CIVIL PROCEDURE—Federal Rule of Civil Procedure 54(d) Does Not Give a District Court Discretion to Award Expert Witness Fees to a Prevailing Party in Excess of the Statutory Limit—*Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 107 S. Ct. 2494 (1987).

After successfully defending an employment discrimination action,[1] the defendant corporation filed a motion to recoup its expenses for expert witness fees. The motion sought fees of the statutory limit of $30 per day as a litigation expense incidental to an award of attorney's fees authorized by 42 U.S.C. § 1988.[2] The United States District Court for the Northern District of Mississippi considered the expert testimony to be "helpful and perhaps necessary" to resolve the case, but denied the motion.[3] On rehearing en banc,[4] the Fifth Circuit Court of Appeals held that fees of non-court-appointed expert witnesses are taxable in diversity cases only in the amount specified by statute (*i.e.*, $30 per witness per day), except when there is statutory authority for awarding greater fees[5] or when one of three equitable exceptions to the American rule of limited recovery applies.[6]

In a second case (an antitrust action arising under the Clayton Act), the United States District Court for the Eastern District of Louisiana granted a directed verdict in favor of the defendant[7] and awarded the defendant expert witness fees in excess of the statutory limit pursuant to Federal Rule of Civil Procedure 54(d).[8] In awarding over $86,000 in expert witness fees to

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1. *See* International Woodworkers v. Champion Int'l Corp., 752 F.2d 163 (5th Cir. 1985), *reh'g en banc granted*, 772 F.2d 138 (5th Cir.), *vacated*, 790 F.2d 1174 (5th Cir. 1986). This is the first of two cases arising in the Fifth Circuit consolidated for appeal before the United States Supreme Court to address the question whether a federal court has discretion to award expert witness fees in excess of the statutory limit (*i.e.*, $30 per witness per day) to prevailing parties.

2. *Id.* It should be noted that the Supreme Court did not address the issue whether 42 U.S.C. § 1988 gives a district court discretion to award expert witness fees in excess of the amount specified in 29 U.S.C. § 1821(b). *See* Crawford Fitting Co. v. J.T. Gibbons, Inc., 107 S. Ct. 2494, 2499-50 (1987) (Blackmun, J., concurring, and Marshall, J., dissenting).

3. International Woodworkers v. Champion Int'l Corp., 790 F.2d 1174, 1175 (5th Cir. 1986).

4. *Id.*

5. *Id.* at 1179, n.7. In note 7 the Fifth Circuit Court of Appeals listed twenty-eight federal statutes that provide for the taxing of expert witness' fees as a cost in civil actions.

6. *Id.* at 1177. The court stated that the three exceptions to the American rule of limited recovery arise: (1) where the trustee of a fund or property, or a party in interest, preserved or recovered the fund for the benefit of others in addition to himself; (2) where a party acted in willful disobedience of a court order; or (3) where the losing party acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *Id.* (citing Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975)).

7. J.T. Gibbons, Inc. v. Crawford Fitting Co., 102 F.R.D. 73 (E.D. La. 1984).

8. *Id.*

the defendant,[9] the district judge concluded that the expert testimony was "crucial and indispensable to the presentation of the defendant's case."[10] The Fifth Circuit Court of Appeals affirmed in part,[11] but reversed and remanded on rehearing.[12]

The United States Supreme Court consolidated these two cases and granted certiorari to address the question whether Federal Rule of Civil Procedure 54(d) empowers a federal court to award a prevailing party expert witness fees in excess of the limit imposed by 28 U.S.C. §§ 1821(b) and 1920.[13] In a seven-to-two decision the Supreme Court held that where a prevailing party seeks recovery of fees paid to its expert witnesses, "a federal court is bound by the limits of [28 U.S.C.] § 1821(b), absent contract or explicit statutory authority to the contrary."[14] Chief Justice Rehnquist delivered the opinion of the Court, in which Justices White, Blackmun, Powell, Stevens, O'Connor, and Scalia joined.[15] Justice Marshall, joined by Justice Brennan, dissented.[16]

The majority's opinion is significant in that it defined the relationship between Federal Rule of Civil Procedure 54(d) and 28 U.S.C. §§ 1821(b) and 1920 in the context of a district court's discretion to award a prevailing party expenses for expert witness fees.[17]

