

# THE DISCRETIONARY AWARD OF ATTORNEY'S FEES BY THE FEDERAL COURTS: SELECTIVE DEVIATION FROM THE NO-FEE RULE AND THE REGRETTABLY BRIEF LIFE OF THE PRIVATE ATTORNEY GENERAL DOCTRINE

## I. INTRODUCTION

Unlike the normative practice in other modern nations,<sup>1</sup> the general rule in the United States is that each party to a legal dispute is responsible for payment of the attorney's fees which he incurs prior to and during litigation, regardless of the ultimate disposition of the dispute by the courts.<sup>2</sup> "Costs" are typically awarded to a successful litigant and taxed against the losing party,<sup>3</sup> but statutory cost do not usually include attorney's fees.<sup>4</sup> The no-fee rule,<sup>5</sup> which is generally applicable in every American jurisdiction except one,<sup>6</sup> has long in-

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<sup>1</sup> The United States "now is probably alone in failing to allow counsel fees to the victorious litigant." Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792, 797 (1966). However, there is not uniformity among nations with respect to procedure for award of attorney's fees. *Id.* at 797-98. For discussions of the methods by which several countries provide for defrayal of victors' legal expenses, see 1962 PROCEEDINGS OF SECTIONS OF INTERNATIONAL AND COMPARATIVE LAW, A.B.A. 121-35 (1963)(Austria, Switzerland, France, Hungary).

<sup>2</sup> See, e.g., *Hall v. Cole*, 412 U.S. 1, 4-5 (1973); *Fleischmann Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967). The United States Supreme Court first approved the rule in *Arcambel v. Wiseman*, 3 U.S. (3 Dal.) 306 (1796).

<sup>3</sup> The term "costs," which is amenable to several interpretations, is herein used to indicate those expenses attendant to litigation which may be taxed against a disputant.

FEDERAL RULE OF CIVIL PROCEDURE 54 (d), provides in part:

Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs . . . .

The various states have similar provisions. See, e.g., OHIO R. CIV. P. 54(D).

<sup>4</sup> Elements of taxable costs in federal court litigation are enumerated in 28 U.S.C. § 1920 (1970). Such costs include the various fees payable to the court and its functionaries and related items of expense. They do not include the expense of legal counsel, with the technical exception of a nominal docket fee, typically \$20.00. See 28 U.S.C. § 1923(a) (1970).

<sup>5</sup> The term "no-fee rule" is used herein to denote the general American rule that attorney's fees are not awarded to a victorious litigant. The term "fee-shifting" will hereinafter be employed generically to indicate deviation from the no-fee rule.

<sup>6</sup> The State of Alaska is the only American jurisdiction in which the no-fee rule is wholly inoperative. Victorious litigants are routinely awarded counsel fees as costs by Alaskan state courts. See ALASKA STAT. § 09.60.010 (1973). The amount of such an award is determined by applying a percentage to the amount of monetary judgment, the percentage, from among several alternative figures, to be applied depends upon the stage of the litigation process at which the dispute is terminated. ALAS. R. CIV. P. 82(a). Where computation of an award in

spired acerbic commentary from many quarters.<sup>7</sup> Despite these continuing attacks, the no-fee rule has enjoyed persistent vitality throughout our nation's history.

Proposals for the complete abrogation of the no-fee rule<sup>8</sup> have been to no avail. Moreover, throughout most of the past two hundred years, the American judiciary has been loathe to sanction any far-reaching deviation from the traditional allocation of attorney's fees.<sup>9</sup> However, the no-fee rule is not inviolable, and exceptions to its appli-

this manner is unsuitable," the court shall award a fee commensurate with the amount and value of legal services rendered." *Id.*

Nevada has a partial indemnity system. The courts of Nevada are empowered to make an award of attorney's fees to a prevailing litigant who recovers not more than \$10,000 or who successfully defends an action wherein the amount prayed for does not exceed \$10,000. *See* NEV. REV. STAT. § 18.010(3) (1971). Other states have statutory provision for limited fee-shifting. However, the maximum amounts which may be awarded under such statutes are usually nominal, as under the federal scheme.

<sup>7</sup> Professor Ehrenzweig has been perhaps the most vehement critic of the no-fee rule. *See* Ehrenzweig, *supra* note 1; Ehrenzweig, *Shall Counsel Fees Be Allowed?*, 26 CALIF. ST. B. J. 107 (1951). He opined that the no-fee rule fosters "the power and, indeed, the right of a losing party in a civil suit to inflict on the winner not only the misery but also the expense of enforcing his just claim." Ehrenzweig, *supra* note 1, at 792-93. Professor Ehrenzweig's disenchantment with the no-fee rule was buttressed by personal exposure to its harshness and inequity as an impoverished immigrant in the United States. *Id.* at 792.

Professor Ehrenzweig was neither the first nor the most recent detractor of the no-fee rule. A nineteenth century American writer termed the no-fee rule "a lingering remnant of the old barbaric dispensation, when philosophy, justice and common sense were sacrificed to formal and senseless precedents." Watson, *A Rationale of the Law of Costs*, 16 CENT. L. J. 306, 307 (1883). Fifty years ago, the Judicial Council of Massachusetts evinced disbelief in the correctness of the rule, posing, but unable to persuasively answer, the question: "On what principle of justice can a plaintiff wrongfully run down on a public highway recover his doctor's bill but not his lawyer's bill?" *First Report of the Judicial Council of Massachusetts*, 11 MASS. L. Q. 7, 64 (1925). Many commentators have since voiced dissatisfaction with the no-fee rule. *See, e.g.,* Avilla, *Shall Counsel Fees Be Allowed?*, 13 CALIF. ST. B. J. 42 (1938); Greenberger, *The Cost of Justice: An American Problem, An English Solution*, 9 VILL. L. REV. 400 (1964); Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75 (1963); McLaughlin, *The Recovery of Attorney's Fees: A New Method of Financing Legal Services*, 40 FORDHAM L. REV. 761 (1972); Stirling, *Attorney's Fees: Who Should Bear the Burden?*, 41 CALIF. ST. B. J. 874 (1966); Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 U. COLO. L. REV. 202 (1966); Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216 (1967).

<sup>8</sup> Most commentators who have expressed disapproval of the no-fee rule have advocated the adoption of some type of across-the-board indemnity system. *See, e.g.,* Ehrenzweig, *supra* note 1; Greenberger, *supra* note 7; Kuenzel, *supra* note 7; Professor Stoebuck has offered a draft statute governing the allocation of attorney's fees. Stoebuck, *supra* note 7, at 211-18.

<sup>9</sup> Particularly during the 1800's, the United States Supreme Court demonstrated unyielding adherence to the no-fee rule, usually without offering substantial explanation for its posture. This phenomenon is exemplified in the following line of cases: *Arcambel v. Wiseman*, 3 U.S. (3 Dal.) 306 (1796); *Day v. Woodworth*, 54 U.S. (13 How.) 363 (1852); *Oerlichs v. Spain*, 82 U.S. (15 Wall.) 211 (1872); *Stewart v. Sonneborn*, 98 U.S. 187 (1878). When exceptions to the no-fee rule were later recognized, they were quite narrowly applied. *See* notes 107-36 *infra* and accompanying text.

cations have been carved out by legislatures<sup>10</sup> and by the courts.<sup>11</sup> While some judicially created equitable exceptions to the no-fee rule have long been recognized, the past decade has witnessed a dramatic broadening of the circumstances wherein equitable fee-shifting has been undertaken by federal courts.<sup>12</sup> This laudable trend was abruptly curbed earlier this year by the United States Supreme Court.

It is the thesis of this note that lower federal court decisions of the past several years constituted a significant and welcome departure from traditionally rigid judicial adherence to the no-fee rule and its narrowly circumscribed exceptions and that the Supreme Court's recent disapproval of these developments is lamentable. The discussion will initially present an overview of the no-fee rule, briefly tracing its English antecedents, suggesting the bases for its development in the United States, and then surveying the values which it purportedly serves and considering the criticisms which have been levelled against it. The focus will then shift to the exceptions to the no-fee rule. First, the long-recognized exceptions will be detailed. This note will then describe the extension of traditional grounds for equitable fee-shifting to encompass a greater variety of situations and will outline the culmination of this process of extension in the emergence of a new formulation for the equitable award of attorney's fees, the conceptually broad "private attorney general" doctrine. This discussion will next offer an assessment of this new equitable fee-shifting doctrine by exploring its theoretical underpinnings in two decisions of the United States Supreme Court, reviewing its articulation and use by the lower federal courts, and suggesting reasons for its soundness as a basis for exercising discretionary judicial power. Finally, this note will examine the recent Supreme Court case, *Alyeska Pipe Service Co. v. Wilderness Society*,<sup>13</sup> in which the Supreme Court severely curtailed the power of the federal courts to award attorney's fees and will attempt to demonstrate that the Court's reasoning was flawed and that the holding in the case was unduly broad.

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<sup>10</sup> See notes 86 and 87 *infra*.

<sup>11</sup> See notes 101-243 *infra* and accompanying text.

<sup>12</sup> Consideration of state court fee-shifting is beyond the scope of this note. Recent trends in the expansion of rationales for fee awards are most dramatically apparent in federal court decisions. However, equitable exceptions to the no-fee rule, where applicable to the particular set of circumstances presented by a piece of litigation, should lead to fee-shifting regardless of the forum. There is a single body equity, and its principles should possess validity in all American jurisdictions.

<sup>13</sup> 95 S. Ct. 1612 (1975).

## II. GENESIS AND PERPETUATION OF THE NO-FEE RULE

### A. Allocation of Attorney's Fees in England

The contemporary practice in England is that attorney's fees are routinely awarded as costs to successful litigants,<sup>14</sup> although a trial court may, in the exercise of its discretion, decline to make such an award.<sup>15</sup> The current English system for allocation of attorney's fees has prevailed in essentially the same form<sup>16</sup> since 1875,<sup>17</sup> the result of an evolutionary process of six centuries' duration. Historically, the treatment of attorney's fees in England was a function of the demarcation between law and equity.<sup>18</sup>

At early common law there was no judicial allocation of litigation expenses among litigants.<sup>19</sup> However, an unsuccessful plaintiff was amerced—assessed a fine payable to the crown—for asserting an untenable claim.<sup>20</sup> The law made no provision for imposition of a similar fine upon a losing defendant.<sup>21</sup> The Statute of Gloucester,<sup>22</sup> enacted in 1275, first provided for award of litigation expenses by English law courts.<sup>23</sup> That statute authorized taxation of costs only against unseccessul defendants, its one-sidedness apparently “based upon the theory that the amercement in favor of the crown would be sufficient to deter the prosecution of wrongful demands, but that the damages awarded against a defendant *in misericordia* were insufficient to discourage the interposition of wrongful defenses, or to reimburse the plaintiff for his expenses.”<sup>24</sup> On its face the Statute of

<sup>14</sup> 6 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 54.77[2] at 1703 (2d ed. 1974).

<sup>15</sup> *Id.*

<sup>16</sup> For a cogent explanation of the modern English procedure for the taxation of costs, including attorney's fees, see Goodhart, *Costs*, 38 YALE L. J. 849, 856-72 (1929). A more thoroughgoing treatment of the same subject appears in R. JACKSON, THE MACHINERY OF JUSTICE IN ENGLAND (5th ed. 1967).

