly, the parties would still face the uncertainty regarding whether the fees would be available, as many of the appellants in these cases never wound up paying the bond or fees at all.²²⁷ Seemingly, a motion for dismissal is not sufficiently analogous to FRAP 7 bonds' protections to constitute an

²²⁵ See *Pedraza v. United Guar. Corp.*, 313 F.3d 1323, 1333 n.14 (11th Cir. 2002).

²²⁶ See, e.g., *In re Cardizem CD Antitrust Litig.*, 391 F.3d 812, 815 n.2 (6th Cir. 2004) (implying that an expedited appeal would take at least six months to resolve).

²²⁷ See, e.g., *Adsani v. Miller*, 139 F.3d 67, 70 (2d Cir. 1998) (“*Adsani* did not oppose enforcement of judgment for the remaining \$57,993.39 in attorney's fees nor did she make payment on this remaining sum.”); *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 786 F.2d 794, 799–800 (7th Cir. 1986) (allowing for alternative security instead of a bond).

alternative to bonds. Second, the *Pedraza* court read the underlying statute far too narrowly. FRAP 7's terms deserve a broad reading based on three important factors. First, amendments to FRAP 7 expanded FRAP 7 from \$250 to a larger amount in the district court's discretion indicating a broader need for appellee protection.²²⁸ Second, the Advisory Committee notes explained the expansive purpose of FRAP 7 to cover the "actual costs."²²⁹ Finally, the case of *Bradley v. Richmond School Board*²³⁰ indicates that appellee protection becomes appropriate when the district court decides parties' substantial rights—even prior to final disposition.²³¹ Taken together, these three important factors make *Pedraza*'s narrow reading inappropriate.

Cardizem's legal and analytical approaches are largely unobjectionable. However, the case's practical realities reveal a flaw in the doctrine: the FRAP 7 bond as currently imposed is too conditional. The *Cardizem* court dismissed the appeal for failure to post the FRAP 7 bond, but only after more than a year passed and the appellees incurred the costs of briefing motions.²³² This is unfortunate for two reasons. First, the appellees in *Cardizem* had already endured several of the appellant's motions, each of which failed, showing that the appeal was at most unlikely to win.²³³ Second, the affirmance rate on all appeals in the United States is overwhelmingly high.²³⁴ Thus, allowing appellees to face over a year delay when they have already won at the district court level and will almost certainly win on appeal frustrates and—given the inability of many appellants to ever pay fees—potentially undoes the appellee-protection purposes of FRAP 7.

Azizian's main criticism lies outside the scope of this Note, dealing with class-action objectors and appellate bonds.²³⁵ However, one aspect of the court's reasoning is squarely wrong: requiring class-action objectors to post an appellate bond would not further a fee-shifting statute's purpose of encouraging meritorious suits.²³⁶ It is apparent that plaintiffs and plaintiffs' counsel would be more willing to bring an antitrust claim if the court would secure their appellate attorney fees following an offered settlement. For example, in *Azizian*, the court did not decide the objector's appeal until two-and-a-half

²²⁸ See FED. R. APP. P. 2 advisory committee's notes (1979).

²²⁹ See *id.*

²³⁰ 416 U.S. 696 (1974).

²³¹ See *id.* at 723.

²³² See *In re Cardizem CD Antitrust Litig.*, 391 F.3d 812, 814 (6th Cir. 2004).

²³³ See *id.*

²³⁴ See COFFIN, *supra* note 48, at 97; Clermont, *supra* note 7, at 1970–72.

²³⁵ For a very interesting discussion on this particular topic, see John E. Lopatka & D. Brooks Smith, *Class Action Professional Objectors: What to Do About Them?*, 39 FLA. ST. U. L. REV. 865 (2012).

²³⁶ See *Azizian v. Federated Dep't Stores, Inc.*, 499 F.3d 950, 959 (9th Cir. 2007).

years after the district court approved the settlement.²³⁷ At least the converse is likely true: antitrust victims and attorneys may be less likely to bring meritorious claims if they know they could be subject to a two-and-a-half year delay without attorney fees protection.

