1993

An Intent-Based Approach to the Acceptance of Benefits Doctrine in the Federal Courts

Benson K. Friedman
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [Legal Remedies Commons](#), and the [Litigation Commons](#)

Recommended Citation

Benson K. Friedman, *An Intent-Based Approach to the Acceptance of Benefits Doctrine in the Federal Courts*, 92 MICH. L. REV. 742 (1993).

Available at: <https://repository.law.umich.edu/mlr/vol92/iss3/6>

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

An Intent-Based Approach to the Acceptance of Benefits Doctrine in the Federal Courts

Benson K. Friedman

INTRODUCTION

A plaintiff wins a judgment in federal district court. Although the plaintiff believes that the judgment does not fully address her claim, the defendant tenders and the plaintiff accepts the full amount or a substantial portion of the judgment. The plaintiff then proceeds to appeal in an effort to increase the judgment. The defendant may have tendered the payment in an attempt to settle the litigation. Alternatively, the defendant may have offered the payment for a variety of reasons not based on an offer to settle: the defendant may have sought, but been denied, a stay of the judgment pending appeal; the defendant may have sought to convince the plaintiff to release liens on the defendant's property; the defendant may have wished to encourage the plaintiff to drop the appeal because the prospect of winning more does not justify incurring the cost of proceeding further; or interest on the judgment may be greater than the value of the money to the defendant. On appeal, the defendant claims that the plaintiff may not now appeal after accepting the payment.

Under the common law acceptance of benefits doctrine, a plaintiff who accepted a substantial portion of the benefits of a judgment¹ could not appeal the amount of the award unless the case fell within one of two exceptions.² First, a plaintiff could appeal if the defendant did not contest the amount of the payment. This exception allowed a plaintiff to proceed if the defendant admittedly owed the amount of the payment. Second, the plaintiff could appeal despite accepting the payment if the judgment involved divisible issues. Under this exception, the plaintiff could still appeal when the payment concerned a completely distinct claim from the one the plaintiff contested on appeal.

This traditional formulation of the acceptance of benefits doctrine

1. A plaintiff could accept the substantial benefits of a judgment by receiving payment of a major portion of a monetary award or by enforcing an injunction.

2. See generally Annotation, *Right To Appeal from Judgment as Affected by Acceptance of Benefit Thereunder* — *Federal Cases*, 5 L. Ed. 2d 889 (1960) (assessing the adherence to the traditional rule among the federal circuit courts of appeals). Courts treated this issue distinctly from whether the party who *paid* a judgment still could appeal. When a party pays a judgment, the federal courts traditionally have allowed that party to appeal nonetheless. See, e.g., *Cahill v. New York, N. Haven & Hart. R.R.*, 351 U.S. 183, 184 (1956); *Dakota County v. Glidden*, 113 U.S. 222, 224 (1885); *Chicago Great Ry. v. Beecher*, 150 F.2d 394, 397-98 (8th Cir.), *cert. denied*, 326 U.S. 781 (1945).

prevailed in the U.S. circuit courts until 1960,³ when the Supreme Court invalidated the common law rule in *United States v. Hougham*.⁴ In *Hougham*, the federal government won a judgment in district court against a defendant who had fraudulently acquired surplus war materials.⁵ The defendant tendered a promissory note for the amount of the judgment and asked the United States to release liens on his property. The government complied, and both parties appealed the trial court decision. In the Supreme Court, the defendant, relying on the acceptance of benefits doctrine, argued that acceptance of the promissory note prevented the United States from appealing. The Court rejected the argument and stated: "It is a generally accepted rule of law that where a judgment is appealed on the ground that the damages awarded are inadequate, acceptance of payment of the amount of the unsatisfactory judgment does not, standing alone, amount to an accord and satisfaction of the entire claim."⁶ The dissent disagreed with this statement and would have adhered to the traditional formulation of the rule.

Both the majority and dissenting opinions in *Hougham* relied on *Embry v. Palmer*⁷ for their conflicting conclusions. In *Embry*, the plaintiff accepted the defendant's payment of \$2,296.25 out of a \$9,185.18 award. The Supreme Court rejected the defendant's argument that, by accepting the \$2,296.25, the plaintiff waived his right to appeal because the defendant admittedly owed the plaintiff the amount of the payment. The Court said:

Without entering upon a discussion of the general question, it is sufficient for the present purpose to say that no waiver or release of errors, operating as a bar to the further prosecution of an appeal or writ of error, can be implied, except from conduct which is inconsistent with the claim of a right to reverse the judgment or decree. . . . The amount awarded, paid, and accepted constitutes no part of what is in controversy. Its acceptance by the plaintiff in error cannot be construed into an admission that the decree he seeks to reverse is not erroneous; nor does it take from the defendants in error anything, on the reversal of the decree, to which they would otherwise be entitled; for they cannot deny that this sum, at least, is due and payable from them to him.⁸

3. See, e.g., *Kantor v. American & Foreign Power Co.*, 197 F.2d 307, 315 (1st Cir. 1952); *Wilson v. Pantasote Co.*, 254 F.2d 700, 702 (2d Cir. 1958); *Spencer v. Babylon Ry.*, 250 F. 24, 26 (2d Cir. 1918); *Smith v. Morris*, 69 F.2d 3, 4-5 (3d Cir. 1934); *Firefrock v. Kenova Mine Car Co.*, 37 F.2d 310, 314 (4th Cir. 1930); *Kaiser v. Standard Oil*, 89 F.2d 58, 59 (5th Cir. 1937); *Spanel v. Berkman*, 171 F.2d 513, 515 (7th Cir. 1949); *Worthington v. Beeman*, 91 F. 232, 234 (7th Cir. 1899); *Sorley v. Armour & Co.*, 107 F.2d 499, 504 (8th Cir. 1939).

4. 364 U.S. 310 (1960).

5. The government sued under 40 U.S.C. §§ 484, 489 (1988). Section 484 gives veterans priority preferences in the purchase of surplus war materials. Section 489(b) authorizes the United States to recover damages against any person who acquires surplus property fraudulently.

6. 364 U.S. at 312.

7. 107 U.S. 3 (1883).

8. 107 U.S. at 8.

The reliance on *Embry* by both the majority and the dissent in *Hougham* made for a confusing situation. The Court in *Embry* explicitly refused to extend the holding beyond the specific facts of the case. The *Hougham* Court, however, extended the rule in *Embry* to a case in which the defendant contested the entire award and cited *Embry* for the proposition that acceptance of the benefits of a judgment does not prevent appeal.⁹ The dissent, though, read *Embry* differently and pointed out that *Embry* did not upset the prevailing rule because the facts fell within a well-recognized exception that allowed appeal by the plaintiff when the defendant did not contest the amount of the payment.¹⁰ Justice Whitaker's dissenting opinion also demonstrates that, despite assertions to the contrary in the majority opinion, the rule stated in *Hougham* ran contrary to the prevailing rule in the circuit courts of appeals.¹¹

The vague scope of the holding in *Hougham*, combined with the apparent departure from the prevailing rule, caused confusion in the federal courts. Some circuits followed the literal language of *Hougham* to the extent possible, some maintained the old rule, and still others manufactured new rules.¹² This confusion has multiplied in diversity actions. In diversity actions since *Hougham*, circuits have divided on whether to apply the federal rule or a state rule to address acceptance of benefits problems. The conflicting views on the federal rule under *Hougham* and on the choice of law in diversity cases leave a confusing trap for the unwary plaintiff who might wish to accept payment of all or part of an unsatisfactory judgment.

This Note discusses the question of when federal courts should allow a party who accepts payment of a judgment subsequently to appeal the deficiency of the award. Part I examines the discrepancies currently existing in the acceptance of benefits doctrine as applied by the federal courts. Part II analogizes this issue to the law of implied-in-fact contracts and argues that accepting the benefits of a judgment should not prevent an appeal unless circumstances clearly indicate a mutual intent to settle all claims and thereby terminate litigation. Part III contends that, under the doctrine expressed in *Erie Railroad v. Tompkins*,¹³ federal courts should apply this proposed rule in diversity actions. This Note concludes that federal courts should apply a uniform, intent-based rule both in cases arising under federal law and in diversity actions.

9. See 364 U.S. at 312 (citing *Embry*, 107 U.S. at 3).

10. See 364 U.S. at 319 (Whitaker, J., dissenting).

11. See 364 U.S. at 320-21 (Whitaker, J., dissenting) (noting that the Third, Fourth, Fifth, and Eighth Circuits followed the traditional rule).

12. See *infra* section I.A.

13. 304 U.S. 64 (1938).

I. THE ACCEPTANCE OF BENEFITS DOCTRINE IN THE FEDERAL COURTS

In 1960, for the first time since 1883, the Supreme Court addressed the issue whether a party who accepts payment of a substantial portion of a judgment still may appeal the amount of the award. Although the opinion in *United States v. Hougham* stated that a plaintiff does not relinquish her right to appeal solely by accepting the benefits of a judgment,¹⁴ the vague decision gave little guidance to lower courts regarding what facts *would* preclude an appeal. The federal courts consequently developed a variety of approaches to address this question. This Part analyzes the federal decisions in the aftermath of *United States v. Hougham*. Section I.A discusses the variety of rules on the acceptance of the benefits of a judgment that have evolved in the circuit courts since *Hougham*. Section I.B examines the conflicting cases in which courts have addressed the corresponding choice of law issue in the specific context of diversity actions.

A. The Circuit Courts

The first line of cases to address the acceptance of benefits doctrine after *Hougham* began with a decision by the Fourth Circuit that made no reference to the Supreme Court's holding. In *Gadsden v. Fripp*,¹⁵ the court created a new rule that allowed a plaintiff who accepts payment of a judgment to appeal unless the circumstances indicate a mutual intent to terminate litigation. The plaintiff in *Gadsden* had brought a diversity action to recover damages for an abandoned attempt by county officials to condemn the plaintiff's real estate. At a hearing on a motion for summary judgment, the district court awarded the plaintiff some \$1700 in damages, which was less than the amount the plaintiff claimed. After entry of the judgment, the defendant offered a check for the amount of the judgment, and the plaintiff accepted it. The plaintiff then appealed in an effort to reverse the summary judgment, and the defendants sought to dismiss the appeal under the traditional acceptance of benefits doctrine. The court rejected the defendant's argument and stated:

When a payment of a judgment is made and accepted under such circumstances as to indicate an intention to finally compromise and settle a disputed claim, an appeal may be foreclosed, but, under such circumstances, it is the mutual manifestation of an intention to bring the litigation to a definite conclusion upon a basis acceptable to all parties which bars a subsequent appeal, not the bare fact of payment of the judgment.¹⁶

Gadsden did not rely on *Hougham* but instead analogized to the com-

14. See 364 U.S. at 312.

15. 330 F.2d 545 (4th Cir. 1964).