<sup>17</sup> Goodhart, *supra* note 16, at 854.

<sup>18</sup> *Id.* at 851.

<sup>19</sup> 2 F. POLLOCK AND F. MAITLAND, THE HISTORY OF ENGLISH LAW 597 (2d ed. 1898). It has been suggested that the effects of this rule were not immutable in practice: “[I]t appears that attempts were made . . . to reimburse the plaintiff, by taking his expenses into consideration in measuring his damages; but this custom never became a rule and was rarely and reluctantly followed.” Watson, *supra* note 7, at 306-07 (citations omitted).

<sup>20</sup> Day v. Woodworth, 54 U.S. (13 How.) 363, 372 (1852). The amercement was assessed *pro falso clamore*. Goodhart, *supra* note 16, at 852.

<sup>21</sup> A losing defendant “was *in misericordia* for his unjust detention of the plaintiff's right, but was not liable to the payment of any costs of suit, at least under that title.” Goodhart, *supra* note 16, at 852.

<sup>22</sup> 6 Edw. I, c. 1 (1275).

<sup>23</sup> Goodhart, *supra* note 16, at 852. The Statute of Gloucester was purportedly predicated by public displeasure with the plight of successful plaintiffs who were saddled with the expense of vindicating their rights. Watson, *supra* note 7, at 307.

<sup>24</sup> Watson, *supra* note 7, at 307; see also Goodhart, *supra* note 16, at 853.

Gloucester provided merely for recovery of the "costs of writ" in actions for land,<sup>25</sup> the type of action in which plaintiffs' expenses were greatest,<sup>26</sup> but the courts soon came to construe the enactment to mandate the award of all litigation expenses in any case wherein the plaintiff recovered damages.<sup>27</sup> Statutory authorization for recovery of costs, including attorney's fees by vindicated defendants followed more than three hundred years later.<sup>28</sup>

On the equity side the ability to award appropriate costs, including counsel fees was traditionally among the broad discretionary powers reposed in the English Chancellor.<sup>29</sup> A 1394 enactment<sup>30</sup> supplied a statutory underpinning for the discretionary award of costs in equity. Whether that statute actually created equity's power to award costs<sup>31</sup> or was simply declaratory of an inherent equitable power<sup>32</sup> is not entirely clear. However, the preferred view seems to be that the power to make discretionary awards of costs antedated the statute.<sup>33</sup> With the passage of the Supreme Court of Judicature Acts of 1873<sup>34</sup> and 1875,<sup>35</sup> law and equity assumed essentially equal footing with respect to the award of costs,<sup>36</sup> a situation which still prevails.<sup>37</sup> Those two enactments vested in law courts substantial discretionary latitude, establishing their authority to forego the usual award of costs to a prevailing party "for good cause,"<sup>38</sup>

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<sup>25</sup> Watson, *supra* note 7, at 307.

<sup>26</sup> Note, *Use of Taxable Costs to Regulate the Conduct of Litigants*, 53 COLUM. L. REV. 78, 79 (1953).

<sup>27</sup> Goodhart, *supra* note 16, at 852-53; Watson, *supra* note 7, at 307.

<sup>28</sup> 4 Jac. I, c. 3 (1607). There were some intervening statutory developments. See Note, *supra* note 26, at 80.

<sup>29</sup> Goodhart, *supra* note 16, at 854.

<sup>30</sup> 17 Rich. II, c. 6 (1394).

<sup>31</sup> It has been stated that "the Chancellor's power to award costs originated by statute . . ." Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216, 1217 n. 6 (1967). See also *Stallo v. Wagner*, 245 F. 636, 638 (2d Cir. 1917).

<sup>32</sup> See King and Plater, *The Right to Counsel Fees in Public Interest Environmental Litigation*, 41 TENN. L. REV. 27, 32 (1973).

<sup>33</sup> Sir Arthur Goodhart said: "The better view seems to be that the power was inherent, and it is clear that the courts have acted on this view." Goodhart, *supra* note 16, at 854 (citing *Andrews v. Barnes*, 39 Ch.D. 133 (1888); *Corporation of Burford v. Lenthall*, 2 Atk. 551 (1743)).

<sup>34</sup> 36 & 37 Vict., c. 66 (1873).

<sup>35</sup> 38 & 39 Vict., c. 77 (1875).

<sup>36</sup> 6 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 54.70[2], at 1302 (2d ed. 1974).

<sup>37</sup> See King and Plater, *supra* note 32, at 32.

<sup>38</sup> Goodhart, *supra* note 16, at 854.

## B. *Emergence of the American No-Fee Rule*

The history of costs in colonial America is clouded.<sup>39</sup> Following the Revolution the then operating English system of costs was received as an element of the common law of the United States.<sup>40</sup> That is, costs, including attorney's fees, could be awarded to victorious litigants, but only pursuant to statute in actions at law.<sup>41</sup> However, there has always been a disparity between the United States and England with respect to the actual incidence of fee-shifting. Several theories have been offered in explanation of this disparity.

Professor Ehrenzweig insisted that prevailing litigants are not routinely awarded their attorney's fees as costs in the United States solely because of an "historical accident."<sup>42</sup> Recognizing that many states had legislatively provided for recovery of attorney's fees during the nation's first half century,<sup>43</sup> he contended that such statutes fell into disuse through inadvertence. Legislatures committed the "fatal mistake of fixing the amount recoverable in dollars and cents rather than in percentages of the amount recovered or claimed."<sup>44</sup> Charges made for legal services increased with the passage of time, and the prescriptions of the fixed-amount statutes which authorized fee recovery became economically unrealistic. Thus, Professor Ehrenzweig asserted, as such statutes were stripped of practical impact, they were disregarded, and the no-fee rule was born of a "process of gradual forgetting rather than a deep-seated moral argument. . . ."<sup>45</sup>

Many commentators do not subscribe to Professor Ehrenzweig's "historical accident" theory. Some writers have suggested that the

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<sup>39</sup> Conflicting views have been expressed concerning the early colonial treatment of litigation expenses. Several writers have asserted that costs, including attorney's fees, were typically awarded to prevailing litigants in colonial America. See, e.g., Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 640 (1974); Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216, 1218 (1967). Note, *Use of Taxable Costs to Regulate the Conduct of Litigants*, 53 COLUM. L. REV. 78, 80 (1953). Others have intimated that the general English system of allocating the expenses of litigation among disputants was not adopted by the early colonists. See Ehrenzweig, *supra* note 1, at 798; Goodhart, *supra* note 16, at 873; Note, *Distribution of Legal Expense Among Litigants*, 49 YALE L. J. 699, 700 (1940).

<sup>40</sup> 6 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 54.70[2], at 1303 (2d ed. 1974).

<sup>41</sup> *Id.* See also notes 19-28 *supra* and accompanying text.

<sup>42</sup> See Ehrenzweig, *supra* note 1, at 798-99.

<sup>43</sup> Many jurisdictions enacted statutes authorizing widespread fee-shifting. However, such statutes, most of which were passed during the late eighteenth and early nineteenth centuries, limited fee awards to rather small monetary amounts. These statutes are collected in Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216, 1218-19 nn. 13-15 (1967).

<sup>44</sup> Ehrenzweig, *supra* note 1, at 799.

<sup>45</sup> *Id.*

no-fee rule is an outgrowth of widely held seventeenth century distrust of lawyers.<sup>46</sup> Throughout much of the colonial era, the legal profession was held in low esteem:

In every one of the Colonies, practically throughout the Seventeenth Century, the lawyer or attorney was a character of disrepute and suspicion . . . . In many of the Colonies, persons acting as attorneys were forbidden to receive any fee; in some all paid attorneys were barred from the courts . . .<sup>47</sup>

Adherents of the view that the no-fee rule was spawned by longstanding disdain for lawyers theorize that the later statutes providing for recovery of attorney's fees<sup>48</sup> were enacted only after the legal profession had achieved enhanced social esteem.<sup>49</sup> They believe that legislatures intentionally prescribed rigid dollar amount limits for fee awards due to vestigial suspicion of lawyers.<sup>50</sup>

At least one writer has taken a broader view, advancing a more comprehensive and, it is submitted, more credible explanation for the nascence of the no-fee rule.<sup>51</sup> According to this theory, the cumulation of diverse social, political and economic factors, including distrust of lawyers, predicated adoption of the no-fee rule in the United States. One such factor was the colonial perception of the law. During the seventeenth century the law was viewed as an amalgam of simple rules which could easily be comprehended by the citizenry.<sup>52</sup> Thus utilization of trained legal counsel, and concomitant payment of attorney's fees were not seen as indispensable requisites for successful litigation. This belief was undoubtedly reinforced by the fact that many judges were not lawyers.<sup>53</sup>

The early Americans' simplistic view of the law comported well with the individualistic spirit of the times. The same strident individualism and self-reliance which led to the rejection of the fetters of English domination and fostered exploration of the western frontier also demanded that each man be willing to defend himself, whether

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<sup>46</sup> See, e.g., Note, *Use of Taxable Costs to Regulate the Conduct of Litigants*, 53 COLUM. L. REV. 78, 80 (1953); Note, *Distribution of Legal Expense Among Litigants*, 49 YALE. L. J. 699, 701 (1940).

<sup>47</sup> C. WARREN, A HISTORY OF THE AMERICAN BAR 4 (1911).

<sup>48</sup> See note 43 *supra*.

<sup>49</sup> See Goodhart, *supra* note 16, at 873.

<sup>50</sup> See sources cited in note 46 *supra*.

<sup>51</sup> See Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216, 1218-21 (1967).

<sup>52</sup> Goodhart, *supra* note 16, at 873. See generally C. WARREN, A HISTORY OF THE AMERICAN BAR 4-16 (1911).

<sup>53</sup> Goodhart, *supra* note 16, at 873.

in court or elsewhere.<sup>54</sup> At a time when legal representation was considered non-essential, there existed little need for awards of attorney's fees. On the contrary, provision for fee awards might have stimulated the use of attorneys by disputants, a decidedly unwanted development to many in light of the legal profession's general disrepute.<sup>55</sup> Moreover, the colonial courtroom was an arena which provided drama and amusement for spectators and offered litigants opportunity to display their argumentative capabilities.<sup>56</sup> The introduction of trained counsel into such an atmosphere might have spoiled the contest, giving the represented party an unfair advantage.<sup>57</sup> And even if one party chose to retain an attorney, the ethic of the "game" required that he alone should bear the cost.<sup>58</sup> It is these early American attitudes — emphasis upon individual action and responsibility, distrust of lawyers, simplistic perception of the law, and belief that litigation was a "game" — which were the foundation of the no-fee rule.<sup>59</sup>

Whichever of the offered rationales for the no-fee rule's origination one chooses to accept, it is asserted that the rationale scarcely constitutes a compelling justification for retention of the no-fee rule today. Certainly if Professor Ehrenzweig's "historical accident" theory is valid, there exists no valid reason why modern litigants should continue to bear the brunt of early nineteenth century legislative imprudence. Furthermore, even if, as most commentators suggest, the inception of the no-fee rule can be linked to salient policy considerations, reflective of deeply ingrained seventeenth and eighteenth century values and belief, the United States has long ceased to

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<sup>54</sup> The conditions of early American living mandated that persons be capable of fending for themselves in the face of adversity. Accentuation of the virtues of independent action and self-sufficiency did not abate at the courthouse door. On the contrary, self-representation by litigants—one man pitted against another without the interference of lawyers—was wholly consistent with the individualistic tenor of early American life. See generally R. POUND, *THE SPIRIT OF THE COMMON LAW* 124-45 (1921).

