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

The first requirement for an exception to apply is found in § 1997e(d)(1)(A), which states that the fees must have been directly and reasonably incurred in proving an actual violation of the prisoner's rights.[21] More specifically, combining this requirement with the requirement under subsection (d)(1) that fees must be authorized under § 1988, fees will only be awarded if they directly relate to proving a civil rights violation.[22] Additionally, the second requirement, found in subsection (d)(1)(B), states that

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

B. The Grey Area: Fees on Appeal

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

1. *Riley v. Kurtz*, Sixth Circuit (2004):[35] The Fee Cap Applies at the Appellate Level

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

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

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

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

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

34. *Compare*

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

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The district court disagreed and held "that the [150%] cap applies to cases in which the plaintiff obtains *only* monetary relief."[70]

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

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

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

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

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

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

79. *Id.* at 1179.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Woods*, 722 F.3d at 1180 ($2250 instead of the $16,800 requested for appellate attorney's fees).
84. 42 U.S.C. § 1997e(d)(1)–(2) (2006).
85. *Woods*, 722 F.3d at 1181.
86. *Id.*
87. *See id.*; *see also* 42 U.S.C. § 1997e(d)(2).
88. *See Woods*, 722 F.3d at 1181–82.
89. *See id.* at 1181.

Circuit held it would be unfair and disproportionate to "ignore the attorney's efforts in pursing the non-monetary relief," i.e. injunctive relief, by capping the total fee award at 150% of the monetary judgment, and consequently held that subsection (d)(2) only caps attorney's fees "incurred for the sole purpose of securing a monetary judgment."[90]

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

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

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

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

92. *Id.* at 1182.

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

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

95. *Id.*

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

97. *Id.*

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and thus would not have been a problematic area the PLRA was aimed to affect.[98]

The Ninth Circuit's idea that § 1997e(d), in the spirit of the PLRA's overarching purpose of deterring frivolous claims, only applies to the trial level

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

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

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

Answering this question requires deciphering the statute. The following analysis will break down the important parts of § 1997e(d): the scope in subsection (d)(1); the exceptions in subsections (d)(1)(A) and (d)(1)(B)(i); and

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were meant to be classified based on which court rendered which judgment, the appeals process would be a distinct and separate process.[124] Reality shows us that trial and appellate courts interact and influence each other, thus, the two are not wholly isolated and neither are their judgments. Therefore, when the Sixth Circuit wrote that "action" encompasses appeals because there is no "final judgment" until an appeal is determined,[125] "final judgment" was not being used as a legal term of art, as critiqued in *Prisoners' Rights*,[126] but rather in its layperson's sense to mean "conclusive."[127] A final judgment may happen multiple times throughout a lawsuit, but a conclusive judgment, as meant by

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

It seems clear that both circuits, although attributing different weight to the word "action," found that an appeals process is still part of an original action brought by a prisoner.[138] The Sixth Circuit's definition of "action" showed a willingness to extend § 1997e(d)'s applicability to the entire course of litigation.[139] In contrast, the Ninth Circuit offered minimal analysis in regards to the meaning of "action" and showed an unwillingness to take

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

This lays out the basics on how § 1988's attorney's fees provision functions, but the PLRA imposes its own restrictions independent of § 1988.[154] In *Riley*, the defendant argued that, regardless of § 1988's general grant of attorney's fees to prevailing parties, the PLRA was intended by Congress to "limit the definition of prevailing party for attorney's fees purposes" in regards to prisoner litigation, excluding some prisoner plaintiffs, even if § 1988 prevailing parties ordinarily can recover attorney's fees on appeal.[155] The Sixth Circuit looked to the PLRA's legislative history for guidance, specifically at a House Committee on the Judiciary report addressing the attorney's fees section

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Additional evidence of this intent to limit prevailing parties can be found at the end of § 1997e(d)(1) in the wording "[s]uch fees shall not be awarded, except."[158] The starting point of the statute is that "fees shall not be awarded."[159] This shows that the default rule under § 1997e(d), in contrast to § 1988's general grant of attorney's fees to prevailing parties, is to prohibit awards of attorney's fees to prevailing parties unless a certain set of requirements are met.[160] Consequently, § 1997e(d) does indeed change the definition of "prevailing party."[161] No longer is achieving a sought-after benefit on a significant issue the guidepost for identifying "prevailing parties,"