16. 330 F.2d at 548.

mon law rule that payment of a judgment does not prevent a defendant from appealing,¹⁷ even though traditionally federal courts had treated paying defendants and accepting plaintiffs differently.¹⁸ Since the Fourth Circuit's decision, three other circuits have adopted the *Gadsden* rule.¹⁹

The Second Circuit, in comparison, has ostensibly followed the letter of *Hougham* and has declared only that acceptance of benefits does not, in and of itself, prevent appeal. In *DiLeo v. Greenfield*,²⁰ the board of education of a local school district fired DiLeo, a tenured teacher, for "improper conduct."²¹ DiLeo challenged his termination in federal court. In his suit, DiLeo claimed that the termination hearing admitted hearsay in violation of his due process rights. After the district court reinstated diLeo, the board of education again fired him. DiLeo then challenged as unconstitutionally vague the statute under which the board of education fired him. The district court rejected the claim but awarded DiLeo damages for the time he was out of work between the first and second hearing. DiLeo accepted payment of the damages and proceeded to appeal the district court's ruling on the constitutionality of the statute. The board of education sought to dismiss the appeal under the acceptance of benefits doctrine. The Second Circuit found that the case involved divisible issues and that DiLeo's claim on appeal did not relate to the one for which he received the payment.²² The court then proceeded to state in dicta that even if this had been a case involving the acceptance of benefits, *Hougham* would have allowed an appeal.²³ The court acknowledged that it adopted a different rule than *Gadsden v. Fripp* when it noted that it would have arrived at the same result even if it had applied the test of *Gadsden*.²⁴

Under the Second Circuit approach, no established set of circumstances directs a court to deny a plaintiff's appeal. Unlike *Gadsden*, which declared that the mutual intent of the parties would defeat a plaintiff's right to appeal, the Second Circuit allows an appeal unless the facts meet some unknown threshold level that goes beyond the "standing alone" language of *Hougham*. Until the Second Circuit elaborates on this threshold, this approach would appear to allow more appeals than would the *Gadsden* rule because no set of circumstances, such as mutual intent, can cut off a plaintiff's appeal rights.

17. 330 F.2d at 548.

18. See *supra* note 2 and accompanying text.

19. See *McGowen v. King, Inc.*, 616 F.2d 745, 747 (5th Cir. 1980); *United States ex rel. H & S Indus. v. F.D. Rich Co.*, 525 F.2d 760, 764-65 (7th Cir. 1975); *Hawaiian Paradise Park Corp. v. Friendly Broadcasting Co.*, 414 F.2d 750, 752 (9th Cir. 1969).

20. 541 F.2d 949 (2d Cir. 1976).

21. 541 F.2d at 951.

22. 541 F.2d at 952.

23. 541 F.2d at 952.

24. 541 F.2d at 953.

Several other courts continue to recognize the validity of the old common law rule on the acceptance of benefits, despite *Hougham* and subsequent decisions. The Eleventh Circuit, for example, has applied the traditional rule and barred a plaintiff's appeal. In *Fidelcor Mortgage Corp. v. Insurance Co.*,²⁵ Fidelcor brought suit against its insurer to obtain indemnity after a third party successfully sued Fidelcor for fraud, slander of title, and punitive damages. Fidelcor appealed the district court finding that the insurance policy only covered the slander claim. After filing the notice of appeal, Fidelcor accepted payment of the amount of the judgment and executed a satisfaction of judgment on a standard form. This form acknowledged that the plaintiff received payment in the amount of the judgment and authorized the clerk of the court to record that fact.²⁶ The Eleventh Circuit rejected Fidelcor's arguments that the fraud and slander claims constituted separable issues and dismissed the appeal.²⁷ The court also rejected the notion that Fidelcor's subjective intent to appeal had any relevance in this context.²⁸ The court then relied on a pre-*Hougham* Second Circuit case²⁹ and the traditional acceptance of benefits rule to dismiss Fidelcor's appeal.³⁰

The *Fidelcor* court may have implicitly assumed that the signing of the satisfaction of judgment form indicated that the plaintiff intended to settle the case. If so, the decision would have put the Eleventh Circuit in line with the *Gadsden* approach, which explicitly relies on intent. But even if the *Fidelcor* court agrees with the Fourth Circuit, the decision still poses difficulties because the court ostensibly adhered to the common law rule and legitimated its continued use in the future.

Other courts have recognized the validity of the pre-*Hougham* acceptance of benefits doctrine while analyzing cases within existing exceptions. In *Price v. Franklin Investment Co.*,³¹ the buyer of a used car sued the seller and the assignee of the loan contract under the Truth in Lending Act³² and the Federal Reserve Board's Regulation Z.³³ The district court granted summary judgment in favor of the buyer and against the seller and dismissed the claims against the assignee loan company along with the pendent state claims. Although the court had not yet determined the attorney fees award, the plaintiff accepted pay-

25. 820 F.2d 367 (11th Cir. 1987).

26. 820 F.2d at 369.

27. 820 F.2d at 369-70.

28. 820 F.2d at 370.

29. *Wilson v. Pantasote Co.*, 254 F.2d 700, 702 (2d Cir. 1958).

30. 820 F.2d at 370.

31. 574 F.2d 594 (D.C. Cir. 1978).

32. Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601-1666 (1988)).

33. 12 C.F.R. §§ 226.1-.1002 (1993).

ment of the judgment by the car seller and then appealed in an effort to challenge the dismissal of the claims against the loan company.

The Circuit Court for the District of Columbia first recognized the traditional rule: "It is a settled rule of law that a litigant may not accept all or a substantial part of the benefit of a judgment and subsequently challenge the unfavorable aspects of that judgment on appeal."³⁴ The court then allowed the appeal under an exception to the common law rule that applies if the judgment concerns divisible issues.³⁵ The court decided it could consider the issues divisible for two reasons: first, the statute might allow for separate recovery against the seller and the loan company; second, the seller and loan company might be jointly liable, in which case the loan company's liability could affect still undetermined attorneys' fees.³⁶ Under the Act, the "issues affecting the determination of these [attorneys'] fees have an independent significance and should be appealable."³⁷ Although it came to the same result as it would have reached had the court followed *Hougham*,³⁸ the District of Columbia Circuit framed its decision in a manner consonant with the traditional acceptance of benefits doctrine.

In some post-*Hougham* cases, to prevent injustice, courts that still recognize the general validity of the acceptance of benefits doctrine as a bar to appeal have made liberal use of exceptions to the rule in order to allow a plaintiff to appeal. In *Cherokee Nation v. United States*,³⁹ for example, the Cherokee Nation had won a \$13 million judgment against the federal government. The Indian Claims Commission then awarded the Cherokee Nation's attorneys 6.96% of the award for their fees, more than three percent less than the specified contingency in the contract between the attorneys and the tribe. The attorneys accepted payment of the award and then appealed in an effort to increase it to ten percent. The Court of Claims recognized the general rule that a party usually may not accept the benefits of an award and then challenge the deficiency of the award.⁴⁰ However, the court reasoned that this rule applies only when a party accepts the benefits voluntarily.⁴¹ In this case, the court found that the attorneys did not accept payment of their fees voluntarily; personal illness and financial troubles

34. 574 F.2d at 597.

35. 574 F.2d at 597.

36. 574 F.2d at 597-98.

37. 574 F.2d at 598.

38. Under *Hougham*, the attorneys' acceptance of the fee payment by itself would not defeat the plaintiff's right to appeal.

39. 355 F.2d 945 (Ct. Cl. 1966).

40. 355 F.2d at 949.

41. 355 F.2d at 949 (citing 4 AM. JUR. 2D *Appeal and Error* § 251 (1962), along with two state cases, *Miller v. Lobdell*, 241 P.2d 30 (Cal. Dist. Ct. App. 1952); *Greenspot Desert Inns v. Roy*, 146 P.2d 39 (Cal. Dist. Ct. App. 1944)).

“forced” the attorneys to accept payment.⁴² Like the *Franklin Investment* court, the *Cherokee Nation* court arrived at a result that did not conflict with the rule in *Hougham*, but at the same time recognized the validity of the old acceptance of benefits doctrine for subsequent courts facing the same issue.

B. Choice of Law: Acceptance of Benefits in Diversity

Aside from the confusion concerning which federal rule to follow, the acceptance of benefits doctrine has presented another question to the federal courts. Federal courts, sitting in diversity, have had to decide whether to apply the federal rule as they perceive it, or a state rule. Different circuits have variously applied either federal or state law to the issue.

In *United States ex rel. H & S Industries v. F.D. Rich Co.*,⁴³ the Seventh Circuit had to determine whether to apply the state or federal acceptance of benefits rule in a diversity action between a contractor and a subcontractor. In a prior diversity case, the Seventh Circuit had accepted and commented favorably on a stipulation of counsel to apply Indiana law, which would prevent an appeal after the acceptance of benefits.⁴⁴ However, the court in *F.D. Rich* found that the aims identified by the Supreme Court in *Erie Railroad v. Tompkins*⁴⁵ — “discouragement of forum shopping and avoidance of inequitable administration of the laws — would not be served by applying state law to a problem of procedure which would arise, if at all, after completion of trial.”⁴⁶ It therefore followed the most common federal practice and applied the Fourth Circuit federal rule from *Gadsden v. Fripp*.⁴⁷

In contrast, the Eleventh Circuit, when presented with the same issue, applied the state rule on the acceptance of benefits. *Wynfield Inns v. Edward Leroux Group, Inc.*⁴⁸ involved a hotel franchise dispute between a Florida general partnership and a Massachusetts corporation. The plaintiff won a judgment in the district court on its quantum meruit claim, but the court dismissed a related contract claim by a directed verdict. The plaintiff then appealed the directed verdict after accepting and registering payment of the quantum meruit judgment.

42. 355 F.2d at 949.

43. 525 F.2d 760 (7th Cir. 1975).