<sup>55</sup> See Goodhart, *supra* note 16, at 873.

<sup>56</sup> C. McCORMICK, *DAMAGES* 258 (1935).

<sup>57</sup> Dean Roscoe Pound stated that the American legal system early embraced the "theory of litigation as a fair fight, according to the canons of the manly art, with a court to see fair play and to prevent interference." R. POUND, *supra* note 54, at 13. Given this view, the use of counsel might be seen to distort the functioning of the legal process, both hindering the course of justice and detracting from the entertainment value of litigation. See generally *id.* at 124-28.

<sup>58</sup> Note, *Attorney's Fees, Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216, 1220-21 (1967).

<sup>59</sup> It has been suggested that post-Revolution antipathy for England and its institutions also helped foster the development of the no-fee rule in the United States. Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 641 (1974).

be a fledgling, predominantly agrarian society. This fact has been amply noted by those who have disparaged the no-fee rule.

### C. *Contemporary Evaluation of the No-Fee Rule*

The most frequently cited<sup>60</sup> deficiency of the no-fee is that it effectively precludes resort to the adjudicatory process by a sizeable portion of the citizenry.<sup>61</sup> The cost of retained private counsel may be prohibitive for a substantial number of Americans,<sup>62</sup> including many who cannot be categorized as "indigent."<sup>63</sup> In the absence of fee-shifting, it may be more practical to endure an injustice than to seek legal redress:

Current practice tends to deter the prosecution of even clearly meritorious small claims by litigants who could at best recover less than the often high expenses of counsel . . . . And what is true for plaintiffs also holds for defendants: the cost of defending against an unjust small claim may easily exceed the cost of simply paying what is demanded. This result is distasteful, for it ranks legal rights by dollar value . . . .<sup>64</sup>

While various schemes have been employed to assist potential litigants, such devices fail to fully remedy the problem. For example, legal aid programs, whether privately or publicly funded, do not offer sufficient breadth of coverage to furnish representation for all who are in need of assistance. Because limited financial and human resources are devoted to such programs,<sup>65</sup> they are burdened with exceedingly heavy caseloads. Hence "it is physically impossible for legal services, legal aid and other programs established to give civil legal assistance to the poor to serve all, or even a majority, of those

<sup>60</sup> See note 7 *supra*.

<sup>61</sup> "Strangely, terribly, intolerably, these United States, this citadel of democracy, which has taken it on itself to play the decisive role in building the Rule of Law throughout the world, has forgotten the little man in his struggle for civil justice." Ehrenzweig, *supra* note 1, at 793.

<sup>62</sup> The problem of practical unavailability of legal counsel has been extensively discussed. See, e.g., Carlin and Howard, *Legal Representation and Class Justice*, 12 U.C.L.A. L. REV. 381 (1964); Note, *Litigation Costs: The Hidden Barrier to the Indigent*, 56 GEO. L. REV. 516 (1968).

<sup>63</sup> See Comment, *Providing Legal Services for the Middle Class in Civil Matters: The Problem, the Duty, and a Solution*, 26 U. PITT. L. REV. 811 (1965).

<sup>64</sup> Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 650 (1974). See Stirling, *supra* note 7.

<sup>65</sup> It has been estimated that in 1969 there were only 4,000 attorneys working on behalf of the 16.5% of the population whose incomes fell below the federal poverty level; over 200,000 attorneys served those whose income levels were in the upper 20%. See Siver, *The Imminent Failure of Legal Services for the Poor: Why and How to Limit Caseload*, 46 J. URBAN L. 217, 217-18 (1969).

unable otherwise to obtain legal representation."<sup>66</sup> Since scarce resources must be expended where the need is greatest, legal aid programs may be required to concentrate their efforts upon representation of the very poor.<sup>67</sup> Thus members of the working class who, only through substantial financial sacrifice, are able to retain paid counsel are often altogether excluded from the ambit of legal aid programs.<sup>68</sup> Moreover, the quality of services made available through such programs is, at least in some instances, suspect.<sup>69</sup>

The problems confronted by those who lack the means to employ legal counsel on a pay-as-you-go basis can be partially alleviated by use of the contingent fee system.<sup>70</sup> However, the contingent fee method of obtaining representation has been labelled "champertous" by some observers,<sup>71</sup> and it is unquestionably open to criticism on a variety of grounds.<sup>72</sup> And although contingent fee arrangements permit some plaintiffs to obtain legal counsel without out-of-pocket expense, they provide little help to those claimants who seek non-

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<sup>66</sup> *Id.* at 217. See generally Clark, *Legal Services Programs—The Caseload Problem, or How to Avoid Becoming the New Welfare Department*, 47 J. URBAN L. 797 (1970); Bellow, *Reflections on Case-Load Limitation*, 26 LEGAL AID BRIEFCASE 195 (1969); Note, *Neighborhood Law Offices: The New Wave in Legal Services for the Poor*, 80 HARV. L. REV. 805 (1967).

<sup>67</sup> See Nussbaum, *Attorney's Fees in Public Interest Litigation*, 48 N.Y.U. L. REV. 301, 306-07 (1973).

<sup>68</sup> See *id.* See also Comment, *Providing Legal Services for the Middle Class in Civil Matters: The Problem, the Duty, and a Solution*, 26 U. PITT. L. REV. 811 (1965).

<sup>69</sup> The enormous disparity between demand for and resources allocated to legal aid programs, and the resultant heavy caseloads borne by legal aid attorneys, suggest that clients of such programs may sometimes receive inadequate attention. Cf. Clark, *supra* note 66, at 798.

<sup>70</sup> The contingent fee arrangement enables some claimants to procure legal counsel with little or no out-of-pocket expense since the lawyer accepts a specified proportion of the ultimate recovery, if any, in exchange for his services. A thorough discussion of contingent fees appears in F. MACKINNON, *CONTINGENT FEES FOR LEGAL SERVICES* (1964).

<sup>71</sup> Professor Ehrenzweig referred to the contingent fee as "that legitimate sibling of criminal champerty, . . . an incurable symptom of an uncured disease." Ehrenzweig, *supra* note 1, at 794. There has been much debate concerning the propriety of arrangements whereby lawyers have direct financial stakes in the course and outcome of litigation. See, e.g., Comment, *Are Contingent Fees Ethical Where Client Is Able to Pay a Retainer?*, 20 OHIO ST. L. J. 329 (1959); Note, *Contingent Fee: Champerty or Champion?*, 21 CLEV. ST. L. REV. 15 (1972). The contingent fee system is an outgrowth of the no-fee rule, and it has been suggested that resistance to fundamental change in the American method of allocating litigants' expenses has been spearheaded by lawyers who have vested interests in the continued attractiveness of contingent fee arrangements to potential claimants. Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216, 1226 & notes 48-50 (1967).

<sup>72</sup> The contingent fee contributes heavily to the congestion of court dockets. *Id.* It may foster the use of dilatory tactics to exploit the nuisance value of litigation, or it can create situations in which, contrary to his client's best interest, there is substantial monetary incentive for an attorney to accept an early settlement offer. See F. MACKINNON *supra* note 70, at 159-200. See also sources cited in note 71 *supra*.

monetary relief or those whose damage claims are not clearly meritorious, nor do they aid defendants. The efficacy of small claims courts, where available, as a forum for redress of wrongs suffered by the "little guy" is doubtful.<sup>73</sup> The reality of small claims court litigation has led some to speculate "whether the original promise of speedy and inexpensive justice for the poor litigant has not been wildly distorted into a speedy and inexpensive collection mechanism for creditors."<sup>74</sup> Due to great variations in the mechanical and procedural characteristics of small claims court,<sup>75</sup> broad generalizations concerning their effectiveness are perhaps unwarranted. It will suffice to note that only a limited range of actions fall within small claims jurisdiction, that trained counsel may nonetheless be necessary for successful small claims litigation,<sup>76</sup> and that an impecunious defendant has little control over the court in which he is sued. Thus small claims courts, like legal aid programs and the contingent fee system, do not present a complete solution to the problems of persons embroiled in legal disputes but unable to afford regular attorney's fees.<sup>77</sup>

It has been contended that the no-fee rule in fact provides less disincentive to the assertion of legal rights by the less-than-wealthy than does a fee recovery system. The Supreme Court has recognized the argument "that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their

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<sup>73</sup> As an American lawyer I know that the little man's only refuge, the small claims court, is unavailable in innumerable communities; and that where it exists, it is prevailingly a collection agency, and presents otherwise the horrifying spectacle of a court without law, abandoned by the legal profession . . . .

Ehrenzweig, *supra* note 1, at 795-96. *But see* Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 651 (1974).

<sup>74</sup> Steadman and Rosenstein, "Small Claims" Consumer Plaintiffs in the Philadelphia Municipal Court: An Empirical Study, 121 U. PA. L. REV. 1309, 1309-10 (1973). Divergent views have been expressed. Compare Note, *The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California*, 21 STAN. L. REV. 1657 (1969), with Comment, *The California Small Claims Court*, 52 CALIF. L. REV. 876 (1964).

<sup>75</sup> Small claims courts in various jurisdictions differ with respect to what persons are entitled to sue, whether attorneys may appear, subject matter jurisdictional limitations, the expense of bringing suit, available avenues of post-trial action and other matters. *See* Steadman and Rosenstein, *supra* note 74, at 1317-25.

<sup>76</sup> Even a claim involving a small dollar amount may feature issues sufficiently complex to make the use of counsel, especially where the opposing party is represented by an attorney, highly desirable. Although not conclusive, the results of one study indicate that "representation by an attorney would seem to enhance the plaintiff's chances of success or at least to avert a judgment for defendant" in Philadelphia small claims actions. *Id.* at 1333.

<sup>77</sup> *See* Ehrenzweig, *supra* note 1, at 794-96; Kuenzel, *supra* note 7, at 84-85; King and Plater, *supra* note 32, at 35-37; Kuenzel, *supra* note 7, at 84-85.

opponents' counsel."<sup>78</sup> Even if "litigation is at best uncertain," however, it must be assumed that more often than not American tribunals render just decisions when each party is represented by competent counsel.<sup>79</sup> The prospect of assessment of the opposing party's counsel fees might<sup>80</sup> deter some potential litigants in close cases. It would nonetheless obviate the choice, which may present itself under the no-fee rule, between forbearing assertion of a meritorious claim (or declining to defend against a specious claim) and winning a lawsuit to one's financial detriment.<sup>81</sup>

Under the no-fee rule, in most situations, a wronged party cannot be made whole.<sup>82</sup> Even where a litigant receives a damage judgment in excess of his attorney's fees, he is not, in the absence of fee-shifting, restored to the position which he would have occupied had he never been the victim of a legal wrong. The Supreme Court long ago intimated that fee-shifting was not necessary to compensate a victorious litigant completely, viewing the victor's attorney's fees as only a remote consequence of the losing opponent's actions.<sup>83</sup> This notion, if ever reasonable, has little merit today. Access to the courts is crucial to the vindication of legal rights,<sup>84</sup> and it cannot be seriously suggested that persons should venture into litigation without the as-

<sup>78</sup> *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967).