Federal Rule of Civil Procedure 54(d) provides in pertinent part: "Except when express provision therefor is made either in statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs."[18] Under 28 U.S.C. § 1920, a federal court "may tax" specified items, including witness fees, as costs against the losing party.[19] Under 28 U.S.C. § 1821(b), a witness "shall be paid" a fee of

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9. *Id.* at 90.
10. *Id.* at 87.
11. J.T. Gibbons, Inc. v. Crawford Fitting Co., 760 F.2d 613 (5th Cir. 1985).
12. J.T. Gibbons, Inc. v. Crawford Fitting Co., 790 F.2d 1193 (5th Cir. 1986).
13. Crawford Fitting Co. v. J.T. Gibbons, Inc., 107 S. Ct. at 2496-97.
14. *Id.* at 2496.
15. *Id.* at 2496-99.
16. *Id.* at 2499-2502 (Marshall, J., dissenting).
17. *Id.* at 2497-98.
18. Fed. R. Civ. P. 54(d). The full text of Rule 54(d) provides:
Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.
Id.
19. 28 U.S.C. § 1920 (1978). The full text of the statute provides:
A judge or clerk of any court of the United States may tax as costs the following: (1) Fees of the clerk and marshall; (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; (3) Fees and disbursements for printing and witnesses; (4) Fees for exemplification and copies of pa-

$30 per day for court attendance.[20]

Prior to the Court's decision, there was a split of authority as to whether Rule 54(d) gave federal courts discretion to award expert witness fees in excess of the statutory limit of $30 per day. Seven of the circuit courts of appeal had awarded expert witness fees in excess of the statutory limit and only two circuit courts of appeal had categorically denied fees in excess of the statutory amount.

The First Circuit had permitted the discretionary award of expert witness fees upon an express finding that the testimony was indispensable or upon prior court approval.[21] The Third Circuit had awarded expert witness fees in excess of the statutory limit when the expert's testimony was deemed to be "indispensable to the determination of the case."[22] The Fifth Circuit had permitted expert witness fees to be awarded in cases of bad faith litigation,[23] and when, after prior court approval, the testimony proved to be indispensable.[24] The Seventh Circuit had recognized that courts "retain some discretion to tax costs not specifically provided for by statute," but had limited that discretion to "exceptional circumstances."[25] The Eighth Circuit had held that "Federal Rule of Civil Procedure 54 authorizes district judges to award costs not specifically enumerated in 28 U.S.C. § 1821."[26] The Ninth Circuit had allowed the award of expert witness fees when the testimony was necessary to the case and the fees were reasonable.[27] The District of Columbia Circuit had awarded excess fees when "the district court approves in advance or requires the testimony of a specially qualified witness who will furnish information or evidence not otherwise reasonably accessible to the court and whose appearance is determined to be critically important to the

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pers necessarily obtained for use in the case; (5) Docket fees under section 1923 of this title; (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title. A bill of costs shall be filed in the case and, upon allowance, included in the judgment of decree.

Id.

20. 28 U.S.C. § 1821(b) (1978). The full text of the statute provides:

A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of attendance or at any time during such attendance.

Id.

21. Gradman & Holler GMBH v. Continental Lines, S.A., 679 F.2d 272 (1st Cir. 1982).

22. Roberts v. S.S. Kyriakoula D. Lemos, 651 F.2d 201, 206 (3d Cir. 1981).

23. Kinnear-Weed Corp. v. Humble Oil & Ref. Co., 441 F.2d 631, 637 (5th Cir.), *cert. denied*, 404 U.S. 941 (1971).

24. Copper Liquor, Inc. v. Adolf Coors Co., 684 F.2d 1087, 1100 (5th Cir. 1982).

25. Illinois v. Sangamo Constr. Co., 657 F.2d 855, 865 n.14 (7th Cir. 1981).

26. Paschall v. Kansas City Star Co., 695 F.2d 322, 338-39 (8th Cir. 1982), *rev'd on other grounds en banc*, 727 F.2d 692 (8th Cir.), *cert. denied*, 469 U.S. 872 (1984).

