Can Court Award Attorneys' Fees and Costs While Appeal Is Pending?

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On April 11, 2017, the U.S. Court of Federal Claims directed the clerk to enter judgement under Rule 54 (b), at the request of the Plaintiffs (collectively "Memmer") and the Government, as to the amount of just compensation and interest owed to Memmer in a taking case. The Court then ordered the parties to file a joint status report stating their position on whether the Court should stay further proceedings in the case, specifically resolution of Memmer's attorneys' fees, costs, and expenses claim, during the appeal.

The parties responding by filing a status report stating that the Court was divested of jurisdiction over further proceedings in the case during the appeal. The Court disagreed, explaining that the Court retained jurisdiction under Rule 54(b)—which specifically allows the Court to issue judgments "as to one or more, but fewer than all, claims or parties. . . ." Because the judgement was entered under Rule 54 (b), the Court retained jurisdiction over the remaining claims, specifically the attorneys' fees and costs claim, during the appeal.

The Court also noted that the Supreme Court in *Budinich v. Becton, Dickinson & Co.* stated: "As a general matter, . . . it [is] indisputable that a claim for attorney's fees is not part of the merits of the action to which the fees pertain." And most courts, according to Moore's Federal Practice, have held that a trial court "may award attorney's fees . . . after a timely notice of appeal has been filed."

So, in the Court's opinion, the issue was not whether the Court *could* resolve the attorneys' fees and costs issue during the pending appeal but whether the Court *should* resolve that issue. The trial court therefore again ordered the parties to advise the Court of their positions on whether the Court should stay any further proceedings pending resolution of the appeal.

Read Judge Sweeney's full decision [here.](#)