<sup>79</sup> Professor Goodhart issued the classic rejoinder to the argument that fee-shifting is particularly unfair because of the uncertainty of litigation. It had been contended that fee-shifting "is based on the wholly unwarranted assumption that the losing party in litigation is always, or even ordinarily, in the wrong." Satterthwaite, *Increasing Costs to be Paid by the Losing Party*, 46 N.J. L. J. 133, 133 (1923). In response, Professor Goodhart said:

Is not the answer to this that the costs must be paid by one party or the other, and that, in spite of Mr. Satterthwaite's pessimism, it is at least more probable that the losing party was in the wrong? If New Jersey justice is so much a matter of luck, it hardly seems worthwhile to have courts and lawyers; it would be cheaper, and certainly less dilatory, to spin a coin.

Goodhart, *supra* note 16, at 877.

<sup>80</sup> It has been persuasively argued that information presently available does not afford a basis for confident prediction of the effect of fee-shifting on litigation decisions. See Mause, *Winner Takes All: A Re-examination of the Indemnity System*, 55 IOWA L. REV. 26 (1969).

<sup>81</sup> For example, suppose that *A* has suffered a legal wrong and resultant damage in the amount of \$200 at the hands of *B*. The probable cost of obtaining legal counsel to prosecute an action against *B* is \$500. *A* thus has a choice between living with his \$200 loss or invoking the legal process, with the likely result being a net loss of \$300. Such dilemmas may occur frequently in situations where a prospective plaintiff, although entitled to some type of relief, does not have a viable claim for damages. See Stirling, *supra* note 7.

<sup>82</sup> See Greenberger, *supra* note 7, at 406-07; McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN. L. REV. 619, 643 (1931).

<sup>83</sup> See *Stewart v. Sonneborn*, 98 U.S. 187, 197 (1878).

<sup>84</sup> The Supreme Court has observed that in some circumstances "litigation may be the sole practicable avenue open" for the assertion of legal rights. *NAACP v. Button*, 371 U.S. 415, 430 (1963). Cf. *Boddie v. Connecticut*, 401 U.S. 371 (1971).

sistance of trained legal counsel.<sup>85</sup>

The no-fee rule was born in an era of uncrowded court dockets, when resort to litigation was to be encouraged.<sup>86</sup> Today, when virtually all jurisdictions are beset by docket backlogs which cause serious delays in the administration of justice, settlement of disputes is preferable to full-scale adjudication.<sup>87</sup> The no-fee rule can discourage just settlement of disputes by affording a wealthy disputant unconscionable leverage over an impecunious adversary. In a protracted battle of attrition with ever-mounting counsel fees it is the "little guy" who must invariably succumb. Thus the no-fee rule may foster the use of dilatory tactics,<sup>88</sup> exacerbating the problems of our overcrowded courts. Furthermore the no-fee rule fails to adequately deter the prosecution of claims which are wholly specious.<sup>89</sup> Abrogation of the no-fee rule, says some of its critics, would therefore decrease the aggregate volume of litigation.<sup>90</sup> Although any generalization about the impact of wholesale fee-shifting upon the quantum of litigation is highly speculative,<sup>91</sup> it is indisputable that the award of attorney's fees can affect the types of claims and parties which come before the courts.<sup>92</sup> It is recognition of this fact which has led to the development of limited exceptions to the no-fee rule. Realizing that the no-fee rule can operate dysfunctionally, Congress and the federal judiciary have

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<sup>85</sup> The Supreme Court has, of course, recognized the extreme importance of legal representation in the context of criminal actions. *See, e.g.,* *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Johnson v. Zerbst*, 304 U.S. 458 (1938). It has been suggested that much of the reasoning brought to bear in the Court's criminal right-to-counsel decisions applies with like force in the civil litigation context. *See Note, The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322 (1966).

<sup>86</sup> *See generally* R. POUND, *supra* note 54, at 124-45.

<sup>87</sup> *See generally* Burger, *The State of the Judiciary—1970*, 56 A.B.A.J. 929 (1970).

<sup>88</sup> *See Note, Use of Taxable Costs to Regulate the Conduct of Litigants*, 53 COLUM. L. REV. 78, 87-94 (1953).

<sup>89</sup> *See* Kuenzel, *supra* note 7, at 78-80; Stoebuck, *supra* note 7, at 202. Fee-shifting has been used as a method of deterring specious legal action in a rather narrow range of circumstances. *See* notes 107-24 *infra* and accompanying text.

<sup>90</sup> *See, e.g.,* Greenberger, *supra* note 7, at 404-05; Stoebuck, *supra* note 7, at 202; Note, *Use of Taxable Costs to Regulate the Conduct of Litigants*, 53 COLUM. L. REV. 78, 82-94 (1953).

<sup>91</sup> One writer has contended that the effects of across-the-board fee awards are uncertain. Mause, *supra* note 80. He stresses that prospective litigants are usually unable to view the merits of their cases dispassionately. *Id.* at 31-32. He concludes that "analysis indicates that indemnity in favor of all successful litigants is as least as likely to encourage litigation as to discourage it." *Id.* at 35.

<sup>92</sup> Although he contends that "many of the asserted advantages of a general rule of indemnity must be characterized as illusory—at least until more evidence concerning the behavior of litigants is somehow made available," *id.* at 27, even Professor Mause recognizes that fee-shifting can be a useful tool for influencing litigation and litigants. *Id.* at 38-50.

employed a selective, and oft-times haphazard, approach to sanction fee-shifting in situations where the adverse effects of the no-fee rule are most severe.

## II. TRADITIONALLY RECOGNIZED EXCEPTIONS TO THE NO-FEE RULE

### A. *Statutory Provision for Fee-Shifting*

The no-fee rule is subject to modification or negation by statute.<sup>93</sup> Congress has enacted legislation which authorizes the award of attorney's fees in a variety of contexts, most of which are quite limited. Congressional sanction of fee-shifting during recent years has centered upon civil rights<sup>94</sup> and environmental<sup>95</sup> actions. Statutory fee-shifting may be mandatory<sup>96</sup> or permissive.<sup>97</sup> Where Congress has provided that a victorious litigant "may" recover attorney's fees, the propriety of such an award is for the discretion of the court in each case. Since federal courts are generally empowered to make discretionary awards of attorney's fees,<sup>98</sup> explicit legislative authorization for discretionary fee-shifting could be viewed as surplusage.<sup>99</sup> How-

<sup>93</sup> *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967).

A situation similar to those wherein fee-shifting is statutorily mandated is presented when disputants have consented to allocate attorney's fees in a given manner. A contractual arrangement which provides for fee-shifting among the parties will be enforced by the courts. *Id.* For a thorough discussion of contractual allocation of litigation expense, see 2 S. SPEISER, ATTORNEYS' FEES 283-368 (1973).

<sup>94</sup> See, e.g., 20 U.S.C. § 1617 (Supp. 1974) (school desegregation actions). 42 U.S.C. § 2000a-3(b) (1970) (public accommodations). 42 U.S.C. § 2000e-5(k) (1970) (equal employment opportunity).

<sup>95</sup> See, e.g., 33 U.S.C. § 1365(d) (Supp. 1974) (Federal Water Pollution Control Act); 33 U.S.C. § 1415(g)(4) (Supp. 1974) (Marine Protection Research and Sanctuaries Act); 42 U.S.C. § 1857h-2(d) (Supp. 1974) (Clean Air Act).

<sup>96</sup> See, e.g., 7 U.S.C. § 210(f) (1970) (Packers and Stockyards Act); 7 U.S.C. § 499g(b) (1970) (Perishable Agricultural Commodities Act); 15 U.S.C. § 15 (1970) (Clayton Act); 15 U.S.C. § 1640(a) (1970) (Truth in Lending Act); 46 U.S.C. § 1227 (1970) (Merchant Marine Act); 49 U.S.C. §§ 8, 908(b) (1970) (Interstate Commerce Act).

<sup>97</sup> See, e.g., 15 U.S.C. § 78i(e), r(a) (1970) (Securities Exchange Act); 15 U.S.C. § 77www(a) (1970) (Trust Indenture Act); 17 U.S.C. § 116 (1970) (Copyright Act); 35 U.S.C. § 285 (1970) (Patent Act); 38 U.S.C. § 1822(b) (1970) (Servicemen's Readjustment Act).

<sup>98</sup> See notes 101-06 *infra* and accompanying text. *But see* Aleyeska Pipeline Serv. Co. v. Wilderness Soc'y, 95 S. Ct. 1612 (1975), discussed in notes 331-77 *infra* and accompanying text.

<sup>99</sup> Some lower federal courts apparently adopted this view with respect to the discretionary fee-shifting provision of Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b) (1970). Many courts ascribed little, if any, significance to the explicit congressional authorization of fee awards in that statute. See, e.g., *Bell v. Alamatt Hotel*, 243 F.Supp. 472 (N.D. Miss. 1966); *Adams v. Fazio Real Estate Co.*, 268 F.Supp. 630 (E.D. La.), *aff'd*, 396 F.2d 146 (5th Cir. 1968). The Supreme Court gave the same section a different reading in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968).

ever, the Supreme Court has construed one such provision to *require* the award of attorney's fees to a successful plaintiff in the absence of a compelling reason to deny fee-shifting.<sup>100</sup>

### B. *Equitable Fee-Shifting*

It has long been accepted that federal courts possess the power to award attorney's fees to litigants through the exercise of equitable discretion, and the "power to award such fees 'is part of the original authority of the chancellor to do equity in a particular situation.'" <sup>101</sup> Circuit Judge Booth, nearly fifty years ago in *Guardian Trust Co. v. Kansas City Southern Railway Co.*,<sup>102</sup> presented an exhaustive discussion of the power to award attorney's fees as costs in equity.<sup>103</sup> He determined that the federal courts have always been so empowered:

The United States courts of equity at the time of their creation became endowed with the powers, including that over costs, possessed by the English Chancery Court. . . . They have exercised such power, and the power has never been taken from them.<sup>104</sup>

The inherent<sup>105</sup> power of the federal courts to undertake equitable fee-shifting has been invoked whenever "overriding considerations of justice seems to compel such a result."<sup>106</sup> The federal courts have long recognized two types of situations as entailing those "overriding consideration" which justify the discretionary award of attorney's fees.

<sup>100</sup> *Id.* The Court made a similar ruling with respect to 20 U.S.C. § 1617 in *Northcross v. Board of Education*, 412 U.S. 427 (1973).

<sup>101</sup> *Hall v. Cole*, 412 U.S. 1, 5 (1973), quoting *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 166 (1939).

<sup>102</sup> 28 F.2d 233 (8th Cir. 1928), *rev'd on other grounds*, 281 U.S. 1 (1930).

<sup>103</sup> *Id.* at 240-46.