27. Thornberry v. Delta Airlines, 676 F.2d 1240, 1245 (9th Cir. 1982), *vacated on other grounds*, 461 U.S. 952 (1983).

case."[28]

The Second and Fourth Circuits had addressed the issue only in the context of antitrust cases and held that the Clayton Act's allowance of "cost of suit" does not permit awards in excess of statute.[29]

Finally, the Tenth and Eleventh Circuits had categorically denied district courts the discretionary authority to award witness fees in excess of the amounts specified in 28 U.S.C. § 1821(b).[30]

I. The Majority Opinion

To provide a uniform interpretation of the relationship between Rule 54(d) and 28 U.S.C. §§ 1821(b) and 1920, the Court stated that the "logical conclusion" from the "language and interrelation" of these provisions was that 28 U.S.C. § 1821(b) set the fee to be paid to witnesses ($30 per witness per day), 28 U.S.C. § 1920 provided that such fees may be taxed as costs, and Rule 54(d) provided that costs will be taxed against the losing party unless the court directs otherwise.[31]

In reaching this "logical conclusion," the Court rejected the interpretation of Rule 54(d) and 28 U.S.C. §§ 1821(b) and 1920 advanced by the petitioners.[32] The petitioners argued that the discretionary language of 28 U.S.C. § 1920 did not preclude taxation of costs beyond those set out in the statute.[33] The petitioners also contended that Rule 54(d) gave federal courts a "separate source of power" to tax expenses not enumerated in 28 U.S.C. § 1920.[34]

The Court found the petitioners' interpretation of Rule 54(d) to be unacceptable because it amounted to an implicit repeal of 28 U.S.C. § 1920.[35] The Court stated:

> We will not lightly infer that Congress has repealed §§ 1920 and 1821, either through Rule 54(d) or any other provision not explicitly referring to witness fees. As always, where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of priority of enactment.[36]

In response to petitioners' argument that Rule 54(d) gave district courts a "separate source of power" to award expenses, the Court reasoned that the

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28. Quy v. Air America, Inc., 667 F.2d 1059, 1066 n.11 (D.C. Cir. 1981).

29. Berkey v. Eastman Kodak, 603 F.2d 263 (2d Cir. 1974), *cert. denied*, 444 U.S. 1093 (1980); Specialty Equip. & Mach. Corp. v. Zell Motor Co., 193 F.2d 515, 520-21 (4th Cir. 1952).

30. Cleverock Energy Corp. v. Trepel, 609 F.2d 1358, 1363 (10th Cir. 1979); Kivi v. Nationwide Mut. Ins. Co., 695 F.2d 1285, 1289 (11th Cir. 1983).

31. Crawford Fitting Co. v. J.T. Gibbons, Inc., 107 S. Ct. at 2497.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 2499.

36. *Id.*

discretion granted by Rule 54(d) was "solely a power to decline to tax, as costs, the items enumerated in § 1920."[37]

To support its holding, the Court cited *Henkel v. Chicago, St. Paul, Minneapolis & Omaha Railroad*[38] as precedent. In *Henkel* the Supreme Court held that federal courts have no authority to award expert witness fees in excess of the statutory limit set by Congress.[39] The Court reasoned: "Congress has dealt with the subject [of amounts payable and taxable as witness fees] comprehensively and has made no exception of the fees of expert witnesses. Its legislation must be deemed controlling . . . ."[40]

Even though *Henkel* was decided prior to the merger of law and equity under the Federal Rules of Civil Procedure,[41] the Court found *Henkel* to be controlling because it rested on statutory interpretation.[42] In *Henkel*, the Supreme Court had interpreted the Fee Act of 1853, the precursor of 28 U.S.C. §§ 1821 and 1920.[43] In the instant case, the Court emphasized that the provisions of the Fee Act had not been repealed by the merger of law and equity.[44]

The Court explained that the 1853 Fee Act was passed by Congress in response to concern that there was a "great diversity in practice among the courts" and "losing litigants were being unfairly saddled with exorbitant fees."[45] As a "far-reaching Act specifying in detail the nature and amount of the taxable items of cost in the federal courts,"[46] the Act embodied Congress' considered choice as to the kinds of expenses that a federal court may tax as costs against the losing party.[47] The Court noted that the "sweeping reforms of the 1853 Act have been carried forward to today, without any apparent intent to change the controlling rules."[48] Accordingly, the Court found that the particularity with which the statutes were drafted demonstrated Congress' intent to "impose rigid controls on cost-shifting in the federal courts."[49]

The Court noted that the general role of the Fee Act in the federal courts had been previously discussed in *Alyeska Pipeline Service Co. v. Wilderness Society*.[50] In *Alyeska*, the Supreme Court concluded that attor-