44. See *Moser v. Buskirk*, 452 F.2d 147, 149 (7th Cir. 1971).

45. 304 U.S. 64 (1938). In *Erie*, the Supreme Court decided that federal courts sitting in diversity must apply state substantive law rather than general federal common law. For more background on *Erie* and subsequent decisions that refined the *Erie* doctrine, see *infra* section III.A.

46. 525 F.2d at 764.

47. Under the *Gadsden* rule, the mutual intention to terminate litigation, rather than the mere acceptance of benefits by the plaintiff, cuts off the appeal rights of the plaintiff. For a more detailed discussion of *Gadsden*, see *supra* notes 15-18 and accompanying text.

48. 896 F.2d 483 (11th Cir. 1990).

On appeal, the Eleventh Circuit applied Florida common law without comment and concluded that the acceptance of the payment of the quantum meruit judgment constituted a case of acceptance of benefits.⁴⁹ Relying on *McMullen v. Fort Pierce Financing & Construction Co.*,⁵⁰ the court decided that Florida follows the traditional acceptance of benefits rule. The plaintiff could not appeal after accepting payment of the judgment because neither exception to the rule applied: the contract and quantum meruit claims did not constitute divisible claims, and the defendant contested the amount of judgment.⁵¹

Thus, the Supreme Court's decision in *Hougham*, rather than settling questions on the applicability of the acceptance of benefits doctrine, in fact disturbed the existing uniformity among federal courts. Although most circuits have abandoned the traditional rule, their criteria for precluding appeal differ. A few circuits, meanwhile, still recognize the pre-*Hougham* rule. Part II of this Note argues for a uniform federal rule that would strictly follow the criteria established by the Fourth Circuit in *Gadsden v. Fripp*.⁵² Part III contends that federal law on the acceptance of benefits, and not state law, should apply in diversity actions.

II. RESOLUTION OF THE FEDERAL RULE

This Part attempts to resolve the confusion that has arisen in the federal courts since *Hougham* and the resultant conflicting rules concerning when federal courts should allow a plaintiff who has accepted payment of a judgment to appeal the deficiency of the award. Section II.A first analyzes the two approaches courts have taken to decide whether a party can appeal despite the acceptance of benefits: waiver of appeal and mootness. Section II.A then identifies the similarities between the two approaches to facilitate a uniform approach to acceptance of benefits cases in general. Because the cases involve no express agreement to terminate the litigation, courts have had to decide whether to infer an agreement that would constitute a waiver or that would render a case moot. Section II.B then demonstrates that the law of implied contract provides a theory that advises courts when to infer such an agreement between parties. Applying implied contract theory, section II.C concludes that federal courts should adopt a strict version of the rule established by *Gadsden v. Fripp* and allow an appeal unless both parties demonstrably and unambiguously intend to terminate litigation. Finally, section II.D analyzes the pitfalls of this rule

49. 896 F.2d at 489. As an alternate theory, the appeals court also found that the plaintiff had elected its remedy by accepting payment of the quantum meruit judgment and could not appeal under the inconsistent contract claim. 896 F.2d at 488-89.

50. 146 So. 567 (Fla. 1933).

51. 896 F.2d at 489.

52. 330 F.2d 545 (4th Cir. 1964).

— the problems of reversal of the judgment on appeal and administrative difficulty — and maintains that the merits of the proposed rule outweigh these drawbacks.

A. *Waiver and Mootness*

Courts facing the question whether to allow a plaintiff to appeal after accepting benefits have approached the issue from one of two directions. On the one hand, some courts have found that, by accepting the benefits, the plaintiff has waived the right to appeal.⁵³ Federal courts give widespread deference to express agreements to waive appeal rights,⁵⁴ suggesting an easy answer to the question.

In acceptance of benefits cases, however, the parties have not reached an explicit agreement. Thus, a court must decide whether to infer a waiver from the plaintiff's actions. The Supreme Court adopted the waiver approach in *Embry v. Palmer*.⁵⁵ The Court reasoned that the plaintiff's acceptance of the defendant's payment did not constitute an implied waiver of an appeal. Instead, the Court required acts comparable to an admission of the validity of the trial court judgment before it would find that a plaintiff waived an appeal.⁵⁶

The waiver analysis resembles the alternative approach taken by other federal courts, which asks whether the parties have actually settled a case.⁵⁷ Such a settlement after the trial court judgment generally would moot an appeal.⁵⁸ Like the waiver cases, these cases arise when no *express* settlement agreement exists between the parties.

53. See, e.g., *Gillfillan v. McKee*, 159 U.S. 303, 311 (1895); *Embry v. Palmer*, 107 U.S. 3, 8 (1883); *Wynfield Inns v. Edward Leroux Group, Inc.*, 896 F.2d 483 (11th Cir. 1990); *Fidelcor Mortgage Corp. v. Insurance Co.*, 820 F.2d 367, 370 (11th Cir. 1987); *Cherokee Nation v. United States*, 355 F.2d 945, 949-50 (Ct. Cl. 1966).

54. See *In re Lybarger*, 793 F.2d 136, 138 (6th Cir. 1986); *Brown v. Gillette Co.*, 723 F.2d 192, 192 (1st Cir. 1983); *Goodsell v. Shea*, 651 F.2d 765, 767 (C.C.P.A. 1981); *United States Consol. Seeded Raisin Co. v. Chaddock & Co.*, 173 F. 577, 579 (9th Cir. 1909); 4 AM. JUR. 2D *Appeal and Error* § 236 (1962); 4 C.J.S. *Appeal and Error* § 210 (1957). In *Brown*, the court prevented an appeal after the parties agreed "that the determination of the [district] Court on such claims shall be final and binding and hereby waive any and all rights of appeal with respect to such determinations." 723 F.2d at 192.

55. 107 U.S. 3, 8 (1883) ("[N]o waiver or release of errors, operating as a bar to the further prosecution of an appeal or writ of error, can be implied, except from conduct which is inconsistent with the claim of a right to reverse the judgment or decree."); see also *Cherokee Nation v. United States*, 355 F.2d 945, 949-50 (Ct. Cl. 1966) ("If one who accepts the benefits of a judgment or decree does so under compulsion rather than voluntarily, he incurs no waiver. Waiver consists of a *voluntary* and intentional relinquishment of a known right.") (citations omitted).

56. See 107 U.S. at 8.

57. See, e.g., *United States v. Hougham*, 364 U.S. 310 (1960); *McGowan v. King, Inc.*, 616 F.2d 745 (5th Cir. 1980); *Price v. Franklin Inv.*, 574 F.2d 594 (D.C. Cir. 1978).

58. See *Lake Coal Co. v. Roberts & Schaefer Co.*, 474 U.S. 120 (1985) (per curiam); *Local No. 8-6, Oil, Chem. & Atomic Workers Intl. Union v. Missouri*, 361 U.S. 363, 368-69 (1960); *United States Fire Ins. Co. v. Caulkins Indiantown Citrus Co.*, 931 F.2d 744, 747 (11th Cir. 1991); 13A CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3533.2 (Supp. 1993).

Thus, indirect evidence, rather than clear expressions of intent, determines the result.⁵⁹

These two analyses address the acceptance of benefits question similarly. Both depend on the existence of an implied agreement. Moreover, the factual inquiries resemble each other. In a waiver analysis, the court investigates whether the plaintiff has unilaterally forfeited the right to appeal. Waiver in the acceptance of benefits context, though, arises out of an implicit *agreement* between the defendant and plaintiff that leads the plaintiff intentionally to admit the validity of the trial court by accepting the benefits. More fundamentally, then, a court utilizing a waiver approach to the acceptance of benefits can search for evidence that establishes an implied agreement under which a plaintiff waives an appeal by accepting the defendant's payment. Such an agreement, although in principle based on waiver, suggests in fact that the parties have settled the case in order to terminate litigation. The mootness approach looks explicitly to whether the parties have agreed to settle and concludes that a settlement renders an appeal moot because the plaintiff has received full satisfaction of her claims. The question then arises: When should courts infer an agreement to settle from the actions of the parties?

B. *When To Infer Agreements*

In analyzing whether to infer an agreement from the acceptance of benefits, three options exist. A court could decide never to infer agreements in this context and instead apply a rule that allows a plaintiff to appeal in every case. Alternatively, courts could always infer agreements whenever the plaintiff accepts payment of the judgment. This would result in a rule similar to the traditional rule stating that normally the plaintiff can never appeal after accepting payment from the defendant.⁶⁰ Finally, a court could find a rule somewhere between these two extremes. This section examines the purposes of settlement agreements and the nature of the right to appeal, and it uses those considerations to determine the best approach.

1. *Option One: Never Infer Agreements*

A rule that would never allow courts to infer an agreement to settle when a plaintiff accepts the benefits of a judgment would fail to accommodate situations in which parties clearly intended to settle and

59. See, e.g., *United States ex rel. H & S Indus. v. F.D. Rich Co.*, 525 F.2d 760, 764-65 (7th Cir. 1975); *Hawaiian Paradise Park Corp. v. Friendly Broadcasting Co.*, 414 F.2d 750, 752 (9th Cir. 1969).

60. The two exceptions did mitigate the harshness of the traditional rule somewhat. Under the traditional rule, the plaintiff could still appeal if the defendant admittedly owed the plaintiff the amount of the payment or if the defendant made the payment with respect to an issue distinct from the one on which the plaintiff based the appeal.

finally to resolve a case. Such a rule would frustrate the strong federal policy favoring voluntary settlement of civil disputes.⁶¹

Courts provide several reasons for the policy favoring settlements. Settlement agreements conserve judicial and individual resources by eliminating unnecessary proceedings⁶² and helping control the backlog of cases in the courts.⁶³ In addition, they provide amicable and mutually agreeable solutions to the disputes.⁶⁴ Thus, federal courts have expressed a desire to enforce settlements whenever possible.⁶⁵

Although most courts expressed these policy goals in the context of settlements before or during trials, these goals also apply to agreements not to appeal.⁶⁶ Appellate courts face the same need to eliminate unnecessary proceedings, and they also seek to encourage voluntary and amicable solutions to disputes. A satisfactory acceptance of benefits rule should further, or at least not frustrate, these goals.