<sup>104</sup> *Id.* at 241. See also *Payne v. Hook*, 74 U.S.(7 Wall.) 425, 430 (1869); *Fontain v. Raveln*, 58 U.S.(17 How.) 369, 384 (1855). Over a century ago, referring to its original equity jurisdiction in some cases, the Supreme Court stated:

[W]hen the Constitution of the United States conferred that jurisdiction on this court, it cannot be construed to exclude the power possessed and constantly exercised in every court of equity then known, to use its discretion to award or refuse costs, as its judgment of the case, in that particular, might require. The court entertains no doubt of its power to award costs. . . .

*Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 460, 462 (1855). The power over costs discussed by the Court included the ability to award attorney's fees. The Court had previously instructed that federal courts adopt English equity practices in situations not otherwise covered by the Equity Rules promulgated by the Supreme Court. EQUITY R. 33, 20 U.S. (7 Wheat.) xiii (1822).

<sup>105</sup> *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 166 (1939).

<sup>106</sup> *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967). See *Hall v. Cole*, 412 U.S. 1, 5 (1973); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970).

### 1. The "bad faith" equitable exception to the no-fee rule

The long-standing equitable exception to the no-fee rule applies when a litigant has acted "in bad faith, vexatiously, wantonly or for oppressive reasons."<sup>107</sup> Fee-shifting in such circumstances is a wholly natural function of equity's broad powers for the achievement of justice between the parties.<sup>108</sup> Furthermore it should be recognized that recovery of attorney's fees by a party whose opponent has exhibited blatant disregard for legal rules does not contravene two of the arguments most frequently asserted in support of continued adherence to the no-fee rule. First, fee-shifting pursuant to the bad faith equitable exception does not unduly inhibit resort to litigation.<sup>109</sup> Second, the bad faith exception does not entail the shifting of attorney's fees to a party who has been only remotely responsible for the generation of his opponent's legal expense.<sup>110</sup> When a litigant is forced to incur the expense of legal counsel in order to obtain protection from flagrant abuse of his legal rights, it is clear that his attorney's fees arise as a proximate result of his opponent's reprehensible conduct.<sup>111</sup>

The bad faith equitable exception to the no-fee rule has been employed by the federal courts,<sup>112</sup> but its use has been infrequent.<sup>113</sup> A party's bad faith must be clearly established before fee-shifting is warranted. The courts frequently requiring the existence of wilfulness<sup>114</sup> by the offending party. The Supreme Court has distilled the

<sup>107</sup> 6 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 54.77[2], at 1709 (2d ed. 1974).

<sup>108</sup> See generally *Guardian Trust Co. v. Kansas City S. Ry.*, 28 F.2d 233, 240-46 (8th Cir. 1928), *rev'd on other grounds*, 281 U.S. 1 (1930).

<sup>109</sup> See notes 78-81 *supra* and accompanying text. While it is said that the right to litigate is of overwhelming importance, and fears that fee-shifting may deter good faith litigants have been voiced, presumably no one is interested in encouraging bad faith litigation.

<sup>110</sup> See note 83 *supra* and accompanying text.

<sup>111</sup> The causal relationship between a party's bad faith and the expenses incurred by his opponent was confronted by the court in *Gazan v. Vadsco Sales Corp.*, 6 F.Supp. 568 (E.D.N.Y. 1934). The court found that plaintiff's stockholders suit was groundless and awarded attorney's fees to the defendant. However, the fee awarded was for only \$2000, the portion of the defendant's total legal expenses of \$5000 which the court deemed directly attributable to plaintiff's "vexatious" conduct.

<sup>112</sup> See, e.g., *Vaughan v. Atkinson*, 369 U.S. 527 (1962), *Universal Oil Prods. Co. v. Root Ref. Co.*, 328 U.S. 575 (1946); *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (1923); *Federal Facilities Realty Trust v. Kulp*, 227 F.2d 657 (7th Cir. 1955); *Schlein v. Smith*, 160 F.2d 22 (D.C. Cir. 1947); *In re Swartz*, 130 F.2d 229 (7th Cir. 1942). See also 6 J. MOORE, FEDERAL PRACTICE ¶ 54.77[2], at 1709-11 & n. 17 (2d ed. 1974).

<sup>113</sup> See generally Note, *Use of Taxable Costs to Regulate the Conduct of Litigants*, 53 COLUM. L. REV. 78 (1953); Note, *Distribution of Legal Expense Among Litigants*, 49 YALE L. J. 699 (1940).

<sup>114</sup> See, e.g., *Vaughan v. Atkinson*, 369 U.S. 527, 531 (1962) ("willful and persistent" failure to render obligatory performance); *Federal Facilities Realty Trust v. Kulp*, 227 F.2d 657, 658 (7th Cir. 1955) ("willfulness . . . is a major consideration" in civil contempt cases

essence of the bad faith exception in stating that fee-shifting is warranted "if the court finds after a proper hearing that fraud has been practiced upon it, or that the very temple of justice has been defiled . . ."<sup>115</sup>

The requisite bad faith for equitable fee-shifting may be manifested by the event or behavior upon which the litigation is premised<sup>116</sup> or by dilatory and objectionable tactics after legal action has been commenced.<sup>117</sup> The bad faith exception has been used when a party has been held in civil contempt,<sup>118</sup> where a party has brought spurious issues before the court,<sup>120</sup> and, on occasion, where there has been repeated failure to satisfy a legal obligation.<sup>121</sup> Fee-shifting under the bad faith rule has also been held to be proper where the principal dispute culminates in out-of-court settlement.<sup>122</sup> Clearly, the bad faith exception has a punitive focus,<sup>123</sup> but its deterrent effect has not been substantial.<sup>124</sup> Nevertheless, the traditional bad faith exception has helped to provide a springboard for a more expansive approach to equitable fee-shifting.<sup>125</sup>

## 2. The "Common Fund" Equitable Exception to the No-Fee Rule

The other traditionally recognized equitable exception to the no-

wherein indemnity for attorney's fees sought).

<sup>115</sup> Universal Oil Prods. Co. v. Root Ref. Co. 328 U.S. 575, 580 (1946).

<sup>116</sup> See, e.g., Vaughan v. Atkinson, 369 U.S. 527 (1962); Universal Oil Prods. Co. v. Root Ref. Co., 328 U.S. 575 (1946); Schlein v. Smith, 160 F.2d 22 (D.C. Cir. 1947).

<sup>117</sup> See, e.g., City Bank of Honolulu v. Rivera Davila, 438 F.2d 1367 (1st Cir. 1971); Cleveland v. Second Nat'l Bank & Trust Co., 149 F.2d 466 (6th Cir.), cert. denied, 326 U.S. 775 (1945); *In re Swartz*, 130 F.2d 229 (7th Cir. 1942); Gazan v. Vadsco Sales Corp., 6 F.Supp. 568 (E.D.N.Y. 1934).

<sup>118</sup> See, e.g., Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 (1923); Federal Facilities Realty Trust v. Kulp, 227 F.2d 657 (7th Cir. 1955); Feldman v. American Palestine Line, Inc., 18 F.2d 749 (2d Cir. 1927). *But see* Lichtenstein v. Lichtenstein, 481 F.2d 682 (3d Cir. 1973).

<sup>119</sup> See, e.g., Universal Oil Prods. Co. v. Root Ref. Co., 328 U.S. 575 (1946); Schlein v. Smith, 160 F.2d 22 (D.C. Cir. 1947).

<sup>120</sup> See, e.g., Cleveland v. Second Nat'l Bank & Trust Co., 149 F.2d 466 (6th Cir.), cert. denied, 326 U.S. 775 (1945); *In re Swartz*, 130 F.2d 229 (7th Cir. 1942); Gazan v. Vadsco Sales Corp., 6 F.Supp. 568 (E.D.N.Y. 1934). *But see* Byram Concretanks, Inc. v. Warren Concrete Prods., 374 F.2d 649 (3d Cir. 1967); Gold Dust Corp. v. Hoffenberg, 87 F.2d 451 (2d Cir. 1937); Abel v. Loughman, 1 F.R.D. 734 (E.D.N.Y. 1941).

<sup>121</sup> See, e.g., Local No. 149 International Union, United Auto., Aircraft & Agricultural Implement Workers v. American Brake Shoe Co., 298 F.2d 212 (4th Cir. 1962); Rolax v. Atlantic Coast Line R.R. Co., 186 F.2d 473 (4th Cir. 1951).

<sup>122</sup> See Kahan v. Rosenstiel, 424 F.2d 161 (3rd Cir. 1970), cert. denied, 398 U.S. 950 (1971).

<sup>123</sup> See Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 167 (1939); cf. Universal Oil Prods. Co. v. Root Ref. Co., 328 U.S. 575, 580 (1946).

<sup>124</sup> See authorities cited in notes 88-90 *supra*.

<sup>125</sup> See notes 137-44 *infra* and accompanying text.

fee rule, the "common fund" exception, applies in situations where a litigant creates, preserves or enhances a fund of money or other valuable assets.<sup>126</sup> If, through the efforts of a litigant, a fund is brought into existence, protected from diminution, or increased in value, and the fund inures to the benefit of persons other than the litigant, the litigant may have his legal expenses defrayed through the application of fund assets.<sup>127</sup>

The common fund equitable exception, which has English antecedents,<sup>128</sup> was first employed by the United States Supreme Court to accomplish a just allocation of litigation expenses in *Trustees v. Greenough*.<sup>129</sup> The plaintiff was one of many holders of certain railroad bonds. The assets of a fund had been pledged to secure prospective payment of bond interest and installments upon principal. Plaintiff Vose, suing on behalf of all bondholders, alleged that the trustees of the fund had made improper dispositions of fund property. His action to have certain conveyances of fund property set aside was successful, thereby partially restoring the fund and preventing its further dissipation. The Supreme Court stated that unjust enrichment could be avoided only by distributing Greenough's legal expenses among all the recipients who benefited from the litigation, saying that failure to shift fees

would not only be unjust to him [Vose], but it would give the other parties entitled to participate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself. . . .they ought to contribute their due portion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution.<sup>130</sup>

The federal courts have since utilized the common fund analysis to support fee-shifting in many cases.<sup>131</sup> The *Greenough* opinion,<sup>132</sup>

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<sup>126</sup> *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 719 (1967).

<sup>127</sup> A fee award under the common fund equitable exception to the no-fee rule constitutes fee-shifting because it operates to alter the normal incidence of legal expense. However, it differs from bad faith fee-shifting in that the common fund fee award disperses legal expenses among litigation beneficiaries rather than shifting those expenses to the adverse party as a punitive measure. Thus common fund fee-shifting may properly be envisioned as "fee spreading." For an extensive discussion of fee awards in common fund cases, see 1 S. SPEISER, *ATTORNEYS' FEES* 395-456 (1973). See also Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597 (1974).

<sup>128</sup> See *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 164-65 & n. 2 (1939), and authorities cited therein. See also *Guardian Trust Co. v. Kansas City S. Ry.*, 28 F.2d 233, 240-46 (8th Cir. 1928), *rev'd on other grounds*, 281 U.S. 1 (1930).

<sup>129</sup> 105 U.S. 527 (1881).

<sup>130</sup> *Id.* at 532.