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37. *Id.* at 2498.
38. Henkel v. Chicago St. Paul, Mpls. & Omaha R.R., 284 U.S. 444 (1932).
39. *Id.* at 446-47.
40. Crawford Fitting Co. v. J.T. Gibbons, Inc., 107 S. Ct. at 2498 (quoting Henkel v. Chicago St. Paul, Mpls. & Omaha R.R., 284 U.S. 444, 446-47 (1932)).
41. *Id.* at 2498.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 2496 (quoting Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. at 251).
46. *Id.* (quoting Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. at 251-52).
47. *Id.*
48. *Id.* (quoting Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. at 255).
49. *Id.* at 2499.
50. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 240 (1975).

neys' fees were not recoverable by a prevailing party in the absence of statute.[51] The Court stated: "Nor has [Congress] extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever courts might deem them warranted."[52] In the instant case the Court went one step further and concluded that district courts have no "roving authority" to award expert witness fees in excess of the statutory limit.[53]

II. Marshall's Dissent

The crux of Justice Marshall's dissent was that the Court had "rendered Rule 54(d) a nullity" in its "haste to extinguish" the discretionary power of district courts to award expert witness fees in excess of statutory limits.[54]

In response to the majority's assertion that the only discretion granted to a district court by Rule 54(d) is to refuse to tax costs in favor of the prevailing party, Marshall noted that courts already had this veto power because 28 U.S.C. § 1920 is phrased permissively.[55] Accordingly, in Marshall's view, the majority opinion rendered Rule 54(d) "entirely superfluous."[56]

Marshall also contended that the majority's reliance on *Henkel* was misplaced.[57] Marshall noted that *Henkel* was an action at law decided prior to the merger of law and equity under the Federal Rules of Civil Procedure and that Rule 54(d) had adopted the practice formerly followed in equity.[58] In equity, courts possessed the power to award costs not expressly provided by statute, as "part of the original authority of the chancellor to do equity in a particular situation."[59]

Marshall also attacked the majority's premise that *Henkel* was good law because it was based on an interpretation of the 1853 Fee Act.[60] Marshall noted that the 1853 Fee Act contained restrictive language: "the following *and no other* compensation shall be taxed and allowed."[61] In contrast, this language was omitted in the 1948 version of the Fee Act and is not included in the current version of the statute.[62] Since this language was deleted, Marshall argued that 28 U.S.C. § 1920 does not contain an exclusive list of costs

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51. *Id.* at 269.
52. *Id.* at 260.
53. Crawford Fitting Co. v. J.T. Gibbons, Inc., 107 S. Ct. at 2499.
54. *Id.* at 2500 (Marshall, J., dissenting).
55. *Id.* at 2501 (Marshall, J., dissenting).
56. *Id.* (Marshall, J., dissenting).
57. *Id.* (Marshall, J., dissenting).
58. *Id.* (Marshall, J., dissenting).
59. *Id.* at 2500 (Marshall, J., dissenting) (quoting Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 166 (1939)).
60. *Id.* at 2501 (Marshall, J., dissenting).
61. *Id.* (Marshall, J., dissenting) (emphasis original).
62. *Id.* (Marshall, J., dissenting).

that can be taxed.[63]

Instead of relying on *Henkel*, Marshall urged that the court should have relied upon *Farmer v. Arabian American Oil Co.*[64] In *Farmer*, the Supreme Court held that a district court acted within its discretion in refusing to tax a witness' travel expenses as costs against an unsuccessful plaintiff, but rejected the argument that a district court lacks the power to award such expenses as costs.[65] The Court pointed to the discretionary language of Rule 54(d) to support its decision: "While this Rule could be far more definite as to what 'costs shall be allowed,' the words 'unless the court otherwise directs' quite plainly vest some power in the court to allow some 'costs.' "[66]

Marshall also noted that *Farmer* contained other language relating to the discretion granted to district courts by Rule 54(d). Pointing to a sentence labeled as dictum by the majority,[67] Marshall emphasized that the Court had explicitly stated in *Farmer* that a district court's discretion "should be sparingly exercised with reference to expenses not specifically allowed by statute."[68]

Marshall's final attack on the majority opinion was that it was "ill-advised as a policy matter."[69] To make his point, Marshall cited a statement made by Judge Rubin in the court below:

> The costs of the litigation, as we all know, have become staggering. A plaintiff may put a defendant or a defendant may put a plaintiff to a tremendous amount of expense, apart from the cost of obtaining an attorney's services, in defending or prosecuting a case. One cause of this expense is the unavoidable necessity of expert witness testimony to establish or rebut many legal claims . . . . Although the victor in litigation is not entitled to spoils, he ought to be able to invoke the court's discretion to make him whole.[70]

III. Conclusion

While the Court placed its stamp of approval on a view of expert witness fees accepted by only two of the thirteen circuit courts of appeals,[71] the

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63. *Id.* (Marshall, J., dissenting).