However, the reference to § 1988 in § 1997e(d) indicates a more complex relationship between the two statutes.[168]

Although they are connected, § 1988 and § 1997e(d) are distinctly different. The two statutes contain completely contrasting general rules: § 1988 is a general grant of attorney's fees while § 1997e(d) is a general prohibition.[169] The Sixth Circuit correctly aligned its analysis early on with § 1997e(d)'s main purpose of prohibiting awards of attorney's fees unless the requirements for the exception are met;[170] this helped guide it to the correct conclusion that the subsection (d)(2) cap applies at the appellate level.[171] On the other hand, the Ninth Circuit ignored the distinction between § 1988's general grant and § 1997e(d)'s general prohibition and bypassed any discussion of § 1988.[172] In doing so, the Ninth Circuit left a key aspect of

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

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

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

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

198. *See id.*

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

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

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

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

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

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

205. *See Riley*, 361 F.3d at 914–16.

206. *Id.* at 916.

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

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

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219. *See id.* at 915–16.

220. *See id.*

221. *See id.* at 916.

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

223. *See id.*

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

225. *See id.* §§ 1988, 1997e(d).

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

227. *See* 42 U.S.C. § 1997e(d)(1).

228. *See id.* §§ 1988, 1997e(d).

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

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

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

As with defining "action" and "prevailing parties," the Ninth Circuit in *Woods* did not offer any examination, textual or otherwise, of what "directly and reasonably incurred in proving" means.[237]

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

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

If a fee meets the requirements of subsections (d)(1)(A) and (d)(1)(B)(i), it may still be subject to the fee cap in subsection (d)(2).[245] The Ninth Circuit devoted a lot of analysis to the relationship between these two provisions and held that the subsection (d)(1)(B)(i) proportionality requirement limited the effect of subsection (d)(2)'s fee cap.[246] In doing so, the Ninth Circuit relied heavily on its decision in *Dannenberg*.[247] The court overemphasized the analogy with *Dannenberg* and did not clearly explain how that case related to the question of fees for appellate work.[248]

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a. The Sixth Circuit and the Proportionality Requirement Under Subsection (d)(1)(B)(i)[251]

In *Riley*, the Sixth Circuit only mentioned the proportionality requirement when it quoted from the PLRA's legislative history.[252] The legislative history stated that current law allowed for attorney's fees to be awarded in great excess of the actual relief obtained by the prisoner.[253]

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that the proportionality requirement is included to discourage excessive fees.[256] This reasoning is not discussed directly by the Sixth Circuit, but the court

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

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

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

265. *Id.* at 1074–75.

266. *Id.* at 1074.

267. *Id.* at 1074–75.

268. *See id.*

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

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

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

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

273. *Id.* at 1075.

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

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

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If a monetary award is the only relief, then subsection (d)(2) instructs the court to cap the fees award at 150% of the damages.[276] A close reading of subsection (d)(2) reveals that it says: "[w]henever a monetary judgment is awarded in an action described in paragraph (1)."[277] This means that the action must fit into subsection (d)(1)'s exception, meaning the attorney's fees must have been incurred in proving a violation and the fees must be proportionate to the relief.[278] Thus, subsection (d)(2) limits the court's discretion in making its proportionality assessment when it is dealing with an award of solely monetary relief.[279]

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In *Woods* the Ninth Circuit reapplied this misguided logic to the issue of fee awards at the appellate level.[285] Again relying on the proportionality requirement, the court found that "it would . . . be inconsistent with § (d)(1) to

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judgment is awarded, as opposed to any time in a lawsuit in which a monetary judgment has been awarded."[295]

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

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

295. *Id.* at 1182.

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

297. *Merriam-Webster*'s *Dictionary* defines "when" as "at what time." *When Definition*, MERRIAM-WEBSTER'S DICTIONARY

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

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

CONCLUSION

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

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

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

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

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

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

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

309. *See id.*

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

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

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

All of this is sound support for subsection (d)(2)'s application on appeal, but it does not lessen the blow of unfairness that this application invnoes .s

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

MAXWELL MURTAUGH*

* J.D. Candidate, 2015, Saint Louis University School