<sup>131</sup> See, e.g., *United States v. Equitable Trust Co.*, 283 U.S. 738 (1931); *Harrison v.*

as did numerous subsequent common fund opinions,<sup>133</sup> recognized an agency relationship between the successful litigant and those whose interest were served by the litigation. In *Sprague v. Ticonic National Bank*,<sup>134</sup> a decision which foreshadowed the broadening of the common fund exception during the 1960's,<sup>135</sup> the Supreme Court made clear that common fund fee-shifting is not limited to cases in which the party to be indemnified had functioned in a representative capacity. The Court's decision further demonstrated that the bringing of a fund before the court is not an indispensable prerequisite of common fund fee-shifting. The plaintiff in *Sprague* without purporting to represent similarly situated persons, sued the receiver of a bank in which she had deposited money. She obtained a lien upon the funds in possession of the receiver, and the estoppel effect of that litigation established the rights of other depositors to assured payment. The Court invoked the common fund equitable exception to the no-fee rule, saying:

Whether one professes to sue representatively or formally makes a fund available for others may, of course, be a relevant circumstance in making the fund liable for his costs in producing it. But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation—the absence of an avowed class suit or the creation of a fund, as it were, through stare decisis rather than through a decree—hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation. As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility.<sup>136</sup>

### III. EXPANSION OF THE TRADITIONAL EQUITABLE EXCEPTIONS TO THE NO-FEE RULE AND CREATION OF THE "PRIVATE ATTORNEY GENERAL" EXCEPTION

As society becomes more complex and diversified, an increasing

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Perea, 168 U.S. 311 (1897); *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885); *Gibbs v. Blackwelder*, 346 F.2d 943 (4th Cir. 1965); *Angoff v. Goldfine*, 270 F.2d 185 (1st Cir. 1959); *Walsh v. National Savings & Trust Co.*, 247 F.2d 781 (D.C. Cir. 1957); *Cannon v. Parker*, 152 F.2d 706 (5th Cir. 1945), *cert. denied*, 327 U.S. 806 (1946); *Crumb v. Ramish*, 86 F.2d 362 (9th Cir. 1936).

<sup>132</sup> 105 U.S. at 533-35.

<sup>133</sup> See, e.g., *Harrison v. Perea*, 168 U.S. 311 (1897); *Hobbs v. McLean*, 117 U.S. 567 (1886).

<sup>134</sup> 307 U.S. 161 (1939).

<sup>135</sup> See notes 146-59 *infra* and accompanying text.

<sup>136</sup> 307 U.S. at 167.

number of legal disputes involve issues whose resolution may have extensive social impact. The effects of litigation can reach far beyond the named parties. Cases of this type are often generically referred to as "public interest litigation." Proliferation of public interest litigation in recent years has been accompanied by a partial relaxation of the standards for application of the traditional equitable exceptions to the no-fee rule resulting in the formulation of a third equitable exception.

#### A. From "Bad Faith" to "Obduracy"

Much of the public interest litigation of the 1960's involved civil rights issues, particularly desegregation of public schools. In some school desegregation cases, the federal courts evinced a willingness to adopt a variant of the traditional bad faith equitable exception. Classic bad faith fee-shifting cases featured egregious misconduct or intransigence by parties against whom attorney's fees were assessed, with the courts focusing upon the wrongdoers' wilfulness.<sup>137</sup> Under the modified bad faith standard, inquiry into subjective motivation receives less emphasis, and the strength of two additional considerations—the importance of the right in issue and the necessity of resort to litigation for vindication of that right—became the keys to the propriety of fee-shifting.

In *Bell v. School Board*<sup>138</sup> the Fourth Circuit reversed a federal district court's refusal to award attorney's fees to a plaintiff who had successfully sought injunctive relief against continued public school racial discrimination. Although the school board's course of behavior may have justified fee-shifting under the traditional bad faith exception, the Fourth Circuit did not invoke the traditional rubric. The reversal was premised upon a

'long continued pattern of evasion and obstruction which included not only the defendants' unyielding refusal to take any initiative, thus casting a heavy burden on the children and their parents, but their interposing a variety of administrative obstacles to thwart the valid wishes of the plaintiff for a desegregated education.'<sup>139</sup>

In a case involving similar facts, the Eighth Circuit said that the award of "substantial attorney fees should be considered" where "well known constitutional guarantees continue to be ignored or abridged and individual pupils are forced to resort to the courts for

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<sup>137</sup> See cases cited in notes 116-18 *supra*.

<sup>138</sup> 321 F.2d 494 (4th Cir. 1963).

<sup>139</sup> *Id.* at 500.

protection."<sup>140</sup>

The shift in focus, at least in the school desegregation context, from the defendant's motives to the necessity and importance of the litigation itself was clearly demonstrated in *Cato v. Parham*.<sup>141</sup> There a federal district court, after noting the defendant's apparent good faith in attempting to effect desegregation of public schools, nonetheless awarded attorney's fees to plaintiff. The court expressly acknowledged that "whatever progress has been made in the direction of desegregation . . . followed judicial prodding."<sup>142</sup> Thus, where deeply cherished civil rights can be protected only by court action, the importance of a defendant's actual intent pales; and it is the defendant's mere failure to discharge a legal duty, regardless of subjective motivation, which attains paramount significance.<sup>143</sup> In some such cases federal courts have characterized defendants as "obstinately obdurate"<sup>144</sup> and avoided usage of the term "bad faith," thereby implicitly signifying acceptance of less rigid standards for equitable fee-shifting.

#### B. From "Common Fund" to "Substantial Benefit"

The traditional common fund exception to the no-fee rule has also undergone decisional modification. The classic common fund cases<sup>145</sup> each involved the conferral of some monetarily quantifiable benefit upon an identifiable class of persons. Yet it is the bare bestowal of benefit upon others by a litigant and the existence of some means whereby a court is able to equitably distribute the costs of litigation among those who are benefitted which form the heart of fund fee-shifting; whether the benefit bestowed can be readily quantified in dollars and cents should not be a decisive consideration. The principle which underlies fund fee-shifting is the familiar one that

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<sup>140</sup> *Clark v. Board of Education*, 369 F.2d 661, 671 (8th Cir. 1966).

<sup>141</sup> *Cato v. Parham*, 293 F. Supp. 1375 (E.D. Ark.), *aff'd*, 403 F.2d 12 (8th Cir. 1968).

<sup>142</sup> *Id.* at 1378.

<sup>143</sup> The First Circuit subsequently used an approach similar to that of the *Cato* decision in a non-desegregation context. In *McEnteggart v. Cataldo*, 451 F.2d 1109 (1st Cir. 1971), the plaintiff had challenged his dismissal from a college teaching position. The school's board of trustees had declined to furnish to plaintiff a statement of the reasons for its decision, as required by judicial precedent. The board of trustees submitted such a statement, and the trial court dismissed the action. The First Circuit thereafter upheld the dismissal but held that the plaintiff was entitled to an award of attorney's fees since he had been "forced to go to court to obtain the statement of reasons to which he was constitutionally entitled." *Id.* at 1112. Thus it was the necessity of resort to litigation in order to vindicate an important right, rather than demonstration of classic bad faith by the board, which inspired the court's fee-shifting decision.

<sup>144</sup> See, e.g., *Hill v. Franklin County Bd. of Educ.*, 390 F.2d 583 (6th Cir. 1968). *Dyer v. Love*, 307 F.Supp. 974 (N.D. Miss. 1969).

<sup>145</sup> See cases cited in note 131 *supra*.

unjust enrichment should be avoided, and the courts have recognized that non-monetary "substantial benefit" created through litigation can constitute the type of enrichment of others which warrants equitable fee-shifting.

The most important case wherein the fund fee-shifting rationale was held to encompass the conferral of a "substantial benefit" was *Mills v. Electric Auto-Lite, Inc.*<sup>146</sup> The plaintiffs, who were stockholders of Electric Auto-Lite Company at the time of its 1963 merger into Mergenthaler Linotype Company, sought dissolution of that merger. Electric Auto-Lite management had solicited stockholders' votes in favor of the proposed merger by means of a proxy statement which announced that the Electric Auto-Lite board of directors advocated approval of the merger. However, the proxy statement failed to disclose that Mergenthaler Linotype, through its ownership of a majority portion of Electric Auto-Lite's outstanding common stock, exercised effective control of the latter corporation and that all eleven Electric Auto-Lite directors "were nominees of Mergenthaler and were under the 'control and domination of Mergenthaler.'" <sup>147</sup> Plaintiffs therefore asserted that such nondisclosure rendered management's proxy solicitation materially misleading and thus violative of § 14(a) of the Securities Exchange Act of 1934.<sup>148</sup> The Supreme Court agreed with plaintiffs' contention and remanded the case to the trial court for determination of what mode of relief was appropriate under the circumstances.<sup>149</sup>

The Court then proceeded to assess the propriety of an interim award of attorney's fees to plaintiffs. Ironically, the attorney's fees question had been interjected by the Justice Department as *amicus curiae* rather than by the plaintiffs.<sup>150</sup> The Court found that the litigation had generated a "substantial benefit" whose salutary impact reached all Electric Auto-Lite stockholders. Therefore, the Court concluded that the cost of such "corporate therapeutics" should be equitably borne by all who are thereby benefitted,<sup>151</sup> and the fund fee-

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<sup>146</sup> 396 U.S. 375 (1970).

<sup>147</sup> *Id.* at 378. Although Mergenthaler Linotype controlled the board of directors, its fifty-four percent ownership of Electric Auto-Lite common stock was not sufficient to carry the merger vote without the support of minority stockholders. *Id.* at 379.

<sup>148</sup> 15 U.S.C. § 78n(a) (1970). The proxy solicitation was also alleged to have violated SEC Rule 14a-9, 17 C.F.R. § 240.14a-9 (1972).

<sup>149</sup> 396 U.S. at 389.

<sup>150</sup> See Comment, *The Allocation of Attorney's Fees After Mills v. Electric Auto-Lite Co.*, 38 U. CHI. L. REV. 316, 324 & n. 46 (1971).

<sup>151</sup> 396 U.S. at 391-97. The Court stated: "[R]egardless of the relief granted, private stockholders' actions of this sort 'involve corporate therapeutics,' and furnish a benefit of all shareholders . . ." *Id.* at 396 (footnote omitted). The "corporate therapeutics" language was

shifting principle was held applicable, notwithstanding that the product of plaintiffs' efforts defied monetary quantifications:

A primary judge-created exception has been to award expenses where a plaintiff has successfully maintained a suit, usually on behalf of a class, that benefits a group of others in the manner as himself. . . . To allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense. This suit presents such a situation. The dissemination of misleading proxy solicitations was a "deceit practiced on the stockholders as a group," *J. I. Case Co. v. Borak*, 377 U.S., at 432, 84 S.Ct., at 1560, and the expenses of petitioners' lawsuit have been incurred for the benefit of the corporation and the other shareholders. The fact that this suit has not yet produced, and may never produce, a monetary recovery from which the fees could be paid does not preclude an award based on this rationale. Although the earliest cases recognizing a right to reimbursement involved litigation that produced or preserved a "common fund" for the benefit of a group, *nothing in these cases indicates that the suit must bring money into the courts as a prerequisite to the court's power to order reimbursement of expenses.*<sup>152</sup>

Approving the reasoning employed by other courts which had decreed "reimbursement in cases where the litigation has conferred a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them,"<sup>153</sup> the Court held that an interim award of attorney's fees was warranted.<sup>154</sup>

The Supreme Court subsequently utilized the substantial benefit

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adopted from the writings of Professor George Hornstein, who had much earlier advocated the fee-shifting approach embraced by the *Mills* majority. See Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 HARV. L. REV. 658 (1956).