2. Option Two: Always Infer Agreements

A rule that would require courts always to infer a waiver also creates problems. By foreclosing an appeal in all acceptance of benefits cases, this rule could frustrate both parties' manifest intent in cases in which both the plaintiff and defendant contemplated an appeal despite the payment. In so doing, this type of rule could violate the plaintiff's statutory right to appeal a live controversy.⁶⁷

61. See *Williams v. First Natl. Bank*, 216 U.S. 582, 595 (1910) ("Compromises of disputed claims are favored by the courts . . ."); *American Sec. Vanlines, Inc. v. Gallagher*, 782 F.2d 1056, 1060 (D.C. Cir. 1986) ("Few public policies are as well established as the principle that courts should favor voluntary settlements of litigation by the parties to a dispute."); *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1372 (6th Cir.) ("Public policy strongly favors settlement of disputes without litigation."), *cert. denied*, 429 U.S. 862 (1976); *D.H. Overmeyer Co. v. Lofin*, 440 F.2d 1213, 1215 (5th Cir.) ("Settlement agreements are highly favored in the law and will be upheld whenever possible . . ."), *cert. denied*, 404 U.S. 851 (1971); *Autera v. Robinson*, 419 F.2d 1197, 1199 (D.C. Cir. 1969) ("Voluntary settlement of civil controversies is in high judicial favor."); *Gomes v. Brodhurst*, 394 F.2d 465, 468 (3d Cir. 1967) ("Voluntary settlements are to be encouraged . . ."); see also Alyson M. Weiss, Note, *Federal Jurisdiction To Enforce a Settlement Agreement After Vacating a Dismissal Order Under Rule 60(b)(6)*, 10 CARDOZO L. REV. 2137, 2137 (1989).

62. See *American Sec. Vanlines*, 782 F.2d at 1060 n.5; *Aro Corp.*, 531 F.2d at 1372; *Autera*, 419 F.2d at 1199; Weiss, *supra* note 61, at 2137.

63. See *Aro Corp.*, 531 F.2d at 1372.

64. See *Aro Corp.*, 531 F.2d at 1372; *D.H. Overmeyer Co.*, 440 F.2d at 1215; *Autera*, 419 F.2d at 1199.

65. See *Aro Corp.*, 531 F.2d at 1372 ("Settlement agreements should therefore be upheld whenever equitable and policy considerations so permit."); *D.H. Overmeyer Co.*, 440 F.2d at 1215; *Autera*, 419 F.2d at 1199 ("[T]here is everything to be gained by encouraging methodology that facilitates compromise.").

66. See *Goodsell v. Shea*, 651 F.2d 765, 767 (C.C.P.A. 1981) (discussing the "public policy mandate that disputing parties should be encouraged to resolve their disputes through negotiation rather than litigation").

67. See 28 U.S.C. § 1291 (1988); *Deposit Guar. Natl. Bank v. Roper*, 445 U.S. 326, 333 (1980); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 169-71 (1974); *In re McLinn*, 739 F.2d 1395,

The prevailing rule before *Hougham* effectively followed this approach in that it required courts always to infer an agreement except in two situations: it allowed an appeal if the defendant did not contest the amount the plaintiff accepted or if the judgment involved divisible issues.⁶⁸ These two exceptions mitigated the harshness of the rule because they recognized situations in which the parties clearly did not intend to settle the litigation.

Despite the exceptions, courts that followed the traditional rule after *Hougham* still ran into difficulties when they attempted to accommodate the intent of the parties within the framework of the common law doctrine. Courts often stretched the contours of the doctrine in order to avoid foreclosing an appeal when the parties clearly did not intend to settle. In *Cherokee Nation v. United States*,⁶⁹ for example, the court adopted a state court exception that federal courts had not used before. The court allowed attorneys who had accepted fee awards to appeal for an increase in the award because financial duress prevented the attorneys from accepting the award "voluntarily."⁷⁰ While this decision expanded the conditions under which the court would recognize the intent of the parties, courts adhering to the old rule could still violate the intent of the parties under certain circumstances. A better approach would recognize the inadequacy and the questionable validity of the traditional rule after *Hougham* and adopt an approach that makes explicit the need to respect the intent of the parties.

3. *Option Three: Implied Settlement Agreements*

Such all-or-nothing rules do not provide workable solutions to the acceptance of benefits question. In some cases, courts should prevent an appeal — for example, when the parties clearly intended to settle. In other cases, courts should allow appeals despite the acceptance of benefits because the parties did not intend to settle. *Hougham* presents an example of such a situation: the defendant made the payment solely so that the government would release liens on his property. This section provides a framework courts could use in determining whether to bar an appeal after acceptance of benefits.

One proposed solution directs courts to distinguish between payments in satisfaction of judgments and payments in satisfaction of claims.⁷¹ If the payments satisfy a claim, the parties have settled; if

1398-99 (9th Cir. 1984) (en banc); 9 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 203.04 (2d ed. 1993).

68. See *supra* note 3 and accompanying text.

69. 355 F.2d 945 (Ct. Cl. 1966). For more on the *Cherokee Nation* decision, see *supra* notes 39-42 and accompanying text.

70. 355 F.2d at 949.

71. See Annotation, *supra* note 2.

the payments only satisfy a judgment, the parties have not settled. Yet this solution provides no reliable basis on which to distinguish a satisfaction of a judgment from a satisfaction of a claim. Often, parties will not express which they intend to do or will confuse the two.⁷² Thus, although this idea provides a neat theoretical solution, it leaves courts in an equally impractical position.

This Note argues instead that courts should apply the law of implied-in-fact contracts by analogy to determine when to allow an appeal. The law of implied contract instructs courts when to enforce implied-in-fact agreements generally. When an implied-in-fact contract exists, it binds parties just as an express one does.⁷³ To establish an implied-in-fact contract, courts have required the same basic elements that they require for an express contract, but they have allowed parties to prove these elements through different means.⁷⁴ These elements include mutuality of intent, offer and acceptance, and valid consideration.⁷⁵

These elements of implied-in-fact contracts provide the conditions under which a court should bar an appeal. To establish a binding agreement, implied contract doctrine would require a showing of offer and acceptance, valid consideration, and a mutual intent of the parties that the plaintiff waive the right to appeal or that the parties settle the case. This section considers these elements in turn to demonstrate the propriety of applying implied contract theory to the acceptance of benefits issue.

The element of offer and acceptance in an implied-in-fact contract arises from the actions of the parties. By paying the judgment, the defendant may implicitly offer to settle the case.⁷⁶ By accepting the defendant's payment, the plaintiff may thereby accept the defendant's offer to settle the case. Acceptance of the benefits of an offer constitutes an action that can suffice to imply acceptance of the offer.⁷⁷ The

72. *Fidelcor Mortgage Corp. v. Insurance Co.*, 820 F.2d 367 (11th Cir. 1987), serves as an example of the difficulties inherent in this approach. In *Fidelcor*, the plaintiff accepted payment of a judgment, executed an ambiguous satisfaction of judgment form, and still appealed the judgment. The court dismissed the plaintiff's appeal, perhaps based on an implicit determination of the intent of the parties. The court decided the plaintiff had consented to entry of the judgment and could not appeal, although the plaintiff had only completed a boilerplate satisfaction of judgment form. It would seem, then, that a court could easily mistake the completion of a satisfaction of judgment form as evidence of satisfaction of a claim.

73. *Bloomgarden v. Coyer*, 479 F.2d 201, 208 (D.C. Cir. 1973); 1 ARTHUR L. CORBIN, *CONTRACTS* § 18 (1963); see also *Crosby v. Paul Hardeman, Inc.*, 414 F.2d 1, 7 (8th Cir. 1969).

74. See, e.g., *Chavez v. United States*, 18 Cl. Ct. 540, 544-45 (1989); *Miles v. Tennessee River Pulp & Paper Co.*, 862 F.2d 1525, 1528-29 (11th Cir. 1989); *Nitol v. United States*, 7 Cl. Ct. 405, 415 (1985); *Russell Corp. v. United States*, 537 F.2d 474, 482 (Ct. Cl. 1976); *Kirk v. United States*, 451 F.2d 690, 695 (10th Cir. 1971).

75. *Chavez*, 18 Cl. Ct. at 544-45; *Nitol*, 7 Cl. Ct. at 415; *Russell Corp.*, 537 F.2d at 482.

76. See 1 CORBIN, *supra* note 73, § 11.

77. See RESTATEMENT (SECOND) OF CONTRACTS § 69(1)(a) (1979).

U.S. Claims Court, in *Chavez v. United States*,⁷⁸ acknowledged the validity of such an implied acceptance and stated that:

the circumstances of a contract implied-in-fact must indicate that the parties have in fact taken upon themselves corresponding obligations and liabilities, and have come to a meeting of the minds.

An implied-in-fact contract may be created through the acceptance of benefits with the knowledge that the [offeror] expects to be compensated.⁷⁹

According to the *Chavez* court, the acceptance of the benefits creates an implied-in-fact contract that consequently imposes the obligation to compensate for the benefits — in our case, through an agreement not to appeal.⁸⁰ Thus, a court may infer offer and acceptance from payment and acceptance of a judgment.

Contractual consideration in the context of acceptance of benefits problems arises from the defendant's payment of the judgment in return for the plaintiff's promise to settle or not to appeal. As long as the plaintiff believes in the validity of the claim, the plaintiff provides consideration sufficient to support an agreement by forgoing his right to appeal.⁸¹

Given valid consideration and actions which can serve as offer and acceptance, the question whether the acceptance of benefits forms a binding agreement reduces to whether the actions of the parties indicate a mutual intent to prevent an appeal. Under a contractual analysis, a court should inquire whether the plaintiff and the defendant manifested agreement to the same bargain.⁸² The court must determine whether the offer by the defendant included the requirement that the plaintiff waive the right to appeal or settle the case. Also, the court must decide whether the plaintiff who accepted payment accepted those same terms — that the plaintiff agreed to settle or not to appeal. Because acceptance of benefits cases involve no express agreement, the court must determine this mutual intent through indirect means.

C. *Application of the Implied Contract Approach*

Implied contract analysis focuses a court's inquiry on the mutual understanding of the parties and resembles the rule on the acceptance of benefits established by the Fourth Circuit in *Gadsden v. Fripp*.⁸³ The *Gadsden* court looked to whether the parties intended to termi-

78. 18 Cl. Ct. 540 (1989).

79. 18 Cl. Ct. at 545 (citations omitted).

80. 18 Cl. Ct. at 545.

81. RESTATEMENT (SECOND) OF CONTRACTS § 74 (1979).

82. Cf. RESTATEMENT (SECOND) OF CONTRACTS § 17 (1979) (discussing the contractual requirement of a meeting of the minds of the parties).