64. Farmer v. Arabian Am. Oil Co., 379 U.S. 227 (1964).

65. *See id.* at 231-32.

66. Crawford Fitting Co. v. J.T. Gibbons, Inc., 107 S. Ct. 2494, 2500 (1987) (Marshall, J., dissenting) (quoting Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 232 (1964)).

67. *Id.* (Marshall, J., dissenting).

68. *Id.* (Marshall, J., dissenting) (quoting Farmer v. Arabian Am. Oil Co., 379 U.S. at 235).

69. *Id.* (Marshall, J., dissenting).

70. *Id.* (Marshall, J., dissenting) (quoting Judge Rubin's dissenting opinion in International Woodworkers v. Champion Int'l Corp., 790 F.2d 1174, 1192-93 (5th Cir. 1986)).

71. *See supra* note 30. Only the Tenth and Eleventh Circuit Courts of Appeals had categorically denied district courts the discretionary authority to award witness fees in excess of the statutory limit.

Court turned a hodgepodge of case law into a uniform rule. It is another question whether the Court has adopted the proper interpretation of Rule 54(d) in the context of a federal court's discretion to award expert witness fees.

The vigorous dissent by Justice Marshall identifies the shortcomings of the majority's interpretation of Rule 54(d).[72] Prior to the Court's decision, it was "generally recognized" that Rule 54(d) allowed federal courts to award costs not expressly provided for by statute.[73] This had been the practice of courts sitting in equity before the merger of law and equity under the Federal Rules of Civil Procedure.[74]

This view, however, was rejected by the majority opinion.[75] Instead, the majority chose to rely on *Henkel v. Chicago, St. Paul, Minneapolis & Omaha Railroad*,[76] an action "at law" decided prior to the advent of the Federal Rules of Civil Procedure.[77] While *Henkel* was based upon statutory interpretation, the statutes at issue in *Henkel* have since been significantly modified.[78] The majority opinion overlooks this significant fact.

The majority opinion also failed to address the policy argument articulated in the opinion of Judge Rubin in the court below.[79] Though the costs of litigation, particularly the fees paid to expert witnesses, continue to escalate, prevailing parties are now denied the opportunity to invoke the court's discretion to make them whole.[80]

Ultimately, the Court has relegated Rule 54(d) to the same fate that befell the Fourteenth Amendment's Privileges and Immunities Clause in *The Slaughter-House Cases*.[81] For all practical purposes, Rule 54(d) is a "dead letter" in the context of a court's discretion to award expert witness fees to prevailing parties.

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72. *See* Crawford Fitting Co. v. J.T. Gibbons, Inc., 107 S. Ct. at 2499-2502 (Marshall, J., dissenting).

73. *Id.* at 2500 (Marshall, J., dissenting). *See also* 6 J. MOORE, W. TOEGGART & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 54.70[5] (2d ed. 1988).

74. Crawford Fitting Co. v. J.T. Gibbons, Inc., 107 S. Ct. at 2500 (Marshall, J., dissenting).

75. *Id.* at 2498.

76. Henkel v. Chicago, St. Paul, Mpls. & Omaha R.R., 284 U.S. 444 (1932).

77. Crawford Fitting Co. v. J.T. Gibbons, Inc., 107 S. Ct. at 2501 (Marshall, J., dissenting).

78. *Id.* at 2501 (Marshall, J., dissenting).

79. *See* International Woodworkers v. Champion Int'l Corp., 790 F.2d 1174, 1192-93 (5th Cir. 1986) (Rubin, J., dissenting).

80. Crawford Fitting Co. v. J.T. Gibbons, Inc., 107 S. Ct. at 2500 (Marshall, J., dissenting).

81. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). In *The Slaughter-House Cases*, the Supreme Court read the Privileges and Immunities Clause of the Fourteenth Amendment out of the U.S. Constitution.