<sup>152</sup> 396 U.S. at 392 (footnote omitted; emphasis added).

<sup>153</sup> *Id.* at 393-94. The courts of several states had previously accepted the substantial benefit analysis as a valid ground for fee-shifting. The Court cited many of these state court decisions, *id.* at 394-95 nn. 19-22, and approvingly quoted a leading state court case:

Where an action by a stockholder results in a substantial benefit to a corporation he should recover his costs and expenses. . . . [A] substantial benefit must be something more than technical in its consequence and be one that accomplishes a result which corrects or prevents an abuse which would be prejudicial to the rights and interests of the corporation or affect the enjoyment or protection of an essential right to the stockholder's interest.

*Id.* at 396, quoting *Bosch v. Meeker Cooperative Light & Power Ass'n.*, 257 Minn. 362, 366-67, 101 N.W.2d 423, 426-27 (1960).

<sup>154</sup> 396 U.S. at 396-97.

approach to support fee-shifting in a case involving labor union "therapeutics." In *Hall v. Cole*,<sup>155</sup> the Court affirmed the award of attorney's fees to a plaintiff who had been unjustly stripped of his union membership. At a union meeting, the plaintiff had proposed that the members adopt a resolution condemning union officials for mismanagement. Expulsion of plaintiff from the union ensued. Alleging that his ouster from the union constituted a violation of § 101(a)(2) of the Labor-Management Reporting and Disclosure Act,<sup>156</sup> plaintiff successfully sought reinstatement of his union membership, damages for lost wages and reimbursement for attorney's fees. In holding that the lower court's discretionary fee award was proper, the majority opinion reasoned that plaintiff

by vindicating his own right of free speech guaranteed by § 101(a)(2) . . . necessarily rendered a substantial service to his union as an institution and to all of its members. When a union member is disciplined for the exercise of any of the rights protected by Title I [of the Labor-Management Reporting and Disclosure Act], the rights of all members of the union are threatened. . . . [A]s in *Mills*, reimbursement of respondent's attorney's fees out of the union treasury simply shifts the costs of litigation to "the class that has benefitted from them . . ." <sup>157</sup>

Thus *Hall v. Cole*, like *Mills*, stands for the proposition that the fund fee-shifting rationale retains its doctrinal forcefulness where litigation creates a substantial benefit for an ascertainable class, notwithstanding that such benefit defies monetary valuation.<sup>158</sup> The lower federal courts have also applied this fee-shifting principle in cases having therapeutic impact upon institutions other than labor unions and business corporations.<sup>159</sup>

### C. *Emergence of a New Equitable Exception to the No-Fee Rule*

The modification of traditional standards for discretionary fee-

<sup>155</sup> 412 U.S. 1 (1973).

<sup>156</sup> 29 U.S.C. § 412(a)(2) (1970).

<sup>157</sup> 412 U.S. at 8-9; *accord*, *Yablonski v. United Mine Workers*, 466 F.2d 424, 429 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 918 (1973). The Fourth Circuit had long ago presaged the recognition of labor union therapeutics as a substantial benefit capable of justifying fee-shifting in a case wherein the fee award was primarily grounded upon the bad faith equitable exception to the no-fee rule. *See Rolax v. Atlantic Coast Line R.R.*, 186 F.2d 473, 481 (4th Cir. 1951).

<sup>158</sup> These cases, particularly *Mills*, are amenable to a somewhat broader reading. *See* notes 192-200 *infra* and accompanying text.

<sup>159</sup> *See, e.g.*, *Stolberg v. Board of Trustees*, 474 F.2d 485 (2d Cir. 1973); *Callahan v. Wallace*, 466 F.2d 59 (5th Cir. 1972); *Brewer v. School Bd.*, 456 F.2d 943 (4th Cir.), *cert. denied*, 409 U.S. 892 (1972); *Ojeda v. Hackney*, 452 F.2d 947 (5th Cir. 1972); *Bright v. Philadelphia-Baltimore-Washington Stock Exch.*, 327 F. Supp. 495 (E.D. Pa. 1971).

shifting supplied a foundation for the formulation of a third equitable exception to the no-fee rule. The expansive judicial attitudes revealed by the opinions in such cases as *Cato v. Parham* and *Mills* ultimately led the federal courts to fashion a new fee-shifting doctrine. Liberalization of the traditional equitable exceptions received its stimulus from heightened judicial attention to several interrelated considerations—the qualitative nature of the legal rights in issue,<sup>160</sup> the necessity for seeking protection of those rights through the courts,<sup>161</sup> and the widespread therapeutic consequences of particular pieces of litigation.<sup>162</sup> Recognition of the pertinence of these considerations to the equitable allocation of attorney's fees, along with such kindred factors as the huge expense of litigating certain types of civil actions<sup>163</sup> and the unavailability of damage recovery in such actions,<sup>164</sup> spurred development of the "private attorney general" equitable exception to the no-fee rule.<sup>165</sup>

<sup>160</sup> See *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 396 (1970) (noting "the stress placed by Congress on the importance of fair and informed corporate suffrage"); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (involving "a policy that Congress considered of the highest priority"). See also *Ojeda v. Hackney*, 452 F.2d 947, 948 (5th Cir. 1972); *McEnteggart v. Catalda*, 451 F.2d 1109, 1111 (1st Cir. 1971); *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421 (8th Cir. 1970); *Kerr v. City of Chicago*, 424 F.2d 1134 (7th Cir. 1970); *Brown v. Ballas*, 331 F. Supp. 1033, 1037 (N.D. Tex. 1971); *Lyle v. Teresi*, 327 F. Supp. 683, 686 (D. Minn. 1971); *Cato v. Parham*, 293 F. Supp. 1375, 1378 (E.D. Ark.), *aff'd*, 403 F.2d 12 (8th Cir. 1968).

<sup>161</sup> See *McEnteggart v. Catalda*, 451 F.2d 1109, 1111 (1st Cir. 1971) ("plaintiff was forced to go to court"); *Cato v. Parham*, 293 F. Supp. 1375, 1378 (E.D. Ark.), *aff'd*, 403 F.2d 12 (8th Cir. 1968) (progress in desegregation effort only after "judicial prodding"). See also *Rolfe v. Board of Educ.*, 391 F.2d 77, 81 (6th Cir. 1968); *Bell v. School Bd.*, 321 F.2d 494, 500 (4th Cir. 1963); *Dyer v. Love*, 307 F. Supp. 974, 987 (N.D. Miss. 1969).

<sup>162</sup> See, e.g., *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-97 (1970); authorities cited in note 159 *supra*. See also *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421, 429-30 (8th Cir. 1970); *Clark v. American Marine Corp.*, 320 F. Supp. 709, 711 (E.D. La. 1970).

<sup>163</sup> See, e.g. *Clark v. Board of Educ.*, 369 F.2d 661, 671 (8th Cir. 1966), where the court mentioned the "crushing expense of enforcing . . . constitutionally accorded rights." In litigation involving issues of broad public impact, defendants are likely to be public or private institutions with access to substantial financial and legal resources and with keen interest in continuing challenged activity, while private plaintiffs, though possessing equal or greater ardor, may find the financial burdens of extended legal battle extreme. Cf. *Cole v. Hall*, 462 F.2d 777, 780-81 (2d Cir. 1972), *aff'd*, 412 U.S. 1 (1973). As an example of the severe financial burden of protracted public interest litigation, the expense of litigating *Brown v. Board of Education*, which was decided two inflationary decades ago, exceeded \$200,000. 110 CONG. REC. 6541 (1964) (remarks of Sen. Humphrey).

<sup>164</sup> See *Newman v. Piggie Park Enterprises Inc.*, 390 U.S. 400, 402 (1968).

<sup>165</sup> The term "private attorney general" has long been used in reference to private parties who serve the public interest through legal action. The term was coined in the context of a dispute over standing to litigate, see *Associated Indus. v. Ickes*, 134 F.2d 694, 704 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943), and was first used in the fee-shifting context in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968).

Private attorney general fee-shifting is predicated upon the desirability, in some situations, of encouraging socially beneficial litigation by enhancing access to the adjudicative process. The fundamental premise is that the judiciary, through its discretionary power to make fee awards, can and should mitigate financial impediments to the institution of civil actions which promote the public good.<sup>166</sup> As will be seen, the private attorney general exception did not surpass its infancy; the doctrine's parameters, potentially quite broad, were never definitively described. Yet it is clear that the private attorney general exception, although it was the culmination of expansion of the two traditional equitable exceptions, differed qualitatively from other forms of judicial fee-shifting. Private attorney general fee-shifting was not directly related to the conduct of the party against whom the opponent's attorney's fees were assessed. Furthermore, in contradistinction to the common fund and substantial benefit fee-shifting rationale, the private attorney general exception did not rest upon a court's ability to distribute a successful litigant's expenses among the class of beneficiaries of the litigation.<sup>167</sup> A closer look at the private attorney general exception will cause its significance as a device for the attainment of "public therapeutics" to come into focus.

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<sup>166</sup> See generally *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971). One writer briefly described the private attorney general fee-shifting theory:

A basis for awarding attorney's fees frequently employed in recent cases is that a successful litigant can sometimes act as a "private attorney general" by detecting violations of statutes and encouraging compliance through private action. In such cases where the court is seeking to promote private enforcement, awarding attorney's fees reduces the barrier to suit created by high litigation costs. Removing disincentives to sue is particularly important when the attorney's fees may exceed the potential damage award, as in cases seeking injunctive relief.

Note, *Awards of Attorney's Fees to Legal Aid Offices*, 87 HARV. L. REV. 411, 413 (1973) (footnotes omitted).

<sup>167</sup> Unlike fund fee-shifting, fee awards under the private attorney general exception constitute "true" fee-shifting. That is, the private attorney general exception does not depend upon the court's ability to spread the expense of litigation among the recipients of its salutary effects by assessing the victor's counsel fees against the losing party, the losing party may be deemed a litigation beneficiary in the sense that everyone benefits when the public interest is served, but a private attorney general fee award need not operate to distribute the fees among an ascertainable class of litigation beneficiaries. *But cf.* King and Plater, *supra* note 32, at 52-53. In this regard, private attorney general fee awards more closely resemble those made pursuant to the bad faith exception, and the newest equitable exception therefore has more widely-ranging applicability than the fund approach. Elements of all three equitable exceptions to the no-fee rule may coalesce in a single piece of litigation; see, e.g., *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala.), *aff'd*, 409 U.S. 942 (1972), but the private attorney general exception is not dependent upon the punishment or prevention of unjust enrichment bases of traditional equitable fee-shifting. See, e.g., *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972).

#### IV. THE PRIVATE ATTORNEY GENERAL EQUITABLE EXCEPTION TO THE NO-FEE RULE

##### A. *Doctrinal Underpinnings: The Supreme Court's Opinions in Newman and Mills*

Only the lower federal courts explicitly acknowledged acceptance of the private attorney general exception to the no-fee rule. The federal district and circuit courts announced, refined and implemented the newest equitable fee-shifting doctrine<sup>168</sup> without the express approval of the United States Supreme Court.<sup>169</sup> Nevertheless, much of the conceptual framework for lower court formulation of the private attorney general exception was supplied by the Supreme Court in *Newman v. Piggie Park Enterprises, Inc.*<sup>170</sup> and in the *Mills* decision.