83. 330 F.2d 545, 548 (4th Cir. 1964).

nate the litigation.⁸⁴ To effect the mutual intent of the parties and to protect a plaintiff's right to appeal, courts should apply this modified *Gadsden* rule strictly. Courts should dismiss an appeal only when circumstances *unambiguously* indicate a mutual intent to settle and thereby terminate litigation, and courts should place the burden of demonstrating this mutual intent on the defendant.

The need for an appellate court to avoid making acceptance of benefits decisions in ambiguous situations stems from the summary process by which courts would dismiss an appeal under the acceptance of benefits doctrine and from the nature of the appellate rights of a party aggrieved by a district court decision. Federal courts have recognized that they have the power to enforce settlement agreements summarily, without resort to factual hearings.⁸⁵ This "simple and speedy . . . remedy serves well the policy favoring compromise"⁸⁶ Such a summary resolution works especially well in circumstances in which the parties concede or demonstrate a binding settlement agreement.

Ambiguous acceptance of benefits cases, though, present factual disputes. This creates difficulties for an appellate court, which in essence makes summary decisions by not holding evidentiary hearings to investigate factual issues. Such a summary process "is ill-suited to situations presenting complex factual issues related either to the formation or the consummation of the contract, which only testimonial exploration in a more plenary proceeding is apt to satisfactorily resolve."⁸⁷ Thus, in cases in which settlement agreements present questions of fact, trial courts have avoided summary decisions and have held hearings to investigate the factual issues.⁸⁸

These considerations apply equally well to situations in which an appellate court makes the decision concerning a settlement agreement. Appellate courts lack the tools to determine factual issues readily, such as firsthand examinations of testimony and other evidence. These same inadequacies have caused trial courts to refrain from summarily enforcing settlement agreements. Because of their inadequacy as factfinders, appellate courts have often remanded cases for factual determinations to help decide whether new circumstances have rendered a case moot.⁸⁹ Rather than decide to prevent an appeal under

84. 330 F.2d at 548; see *supra* note 16 and accompanying text.

85. See, e.g., *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1372 (6th Cir.), *cert. denied*, 429 U.S. 862 (1976); *Autera v. Robinson*, 419 F.2d 1197, 1200 (D.C. Cir. 1969).

86. *Autera*, 419 F.2d at 1200; see also *Aro Corp.*, 531 F.2d at 1372.

87. *Autera*, 419 F.2d at 1200.

88. See, e.g., *Kukla v. National Distillers Prods. Co.*, 483 F.2d 619 (6th Cir. 1973).

89. E.g., *Dupris v. United States*, 446 U.S. 980 (1980); *Fusari v. Steinberg*, 419 U.S. 379 (1975) (remanding the case to determine the effect of a law enacted after the Court granted certiorari); *Cedar-Riverside Envtl. Def. Fund v. Hills*, 560 F.2d 377, 381 (8th Cir. 1977) (discussing the fact findings that the district court made when the circuit court remanded the case for an investigation into mootness).

ambiguous circumstances, the appellate court faced with an acceptance of benefits problem should defer to a better-equipped investigator and remand the case to the trial court to determine the intent of the parties.⁹⁰

When remanding an acceptance of benefits issue to a district court in this manner, appellate courts should require the defendant to bear the burden of proving a mutual intent to terminate litigation. Ordinarily, a party aggrieved by a final district court decision has a statutory right to appeal.⁹¹ Although a party may waive this right or some occurrence may render the appeal moot,⁹² federal appellate courts presume that they may hear appeals if the district court had jurisdiction, unless a party demonstrates that some occurrence has disturbed the statutory right.⁹³ Consequently, the party who suggests that an occurrence after the district court judgment has rendered a case moot bears the burden of proving mootness.⁹⁴ As a result, appellate courts faced with a factually obscure acceptance of benefits issue should recognize the presumed vested appeal rights of the plaintiff who argues that the district court decision did not satisfy her. To disturb the right to appeal, appellate courts should require the defendant to demonstrate at a district court factual hearing the existence of a mutual intent to terminate litigation.

This analysis, based on mutual understanding, appears at first glance to lack the advantages of bright-line rules such as the traditional pre-*Hougham* approach. The proposed rule, however, allows courts to distinguish more clearly between closely related cases. In one scenario, a defendant, after losing a judgment, sends a check to the plaintiff with a note that states clearly "this check is in full payment of all claims against me and will terminate all litigation between us." The plaintiff who deposits this check has made an unambiguous gesture which signals agreement to the defendant's offer. Consequently, courts should not allow this plaintiff to appeal. However, in a case in which no note accompanies the check and the plaintiff deposits it, the plaintiff's actions have ambiguous meaning.⁹⁵ In the latter case, an appellate court should allow a plaintiff to appeal unless a district

90. Under 28 U.S.C. § 2106 (1988), federal appellate courts have the power to remand a case for further proceedings as necessary to help them determine appeals: "The Supreme Court or any other court of appellate jurisdiction may . . . remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

91. See *supra* note 67.

92. See *supra* notes 53-58 and accompanying text.

93. *Cardinal Chem. Co. v. Morton Intl., Inc.*, 113 S. Ct. 1967, 1975-76 (1993).

94. *Cardinal Chem. Co.*, 113 S. Ct. at 1976; see also *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953).

95. This scenario matches *Kaiser v. Standard Oil Co.*, 89 F.2d 58 (5th Cir. 1937), in which the court applied the traditional acceptance of benefits rule to dismiss the plaintiff's appeal.

court, looking at all the circumstances, determines that the plaintiff's actions constituted an agreement not to appeal.

This *Gadsden*-type rule also enables a court to consider a wider range of relevant circumstances than the traditional approach. For example, in certain circumstances, both the plaintiff and the defendant may appeal a trial court judgment. If the defendant pays the judgment and yet proceeds with an appeal to reduce the judgment, this should serve as strong evidence to combat the existence of a mutual intent to settle. Under the traditional rule, though, a plaintiff accepting a payment under these circumstances could not appeal.

Not only does this intent-based analysis conform court-inferred agreements to the common understanding of the parties, but it also provides a unifying theory that lends internal consistency to the acceptance of benefits jurisprudence, in which the courts have applied a variety of rules but arrived at similar results. In *Hougham*, the Supreme Court applied a rule that gave little guidance to lower courts except to indicate that they should only reluctantly dismiss an appeal. Some statements in the decision, though, demonstrate that the implied-agreement analysis influenced the Court's thinking. The Court stated that "acceptance of payment of the amount of the unsatisfactory judgment does not, standing alone, amount to an accord and satisfaction of the entire claim."⁹⁶ This Note's approach supplements the *Hougham* decision by describing what "standing alone" means. The *Hougham* language allows the payment of a judgment to derail an appeal when the parties mutually intended an end to litigation. The intent-based rule provides more guidance to courts on what actions, in addition to payment "standing alone," suffice to prevent an appeal by a benefit-accepting plaintiff.

*Cherokee Nation v. United States*⁹⁷ demonstrates how courts currently apply an analysis implicitly based on the parties' common understanding, while ostensibly adhering to other rules. In *Cherokee Nation*, the court found it necessary to apply the old common law acceptance of benefits doctrine even though the case came after *Hougham*, but it held that a party could appeal the amount of the award if not accepted "voluntarily."⁹⁸ Federal courts traditionally had not relied on this "voluntariness" requirement. Although state courts had used it, the *Cherokee* court's financial duress argument expanded this state exception beyond its usual scope.⁹⁹ Thus the court

96. 364 U.S. 310, 312 (1960).

97. 355 F.2d 945 (Ct. Cl. 1966).

98. 355 F.2d at 950.

99. *Bibler v. Board of Supervisors*, 142 N.W. 1017 (Iowa 1913), exemplifies a state's use of the "voluntariness" exception. In *Bibler*, a statute required public officers to collect the amount of the trial court's judgment. The court found that acceptance of a judgment by public officers under the statute did not prevent them from appealing the judgment. In *Greenspot Desert Inn v. Roy*, 146 P.2d 39, 42 (Cal. Dist. Ct. App. 1944), the court did use financial circumstances to

reformed the traditional doctrine in response to the attorneys' apparent lack of intent to waive an appeal. Even though the defendants did not force the plaintiff's attorneys to accept the fee award, the plaintiff's attorneys' financial difficulties led to an inference that they did not wish to settle the case or to waive their right to appeal. Under the intent-based rule, "involuntary," need-based acceptance of money would not preclude seeking more money on appeal unless the party demonstrated an unambiguous intent to settle.

The traditional pre-*Hougham* rule did defer to the intent of the parties under some clear circumstances. Unlike the intent-based rule this Note proposes, however, the common law rule placed the burden of proof in ambiguous situations on the wrong party, the plaintiff. Although the old rule prevented an appeal under most circumstances, its exceptions allowed appeal in cases in which the defendant did not contest the amount paid to the plaintiff and the judgment involved divisible issues. In such cases, the courts saw that the parties did not necessarily intend to settle the controversy. In ambiguous situations that did not fall within these exceptions, however, the courts automatically barred an appeal and often frustrated the appeal rights and the understanding of the parties.

Courts have moved away from the old rule and have begun to recognize the logical implications behind an analysis based on intent. Although the traditional doctrine forced agreements in violation of the shared understanding of the parties, the rule established by *Gadsden*, followed strictly, recognizes the need to identify the underpinnings of an agreement before a court can infer a waiver or a settlement. In such fashion, a *Gadsden*-type approach respects the parties' mutual intent. This rule also conforms to the Supreme Court's implicit reasoning and explicit holding in *Hougham*.

D. Drawbacks of an Intent-Based Rule

This Note's approach to acceptance of benefits questions poses two difficulties. First, the rule can present problems when a plaintiff accepts a judgment that is later reversed on appeal. In such a case, creditors may have devoured the judgment funds and thus would prevent the plaintiff from returning the funds to the defendant. Second, the rule may be harder to apply from an administrative standpoint. These problems deserve consideration. This section concludes, however, that these costs do not outweigh the benefits of an intent-based approach to the acceptance of benefits doctrine.

explain why the plaintiffs had not accepted payment of the judgment voluntarily. The plaintiffs did not merely face financial difficulties, as in *Cherokee Nation*, but faced serious financial loss if they did not accept payment because of quickly changing wartime economic conditions. 146 P.2d at 41-42. Additionally, the plaintiffs fell within a well-recognized exception to the general rule: they only accepted the part of the judgment admittedly due them. 146 P.2d at 42.