In summary, this line of cases largely reaches the correct result, but tends to ignore the practical realities surrounding a case. Given FRAP 7's purpose and the high rate of affirmance on appeal, allowing FRAP 7 bond appeals to drag along for as long as two-and-a-half years frustrates Congress's purposes in drafting this rule at all. Accordingly, the Supreme Court should exploit the current circuit split to introduce a better approach.

C. A Better, More Automatic Approach

A better approach to assessing FRAP 7 bonds would involve four steps. First, the district court should automatically assess a FRAP 7 bond following final disposition. Although *Lindsey* and *Adsani* suggest that automatically assessed bonds are impermissible, both cases are relatively old. The court should revisit this issue because an automatically assessed bond can still be "reasonably tailored" to FRAP 7's purpose of protecting appellees. Second, the district court should allow the losing party to stay the bond only by demonstrating irreparable harm. Allowing the losing party this opportunity would strike a balance between the purposes of protecting an appellee and the losing party's right to appeal. Offering an opportunity to avoid the bond at the district court level reduces the burden on a party's right to appeal because the losing party can offer evidence regarding financial hardship without facing the delay between final disposition and appeal. Third, if the district court denies the losing party's motion to stay, the court of appeals should grant the losing party—and potential appellant—the opportunity for an *ex parte* petition to the court of appeals to demonstrate a reasonable inference of irreparable harm from posting a FRAP 7 bond. The *ex parte* nature of such a petition protects appellees from the "substantial costs" of briefing the issues and potential oral argument.²³⁸ It also allows the losing party to retain some control over the future of her case. Finally, should the appellant demonstrate a reasonable inference of irreparable harm, the court of appeals should offer the appellee the opportunity to fully brief its argument regarding the appellant's irreparable harm—with the appeal following as per usual thereafter. This final step protects the appellee's ability to respond to any of the appellant's arguments in its irreparable harm petition.

²³⁷ See *id.* at 950, 954.

²³⁸ See *Cardizem*, 391 F.3d at 815 n.2.

Although this approach may burden appeal, all appellate bonds—including FRAP 7 bonds—burden appeal to some extent; however these bonds are still valid.²³⁹ The proper remedy for this concern is Supreme Court review to ensure that the bonds, although automatically imposed, are reasonably tailored to protecting individual appellees. This approach would recognize the economic reality that most appeals simply do not win and merely expose appellees to added expense, thereby creating opportunity for abuse.

CONCLUSION

Imagine again that you are the numismatist—the coin collector—from the introduction. Imagine your decision to sue and vindicate your rights under any of the three regimes described in the prior section. Under *Hirschensohn* and *American President Lines*, you have no attorney fees in the FRAP 7 bond. You face absolute uncertainty about whether the coin manufacturer can cover your appellate attorney fees even though you already won at the district court level and have an 80% chance of winning on appeal. Under the *Adsani-International Floor Crafts* approach, you likely will have some certainty and protection regarding appellate attorney fees. The Hobby Protection Act treats costs and attorney fees the same, you are a victorious plaintiff entitled to attorney fees under the act, and awarding such fees would encourage meritorious claims in the future. However, briefing these issues and waiting for the court of appeals' decision will impose costs in money and time. Ultimately, after paying your attorney to brief and orally argue the issues on the coin manufacturer's FRAP 7 bond, the court of appeals may reject the bond, leaving you unprotected. Under the better approach detailed above, however, you would have certainty from the moment the district court ruled in your favor. The appellant would have to prove irreparable harm from posting a FRAP 7 bond including attorney fees before you would need an attorney to do anything.

As described, the *Hirschensohn* and *American President Lines* cases reach the entirely wrong result. These decisions eschew FRAP 7 amendments and Supreme Court precedent by narrowly reading FRAP 7 amendments. Further, the *Adsani-International Floor Crafts* line of cases inadequately protects appellees in light of the real-world data regarding the high rate of affirmance on appeal. As a result, a better approach would retain much of the *International Floor Crafts* doctrine, yet add the procedural protections described above.

²³⁹ See *Int'l Floor Crafts, Inc. v. Dziemit*, 420 F. App'x 6, 19 (1st Cir. 2011) (“Any bond imposed pursuant to Rule 7 burdens an appeal to some degree, yet we presume that Rule 7 is valid.”).