By allowing a plaintiff who has accepted benefits to appeal, this Note's approach creates a problem if the plaintiff loses on appeal, finds the judgment reversed, and cannot repay the defendant the amounts he received. Such a scenario may occur when both a plaintiff and a defendant appeal after the payment.¹⁰⁰ This difficulty does not arise under the original common law rule because the plaintiff can only appeal if the defendant does not contest the amount paid to the plaintiff.

The Fourth Circuit proposed a solution to this dilemma in *Gadsden*. The court recommended that the district court require the plaintiff to repay the amounts he received from the defendant or to give a security to the court for its repayment before the district court reopened the case.¹⁰¹ Along with the court's recommendations, the *Gadsden* rule avoids the injustice to the plaintiff that the traditional acceptance of benefits doctrine created, while it preserves the interests of the defendant who has paid the judgment and wants repayment if the plaintiff ultimately loses an appeal.

The proposed approach to the acceptance of benefits based on the mutual intent of the parties poses another problem. It creates administrative costs in ambiguous situations that more definitive rules would avoid because cases involving ambiguous circumstances could require additional proceedings to determine the intent of the parties. The savings in administrative costs ranks highly among the reasons that courts prefer settlement agreements in the first place.¹⁰² A strictly applied intent-based rule would seem to conflict with the desire to conserve judicial resources. Courts recognize, however, that the policy goals of efficiency that support settlements must give way to the need to ensure the protection of the parties' rights and the just adjudication of the parties' interests. The Court of Appeals for the District of Columbia approved summary procedures that would avoid factual hearings only when they would not infringe on the parties' rights:

[T]he summary practice for use in connection with problems [is] capable of precise resolution without attendant hazard to the interests of the parties. At the same time, it is evident that beyond that point the convenience of the summary procedure must yield to the exigencies of safeguarding all legally protected rights that are involved.¹⁰³

Administrative costs should concern a court. But respect for the statutory right to appeal¹⁰⁴ and for the intent of the parties should out-

100. A defendant may pay a plaintiff the amount of a judgment and yet appeal to reduce the award for a number of reasons: as in *Hougham*, the defendant may seek to compel the plaintiff to release liens on the defendant's property; the defendant may not have been able to obtain a stay pending appeal; or the interest on the judgment may exceed the value of the money to the defendant.

101. 330 F.2d 545, 548 (4th Cir. 1964).

102. See *supra* notes 61-65 and accompanying text.

103. *Autera v. Robinson*, 419 F.2d 1197, 1200 (D.C. Cir. 1969).

104. See *supra* note 67 and accompanying text.

weigh worries over marginal costs of additional proceedings.

III. THE CHOICE OF LAW IN DIVERSITY ACTIONS

This Note has argued that the federal courts should treat acceptance of benefits problems with a uniform, *Gadsden*-type rule. In diversity actions, federal courts also must address, as a preliminary matter, whether to apply the federal or state rule.¹⁰⁵ Federal courts have disagreed.¹⁰⁶ This Part suggests a resolution to the conflict. Section III.A provides a background in *Erie* doctrine to create a framework for the choice of law in diversity actions. Section III.B argues that *Erie* considerations support the application of federal law to the acceptance of benefits in diversity actions. This Part concludes that federal courts, even when sitting in diversity, should apply the federal acceptance of benefits rule proposed in Part II.

A. *Erie* Considerations

In *Erie Railroad v. Tompkins*,¹⁰⁷ the Supreme Court decided that federal courts in diversity actions could not supplant state substantive common law with federal common law. *Erie* overturned the 1842 decision in *Swift v. Tyson*¹⁰⁸ and its interpretation of the Rules of Decision Act.¹⁰⁹ *Swift* allowed federal courts to apply an independent federal common law to decide substantive common law issues in diversity actions. In *Erie*, though, the Court reinterpreted the Act to require federal courts to apply state common law as well as state statutory law to substantive issues because "state law" included state common law.

The *Erie* Court noted several policy reasons behind its decision to overturn *Swift*. The *Swift* approach, the Court found, granted unfair advantages to nonresident plaintiffs who could file suit in the forum

105. An argument can be made that courts should apply the state acceptance of benefits rule on federal question claims as well. This Note only addresses diversity actions for two reasons. First, no courts have applied the state rule in cases based on federal causes of action. Second, diversity actions present a more difficult case because they do not call into question the workings of any federal statutory or common law recovery scheme. Thus, in general, federal courts have applied federal law to interpret settlement agreements that resolve federal claims. See, e.g., *Parker v. DeKalb Chrysler Plymouth*, 673 F.2d 1178, 1180 (11th Cir. 1982); *Fulgence v. J. Ray McDermott & Co.*, 662 F.2d 1207, 1208-09 (5th Cir. Dec. 1981); *Jones v. Taber*, 648 F.2d 1201, 1203 (9th Cir. 1981); *Ott v. Midland-Ross Corp.*, 523 F.2d 1367, 1368-69 (6th Cir. 1975).

106. See *supra* section I.B.

107. 304 U.S. 64 (1938).

108. 41 U.S. 1 (1842).

109. Ch. 20, 1 Stat. 92 (1789) (codified as amended at 28 U.S.C. § 1652 (1988)). The Act provided:

The laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.

1 Stat. at 92. *Swift* interpreted the "laws of the several states" not to include state common law. 41 U.S. at 12-13.

that provided the most advantageous substantive law.¹¹⁰ Additionally, *Swift* had failed in its attempt to create a uniform general law. Rather than follow the federal initiative, states continued to follow their own decisions.¹¹¹ The *Erie* Court also noted constitutional objections to the *Swift* decision. The Court found that the federal government “has no power to declare substantive rules of common law applicable in a State.”¹¹² Thus, the Court seemed to distinguish between state substantive law, which federal diversity courts could not supplant, and procedural law, on which the Court placed no apparent restrictions.

Subsequently, the Supreme Court in *Guaranty Trust Co. v. York*¹¹³ attempted to delineate the extent of the holding in *Erie*. In *York*, the Court recognized the inadequacy of the conclusory labels of “substance” and “procedure” to decide when a court must apply state law in diversity actions.¹¹⁴ Instead, the Court focused on the policies behind *Erie*:

Erie R. Co. v. Tompkins . . . expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same . . . as it would be if tried in a State court.¹¹⁵

The Court focused the substance-procedure distinction on these goals and asked: Would the rule “significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?”¹¹⁶ This marked the emergence of the outcome-determinative test and acknowledged *Erie*’s concern that “for the same transaction the accident of a suit by a non-resident in a federal court instead of in a State court a block away should not lead to a substantially different result.”¹¹⁷

This outcome-determinative test, applied strictly, has proved to be problematic. Practically every procedural rule can substantially affect the outcome of litigation. Subsequent decisions have demonstrated the need for flexibility in the application of the outcome-determinative test. In *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*,¹¹⁸ the Supreme Court again reconsidered the validity of federal rules applied

110. *Erie*, 304 U.S. at 73-75.

111. See 304 U.S. at 73.

112. 304 U.S. at 78.

113. 326 U.S. 99 (1945).

114. 326 U.S. at 109.

115. 326 U.S. at 109.

116. 326 U.S. at 109.

117. 326 U.S. at 109.

118. 356 U.S. 525 (1958).

in diversity actions. *Byrd* asked whether a federal court, sitting in diversity, should apply a state rule that required the judge to determine factual issues relating to an affirmative defense to a workman's compensation claim. The Court rejected the argument that any possibility of a federal rule disturbing the outcome required the application of the state rule. Instead, the Court took a three-step approach to the question whether federal courts can apply the federal rule on a particular matter.

The *Byrd* Court began by asking whether the state rule in question was intended to be "bound up with the definition of the rights and obligations of the parties" or whether the rule simply related to the form and mode of enforcement of those rights and obligations.¹¹⁹ *Erie* requires that, on a rule so "bound up," federal courts apply the state rule. However, with a rule related only to the *enforcement* of state-created rights, the analysis continued.

The Court then examined the extent to which the state rule would affect the outcome. The *Byrd* Court recognized that federal courts should conform as closely as possible to the state rules, even procedural rules, when the rules might substantially affect the outcome of the case.¹²⁰ However, the Court then considered "affirmative countervailing considerations"¹²¹ that supported the application of a federal rule. Such considerations in this case included the federal policy toward allocating functions between the judge and jury and the maintenance of the federal courts as an independent system for administering justice. The Court then balanced the desire for uniform outcomes against the federal interest in maintaining the judge-jury balance.¹²² In *Byrd*, the federal interest in the judge-jury balance outweighed outcome-determinative factors because the court found that the difference between a judge or a jury as a factfinder probably would not alter the outcome of the case.¹²³

In a later decision, *Hanna v. Plumer*,¹²⁴ the Supreme Court returned to the outcome-determinative test of *York*, although it noted the need for flexible application. In *Hanna*, Chief Justice Warren stated: "'Outcome-determination' analysis was never intended to serve as a talisman. . . . Indeed, the message of *York* itself is that choices between state and federal law are to be made not by application of any automatic, 'litmus paper' criterion, but rather by reference to the policies underlying the *Erie* rule."¹²⁵

119. 356 U.S. at 536.

120. 356 U.S. at 536-37.

121. 356 U.S. at 537.

122. 356 U.S. at 537.

123. 356 U.S. at 540.

124. 380 U.S. 460 (1965).

125. 380 U.S. at 466-67.

The *Hanna* Court then linked the outcome-determinative test with the twin goals of *Erie* — to avoid the inequitable administration of the laws and to discourage forum shopping.¹²⁶ Because *Hanna* involved a challenge to the application of one of the Federal Rules of Civil Procedure, it did not overturn the balancing test of *Byrd* with respect to federal common law procedural rules.¹²⁷ It does, however, provide insight into the fact that *Erie* goals remain implicit in the outcome-determinative test.

These cases point to a consideration of competing interests to solve *Erie* problems. On the one hand, *Erie* and *York* express the strong federal interest in uniform outcomes in state and federal courts and a respect for local policies represented by state laws. However, the extent to which a rule affects an outcome does not end the analysis. *Byrd* recognizes the need to balance that policy against other vital federal concerns, such as the integrity of the federal judge-jury relationship.

Within this framework, courts must decide which law to apply. For an issue such as the acceptance of benefits, which does not implicate a rule codified in the Federal Rules of Civil Procedure, the courts must look to *Byrd* interpreted in light of *York* and *Erie* to determine whether they may apply federal law. Some courts and commentators believe these cases establish a multifaceted balancing test that accommodates all the competing goals enunciated in *Erie* and its progeny.¹²⁸ The Seventh Circuit recognized: "The history of the *Erie* doctrine has been a continual retreat from conclusionary labels or mechanical solutions and an increasing emphasis has been placed on the consideration and accommodation of the basic state and federal policy goals involved."¹²⁹ Professors Martin Redish and Carter Phillips argue that courts confronted with such *Erie* questions must simultaneously consider three factors: (1) the extent the state procedure is bound up with the accomplishment of state substantive policy; (2) federal policy interests that support the application of federal law; and (3) the danger

126. 380 U.S. at 467-68.

127. 19 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4511 (1982).

128. *E.g.*, *Lumbermen's Mut. Cas. Co. v. Wright*, 322 F.2d 759, 764-65 (5th Cir. 1963); *Allstate Ins. Co. v. Charneski*, 286 F.2d 238, 243 (7th Cir. 1960); *Jaflex Corp. v. Randolph Mills, Inc.*, 282 F.2d 508, 513-14 (2d Cir. 1960); John R. Leathers, *Erie and Its Progeny as Choice of Law Cases*, 11 HOUS. L. REV. 791, 812 (1974); Martin H. Redish & Carter G. Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356, 362-66 (1977); Allen E. Smith, *Blue Ridge and Beyond: A Byrd's Eye View of Federalism in Diversity Litigation*, 36 TUL. L. REV. 443, 464-65 (1962). See generally 19 WRIGHT ET AL., *supra* note 127, §§ 4504, 4511 (explaining the development of the *Erie* doctrine).

129. *Allstate Ins. Co. v. Charneski*, 286 F.2d 238, 243 (7th Cir. 1960); see also Howard Sticklor, Comment, *Federal Judicial Law-Making Power: Competence as a Function of Cognizable Federal Interests*, 18 B.C. INDUS. & COM. L. REV. 171, 179 (1976) (arguing that federal court competence to apply federal law depends on a weighing of competing federal interests).

of different outcomes between state and federal forums.¹³⁰

Thus, an *Erie* analysis should balance, on the one hand, the interest in consistent state-federal outcomes and the right of states to determine laws concerning local policies and, on the other hand, federal interests that argue in favor of a uniform federal rule. This provides a framework to decide whether *Erie* requires courts to apply the state rule on the acceptance of benefits in diversity suits. Section III.B applies this analysis and argues that federal interests in favor of a uniform federal rule outweigh countervailing interests and compel the application of the federal rule on the acceptance of benefits in diversity actions.

B. *Erie Considerations Applied to the Acceptance of Benefits*

In the case of the acceptance of benefits, policies that favor the federal rule include the maintenance of the federal court system, facilitation of settlements in appropriate circumstances, and the concern with the fair adjudication of claims. Balanced against these, courts must consider the policy enunciated in *Erie* in favor of uniform outcomes and the federalism concern about federal interference with local policies inherent in state laws. This section argues that these competing interests favor the application of a federal rule on the acceptance of benefits in diversity actions.

1. *Interference with State Substantive Rules*

Erie reflects a policy concern that federal courts not interfere with the states' regulation of local concerns. The analysis established in *Byrd* questions the extent to which state rules are "bound up" with the accomplishment of state substantive policy or whether the rules exist as a means of enforcement of that policy.¹³¹ The Fourth Circuit further explained this requirement of *Byrd*: "In a diversity case, state law defining and limiting those primary rights and obligations must be applied under the *Erie* doctrine, enabling members of society prudently to plan and conduct their affairs, whether their conduct will later be called into question in a state or a federal court."¹³² The *Erie* inquiry

130. Redish & Phillips, *supra* note 128, at 364-65. Other commentators argue that courts must consider the extent to which a rule is bound up with state substantive policy as a threshold matter before balancing outcome-determinativeness against federal interests behind the federal rule. See, e.g., Alfred Hill, *The Erie Doctrine and the Constitution* (pt. 2), 53 Nw. U. L. REV. 541, 604-5 (1958); John C. McCoid II, *Hanna v. Plumer: The Erie Doctrine Changes Shape*, 51 VA. L. REV. 884, 895 (1965). Because this Note argues that the acceptance of benefits is not "bound up" with state substantive policies and rights, the difference between these approaches does not alter this Note's conclusion that federal courts should apply the federal acceptance of benefits rule in diversity actions.

131. 356 U.S. 525, 536 (1958); see also Redish & Phillips, *supra* note 128, at 364-65.

132. *Wratchford v. S.J. Groves & Sons Co.*, 405 F.2d 1061, 1065 (4th Cir. 1969).

into the acceptance of benefits question then turns to the purposes behind state rules.

States commonly justify the traditional acceptance of benefits rule on the grounds that accepting payment of the judgment estops the plaintiff from taking the inconsistent approach of claiming error to a judgment whose validity the plaintiff has implicitly recognized.¹³³ States have also based their acceptance of benefits doctrine on the notion that the acceptance of the payment extinguishes the judgment, so the plaintiff has nothing from which to appeal.¹³⁴ These rationales suggest that the acceptance of benefits is not "bound up" with state substantive policies, but rather deals with modes of enforcement of substantive rights. State rules on the acceptance of benefits do not reflect the concern that courts enforce certain causes of action to reflect a state's policies, but instead that litigants not take advantage of their court systems with inconsistent claims or by pressing appeals when the court has no jurisdiction. Such rules do not require consistent application to enable "members of society prudently to plan and conduct their affairs, whether their conduct will later be called into question in a state or a federal court."¹³⁵ Thus, a federal rule on the acceptance of benefits would not transgress local substantive policy concerns, which focus more on misuse of state courts than final outcomes. The state court acceptance of benefits justifications do not strongly support the application of state rules in federal court.

Viewing the acceptance of benefits in contractual terms¹³⁶ might lead one to conclude that a federal rule interferes with local policies underlying contract law, such as upholding the expectations of the parties. This general concern for local contract law has led some federal courts to apply state law to construe settlement agreements that resolve pending diversity suits.¹³⁷ Yet the acceptance of benefits rule presents more focused considerations than does the interpretation of express settlement agreements. Unlike an express settlement agreement, a federal acceptance of benefits rule should not undermine the expectations of parties because the parties have not entered into a complex, formal contract thinking that local contract law would apply. Rather, the agreement deals only with the relevant court system and appeal rights. Federal courts may hold parties to the knowledge of court-related rules of practice and procedure. Thus, federal courts can expect that parties litigating in federal court will know how the

133. See, e.g., *Jones v. Hall*, 206 S.W. 671, 673 (Ark. 1918); *Evarts v. Stovall*, 75 P.2d 154, 155 (N.M. 1938); *Tyler v. Shea*, 61 N.W. 468, 469 (N.D. 1894).

134. See, e.g., *Paine v. Woolley*, 80 Ky. 568, 571 (1882); *Ingram v. Groves*, 202 P. 1019, 1022 (Okla. 1922); *Fly v. Bailey*, 36 Tex. 119, 120 (1871).

135. *Wratchford*, 405 F.2d at 1065.

136. See *supra* section II.B.

137. See, e.g., *Lee v. Hunt*, 631 F.2d 1171, 1174 (5th Cir. 1980), cert. denied, 454 U.S. 834 (1981); *Hageman v. Signal L.P. Gas, Inc.*, 486 F.2d 479, 487 (6th Cir. 1973).

federal courts react to the acceptance of benefits. To the extent that parties may rely on a state rule that follows the traditional doctrine, a federal court may take that expectation into account when it investigates the mutual intent of the parties. This ability of a federal court to consider the state rule as evidence of mutual intent further minimizes any slight impact on party expectations that may result from the imposition of the federal rule in diversity actions. Additionally, acceptance of benefits questions arise far more infrequently than cases in which a court must construe express settlement agreements. This, too, reduces the already slight chance that a federal acceptance of benefits rule applied in diversity actions will upset party expectations. Thus, a federal rule in diversity does not conflict with a state's general policies on contract law.

2. *Assessing the Federal Interests*

The *Erie* analysis next focuses on the federal interest in the application of a uniform federal rule. In *Byrd*, the Supreme Court recognized the importance of maintaining "[t]he federal system [as] an independent system for administering justice to litigants who properly invoke its jurisdiction."¹³⁸ In *Atkins v. Schmutz Manufacturing Co.*,¹³⁹ the Fourth Circuit further stressed the need to preserve the integrity of the federal court system through uniform procedures:

It is, of course, neither possible nor necessary for federal courts to be totally neutral in the adjudication of state-created rights. . . . That state and federal judicial systems are not identic will inevitably mean that the choice of forum will have some effect upon the course of litigation. Some adoption of state court procedures by federal courts sitting in diversity may be feasible, but it may also be in conflict with fundamental interests of the federal courts in the conduct of their own business and the maintenance of the integrity of their own procedures, the legitimate interests of a federal forum, *qua* forum.

Literal application of some of the language in *Guaranty Trust Co. v. York* might appear to compel the conclusion that a federal court must apply the state law in every case where failure to do so might make a difference in the outcome of the litigation. . . . Now, in the choice between state and federal law in the disposition of federal procedural problems . . . we properly take account of federal interests and the effective functioning of the federal courts as a cohesive, relatively unitary, system for the administration of justice.

. . . .

That there is a significant federal concern for the application of rules of litigation in federal courts which are consistent with the fundamental nature of the court system is well established.¹⁴⁰

138. *Byrd Elec. v. Blue Ridge Rural Coop., Inc.*, 356 U.S. 525, 537 (1958).

139. 435 F.2d 527 (4th Cir. 1970), *cert. denied*, 402 U.S. 932 (1971).

140. 435 F.2d at 536-37.

By affecting a party's right to appeal errors and the termination of cases through settlements, the acceptance of benefits rule implicates these concerns about the structure of the federal court system.¹⁴¹ In *Gamewell Manufacturing, Inc. v. HVAC Supply, Inc.*,¹⁴² the Fourth Circuit recognized the procedural interests of federal courts in issues that could bring litigation in federal court to a premature end. The court commented on settlement agreements:

Settlements and releases assertedly entered into in respect of federal litigation already in progress implicate federal procedural interests distinct from the underlying substantive interests of the parties. Once a claim — whatever its jurisdictional basis — is initiated in the federal courts, we believe that the standards by which that litigation may be settled, and hence resolved short of adjudication on the merits, are pre-eminently a matter for resolution by federal common law principles, independently derived.¹⁴³

While the Fourth Circuit made these observations about settlement agreements that arise *before* a trial court judgment, this reasoning similarly applies in the context of acceptance of benefits problems. In the acceptance of benefits context, the court has a procedural interest in allowing a party to exercise the statutory right to challenge perceived errors in the course of the trial¹⁴⁴ as well as an interest in enforcing settlement agreements under appropriate circumstances. The balance between these two competing desires points toward the application of the intent-based rule in all federal cases.

If a court applies the acceptance of benefits doctrine hastily, the court may resolve litigation before its natural conclusion. Thus, following a more restrictive state acceptance of benefits rule may lead a federal court to terminate litigation prematurely and disrupt a plaintiff's appeal rights. The federal court has a strong interest in seeing that an early resolution only occurs under circumstances it deems appropriate.

The Fifth Circuit used this rationale in an analogous situation in *Lumberman's Mutual Casualty Co. v. Wright*.¹⁴⁵ In *Lumberman's*, the trial court, sitting in diversity, faced a conflict between discretionary dismissal for failure to prosecute under Rule 41 of the Federal Rules of Civil Procedure, and a state rule that mandated dismissal after five years. Because the Fifth Circuit decided the case before the Supreme Court decision in *Hanna*, the court applied the *Byrd* balanc-

141. 28 U.S.C. § 1291 (1988) gives the federal circuit courts of appeals jurisdiction over most appeals from final district court decisions. The right for a plaintiff aggrieved by a final district court decision to appeal stems from this provision. See *supra* note 67.

142. 715 F.2d 112 (4th Cir. 1983).

143. 715 F.2d at 115 (citations and footnotes omitted).

144. See *supra* note 67 and accompanying text.

145. 322 F.2d 759 (5th Cir. 1963).

ing test to decide which rule to apply. When discussing countervailing interests in favor of the federal rule, the Fifth Circuit commented:

Federal courts should be able to prescribe rules for the administration of the cases to be tried before them. . . . As long as there is still the breath of life in a suit kept alive by the federal courts, it strikes us as unseemly to allow the state to kill the case.¹⁴⁶

These concerns about the federal court system and the premature end to cases within the federal court system support the application of a federal rule to the acceptance of benefits in order to prevent state procedures from ending a case in a manner the federal court system deems inappropriate.

At the same time, applying a state rule more lenient than the intent-based approach would endanger the federal courts' policy to encourage settlements. The federal courts seek to give effect to settlements whenever possible to preserve judicial resources and provide for the amicable resolution of disputes.¹⁴⁷ Applying a state rule that allows too many plaintiffs to appeal despite the acceptance of benefits would frustrate these federal courts' efforts. In this fashion, state rules both more and less strict than the intent-based approach could jeopardize vital interests of federal forums.

The acceptance of benefits implicates federal concerns beyond the structure of the court system. Federal courts also have an interest in the just adjudication of claims and in ensuring fair dealing between the parties of a lawsuit.¹⁴⁸ The interest arises when a strict acceptance of benefits rule enables a defendant's actions to create a trap for the unwary plaintiff. Courts must balance this concern against the federal policy in favor of voluntary settlements,¹⁴⁹ an interest that arises from the federal courts' desire to control their dockets and reduce unnecessary litigation.¹⁵⁰ The balance between these concerns weighs heavily in the decision whether to accept this Note's intent-based acceptance of benefits rule.¹⁵¹

By denying an appeal based on state rules that restrict appeal more than the federal rule, courts may undermine the just adjudication of claims and fair dealing between the parties. But adhering to a more liberal state rule on the acceptance of benefits can create unwanted congestion and violate the manifest intent of the parties. This congestion obstructs the federal courts' interests in controlling their dockets.

146. 322 F.2d at 765.

147. See *supra* notes 61-65 and accompanying text.

148. *Auer v. Kawasaki Motors Corp.*, 830 F.2d 535, 538 (4th Cir. 1987); see also *Autera v. Robinson*, 419 F.2d 1197, 1199 (D.C. Cir. 1969).

149. See *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1372 (6th Cir.), *cert. denied*, 429 U.S. 862 (1976); *Autera*, 419 F.2d at 1199.

150. See *Auer*, 830 F.2d at 538; see also *White Farm Equip. Co. v. Kupcho*, 792 F.2d 526, 530 (5th Cir. 1986).

151. See *supra* notes 53-57, 85 and accompanying text.

All these federal interests strike a careful balance in the intent-based acceptance of benefits rule. Following a state rule that deviates from this intent-based approach may frustrate one or more of these federal concerns.

3. *Application of the Outcome-Determinative Test*

Although federal interests favor applying a federal rule to the acceptance of benefits, courts must also focus on the extent to which the federal rule might disturb the outcome of a proceeding. As the Supreme Court noted in *Hanna v. Plumer*,¹⁵² courts must view the outcome-determinative test not in terms of slight effects on the ultimate determination of a case, but in consideration of the aims of *Erie* — to discourage forum shopping and to avoid the inequitable administration of the laws.

Considered in light of the goals of *Erie*, the acceptance of benefits does not appear to be outcome-determinative. Acceptance of benefits problems only arise, if ever, after a trial has already concluded and the plaintiff has accepted payment of a judgment in her favor. This sequence of contingencies makes the application of the acceptance of benefits rule remote from the perspective of a plaintiff filing suit. This remoteness minimizes the likelihood that a plaintiff will choose a forum based on its acceptance of benefits rule.¹⁵³ Such a result differs markedly from cases such as those involving competing statutes of limitations in which a federal rule might allow a court to hear a case when a state rule would not. Acceptance of benefits issues, then, arise only after the trial court has already provisionally granted a remedy that should mirror the result of a state court proceeding. Because a plaintiff has already won a judgment in a trial that follows state substantive rules, limits on the plaintiff's right to appeal have a minimal effect in creating different remedies between state and federal forums. In this fashion, a federal acceptance of benefits rule should not invoke concerns about the inequitable administration of the laws between federal and state forums.

In the analogous context of a remittitur, federal courts have found that the outcome-determinative test does not favor the application of state law. Remittitur is a common law procedure that allows a trial court judge to grant the defendant a new trial unless the plaintiff agrees to a reduced damage award.¹⁵⁴ Under the federal rule, a plaintiff who accepts the reduced award cannot appeal because she has ac-

152. 380 U.S. 460 (1965).

153. See *United States ex rel. H & S Indus. v. F.D. Rich Co.*, 525 F.2d 760, 764 (7th Cir. 1975) (acknowledging that the aims of *Erie* "would not be served by applying state law to a problem of procedure which would arise, if at all, after completion of trial").

154. See generally 11 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* §§ 2807, 2815 (1973) (explaining remittitur).

quiesced in the judgment.¹⁵⁵ Courts have recognized that a remittitur's remoteness from the onset of a trial reduces any potential influence on the outcome of the litigation.¹⁵⁶ Accordingly, the Supreme Court has held that federal courts should apply the federal remittitur rule in diversity actions because federal interests outweigh any forum-shopping and equitable concerns.¹⁵⁷ Like remittitur cases, acceptance of benefits cases involve a plaintiff who has accepted a payment and still seeks to appeal errors in the trial court. The federal courts' observations of the remoteness of remittitur problems suggest that outcome-determinativeness concerns similarly do not mandate the application of the state rule to the acceptance of benefits cases.

Balanced against policies that argue for the federal rule, the interests in favor of a state rule are inadequate. A federally imposed intent-based acceptance of benefits rule should not seriously implicate concerns about outcome determinativeness and states' freedom to determine local policies. Moreover, countervailing interests argue strongly for applying the federal acceptance of benefits rule. These policies include the maintenance and integrity of the federal appellate system, the just adjudication of claims, and the promotion of fair dealings between the parties. This balance in favor of federal interests should direct courts facing acceptance of benefits questions in diversity actions to apply the federal rule.

CONCLUSION

The federal courts formerly followed a uniform rule on the acceptance of benefits and prevented a prevailing party who accepted payment of a judgment from appealing unless the amount accepted was not in controversy or the judgment consisted of divisible issues. The Supreme Court decision in *Hougham* questioned the validity of the traditional rule but left no clear rule for courts to follow. A division in the federal courts ensued. Some courts followed the letter of *Hougham*, others created new rules, while still others continued to recognize the traditional rule. Courts have also disagreed about whether to apply the federal or state rule when sitting in diversity.

This Note has argued for a consistent approach to the acceptance of benefits. Both the traditional rule and a rule that would always allow a plaintiff to appeal present difficulties. By inferring a settlement that the parties did not intend, the traditional rule can operate to violate the appeal rights and clear intent of parties who wish to appeal. A rule that always allows an appeal, however, frustrates the federal policy in favor of settlements. Thus, federal courts should adopt a rule

155. *E.g.*, *Donovan v. Penn Shipping Co.*, 429 U.S. 648 (1977).

156. *See, e.g.*, *Dorin v. Equitable Life Assurance Socy.*, 382 F.2d 73, 78 (7th Cir. 1967).

157. *Donovan*, 429 U.S. at 649-50.

that prevents an appeal only if the parties mutually and demonstrably intended to terminate litigation through payment of the judgment. This approach respects the intent of the parties but simultaneously facilitates settlements in appropriate circumstances.

This Note also supports a uniform approach to acceptance of benefits problems in diversity actions. Deciding which rule to apply requires a diversity court carefully to balance competing interests. These interests include the state substantive policies inherent in local rules, the policy in favor of uniform outcomes between state and federal diversity forums, and federal interests in the application of a federal rule. In the acceptance of benefits problems, the concerns for uniform outcomes and state substantive policies do not argue strongly for a state rule in diversity actions; meanwhile, strong federal interests in favor of the federal rule that this Note advocates do exist. These concerns include the maintenance of the federal system of appeal and the desire to encourage only voluntary settlements, and they argue for the adoption of a federal rule on the acceptance of benefits in diversity cases. As with acceptance of benefits issues in federal question cases, a court should look to the mutual intent of the parties.