In *Piggie Park*, the plaintiffs sued for injunctive relief, alleging that defendant had violated Title II of the Civil Rights Act of 1964<sup>171</sup> by practicing racial discrimination in the operation of its restaurants. Congress expressly provided authorization for discretionary fee-shifting in cases involving discriminatory conduct proscribed by Title II.<sup>172</sup> On appeal, the Fourth Circuit held that an award of attorney's fees pursuant to this provision was warranted only where the defendant had acted "not in good faith,"<sup>173</sup> thereby reading the statute as merely incorporating the traditional bad faith exception to the no-fee

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<sup>168</sup> See, e.g. *Bond v. White*, 508 F.2d 1397 (5th Cir. 1975); *Taylor v. Perini*, 503 F.2d 899 (6th Cir. 1974) *vacated and remanded*, 95 S. Ct. 1985 (1975); *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974); *Donahue v. Staunton*, 471 F.2d 475 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973); *Cooper v. Allen*, 467 F.2d 836 (5th Cir. 1972); *Knight v. Auciello*, 453 F.2d 852 (1st Cir. 1972); *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1972); *Stanford Daily v. Zurcher*, 366 F. Supp. 18 (N.D. Cal. 1973); *Ross v. Goshi*, 351 F. Supp. 949 (D. Hawaii 1972); *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972); *NAACP v. Allen*, 340 F. Supp. 703 (M.D. Ala. 1972); *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala.), *cert. denied*, 409 U.S. 942 (1972). For excellent discussions of some of the leading lower federal court private attorney general fee-shifting cases, see Nussbaum, *supra* note 67, at 326-31; Note, *Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest*, 24 HAST. L. J. 733, 742-55 (1973).

<sup>169</sup> Until this year, the Supreme Court never directly confronted the propriety of fee-shifting under the private attorney general exception. In its most recent pre-1975 reference to that exception, the Court stated: "This 'private attorney general' rationale has not been squarely before this Court and it is not so now; nor do we intend to imply any view either on the validity or scope of that doctrine." *F.D. Rich Co. v. United States ex rel. International Lumber Co.*, 417 U.S. 116, 130 (1974).

<sup>170</sup> 390 U.S. 400 (1968).

<sup>171</sup> 42 U.S.C. § 2000a (1970), which proscribes discriminatory practices by restaurants affecting interstate commerce.

<sup>172</sup> 42 U.S.C. § 2000a-3(b) (1970) (" . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . .").

<sup>173</sup> *Newman v. Piggie Park Enterprises, Inc.*, 377 F.2d 433, 437 (4th Cir. 1967).

rule.<sup>174</sup> The Supreme Court disagreed. Preferring a less rigid construction, the Court held that the permissive fee-shifting language of the statute required that a successful Title II plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."<sup>175</sup>

The importance of *Piggie Park* cannot be gleaned from the Court's holding, which could have been limited to a narrow range of circumstances. Rather, the true significance of the Court's decision may be discerned only by considering the temporal juxtaposition of *Piggie Park* to *Fleischmann Distilling Corp. v. Maier Brewing Co.*<sup>176</sup> and by examining the language of the short *Piggie Park* per curiam opinion.

In *Fleischmann*, decided only a year before *Piggie Park*, the Supreme Court had taken a "stunning step backward"<sup>177</sup> in the area of equitable fee-shifting. The defendants had deliberately infringed the plaintiffs' trademark rights in violation of the Lanham Act.<sup>178</sup> The trial court, following a large body of federal case law,<sup>179</sup> held that plaintiffs should recover reasonable attorney's fees. The Ninth Circuit reversed on the attorney's fees issue,<sup>180</sup> and the Supreme Court affirmed. Writing for the Court, Chief Justice Warren noted that the Lanham Act prescribes "intricate" and "meticulously detailed" remedies, among which there is no authorization for fee awards.<sup>181</sup> Then, explaining that other federal statutes do provide for fee-shifting,<sup>182</sup> the Chief Justice reasoned that congressional silence with respect to allocation of attorney's fees precluded judicial fee-shifting in Lanham Act trademark infringement actions.<sup>183</sup>

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<sup>174</sup> In effect, the Fourth Circuit interpreted the express grant of fee-shifting discretion to be a mere restatement of the court's inherent power to award attorney's fees, neither augmenting that power nor providing significant direction concerning its use. *Id.*, accord, *Bell v. Alamatt Motel*, 243 F. Supp. 472 (D. Miss. 1966).

<sup>175</sup> 390 U.S. at 402.

<sup>176</sup> 386 U.S. 714 (1967).

<sup>177</sup> Comment, *The Allocation of Attorney's Fees After Mills v. Electric Auto-Lite Co.* 38 U. CHI. L. REV. 316, 320 (1971).

<sup>178</sup> 15 U.S.C. §§ 1051-1127 (1970).

<sup>179</sup> See, e.g., *Baker v. Simmons Co.*, 325 F.2d 580 (1st Cir. 1963). *Wolfe v. National Lead Co.*, 272 F.2d 867 (9th Cir. 1959); *Maternally Yours, Inc. v. Your Maternity Shop, Inc.*, 243 F.2d 538 (2d Cir. 1965); *Century Distilling Co. v. Continental Distilling Corp.*, 205 F.2d 140 (3d Cir. 1953).

<sup>180</sup> *Maier Brewing Co. v. Fleischmann Distilling Corp.*, 359 F.2d 156 (9th Cir. 1966).

<sup>181</sup> 386 U.S. at 719.

<sup>182</sup> *Id.* at 720-21. The court cited numerous statutes, many of which are cited in notes 96 & 97 *supra*. *Id.* at 721 n. 17.

<sup>183</sup> When a cause of action has been created by a statute which expressly provides the remedies for vindication of the cause, other remedies should not readily

*Fleischmann* generated a "chilling effect on the lower federal courts" which was not limited to trademark litigation.<sup>184</sup> The *Fleischmann* opinion offered a general endorsement of the no-fee rule<sup>185</sup> and indicated that judicial fee-shifting was proper only under severely limited circumstances.<sup>186</sup> The restrictive tone of *Fleischmann* arrested a nascent trend among the lower federal courts toward liberalization of equitable fee-shifting.<sup>187</sup> Thus the *Piggie Park* decision, even though involving a statute which permitted fee-shifting, reflected a shift in the Court's attitude toward awards of attorney's fees: "*Piggie Park* broadened the permissible scope of fee granting by interpreting a discretionary provision for attorney's fees as a virtual command always to award fees to a successful plaintiff, and thereby signalled a change in the Court's position toward a more liberal approach."<sup>188</sup> This shift in attitude served to dissipate the chill of *Fleischmann*.

Beyond merely resuscitating the trend toward more expansive applications of the traditional equitable exceptions to the no-fee rule, *Piggie Park* contained the seeds of a new fee-shifting doctrine. The Court buttressed its decision by enumerating several factors which made *Piggie Park* a particularly strong case for an award of attorney's fees:

When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad

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be implied. . . . Congress . . . has selectively provided [for fee awards] . . . in connection with various other statutory causes of action. But several attempts to introduce such a provision into the Lanham Act have failed of enactment. We therefore must conclude that Congress intended § 35 of the Lanham Act to mark the boundaries of the power to award monetary relief in cases under the Act. A judicially created compensatory remedy in addition to the express statutory remedies is inappropriate in this context.

*Id.* at 720-21 (citations and footnotes omitted). In lone dissent, Mr. Justice Stewart ascribed much less significance to the absence of express provision for fee-shifting. *Id.* at 721-23 (Stewart, J., dissenting).

<sup>184</sup> Comment, *The Allocation of Attorney's Fees After Mills v. Electric Auto-Lite Co.*, 38 U. CHI. L. REV. 316, 321 (1971).

<sup>185</sup> 386 U.S. at 717-18.

<sup>186</sup> The Court acknowledged that fee-shifting is proper "in a civil contempt action occasioned by willful disobedience of a court order," *id.* at 718, and "where a plaintiff traced or created a common fund for the benefit of others as well as himself," *id.* at 719. The Court also added that "recognized exceptions to the general rule were not, however, developed in the context of statutory causes of action for which the legislature had prescribed intricate remedies," *id.*, thereby further limiting the ambit of the narrow exceptions it had described.

<sup>187</sup> See, e.g., *Clark v. Board of Educ.*, 369 F.2d 661 (8th Cir. 1966); *Bell v. School Bd.*, 321 F.2d 494 (4th Cir. 1963).

<sup>188</sup> Nussbaum, *supra* note 67, at 319-20.

compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorney's fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts.<sup>189</sup>

The factors stressed by the Court—necessity of private litigation, availability of injunctive relief only, and existence of a strong congressional policy in favor of enforcement—are not exclusive to actions under Title II. Such factors are characteristic of a variety of civil actions, and the lower federal courts have taken ample note of this fact.<sup>190</sup>

As previously explained, *Mills v. Electric Auto-Lite Co.* was a landmark decision because of the Court's acceptance therein of the substantial benefit variant of the traditional common fund exception to the no-fee rule.<sup>191</sup> It is undeniable that the fund fee-shifting rationale served as the essential predicate for the *Mills* decision; the Court's opinion concluded with the statement that "[t]o award attorneys' fees in such a suit to a plaintiff who has succeeded in establishing a cause of action is not to saddle the unsuccessful party with the expenses but to impose them upon the class that has benefitted from them . . ."<sup>192</sup> However, closer scrutiny of the factual situation in *Mills* suggests that the decision is susceptible of an even broader interpretation than that revealed by a literal reading of the Court's opinion. The Supreme Court did something more than simply extend the fund fee-shifting rationale to new ground. As one writer has observed, "*Mills* actually announced a hybrid doctrine with aspects of both the equitable fund and private attorney general exceptions."<sup>193</sup>

Fund fee-shifting involves the allocation of attorney's fees "as between solicitor and client,"<sup>194</sup> such that the expenses of litigation are borne by its beneficiaries. Under the fund rationale, the burden

<sup>189</sup> 390 U.S. at 401-02.

<sup>190</sup> See, e.g., cases cited in note 168 *supra*.

<sup>191</sup> See the prior discussion of *Mills* in notes 146-54 *supra* and accompanying text.

<sup>192</sup> 396 U.S. at 396-97.

<sup>193</sup> Note, *Awarding Attorney and Expert Witness Fees in Environmental Litigation*, 58 CORN. L. REV. 1222, 1237 (1973).

<sup>194</sup> *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 165 (1939) (citing numerous English authorities). Under the fund rationale fees are shifted in a manner such that persons whose interests have been protected by the efforts of counsel ultimately bear the expense of that protection. Thus the fund approach does not result in "true" fee-shifting. See note 167 *supra*.

of attorney's fees is shifted from a beneficent litigant, but they are not shifted to the adverse party *as adverse party*. Yet the *Mills* result may be seen as entailing "true" fee-shifting rather than the distribution of litigation expense among all recipients of benefit. This view stems from the nature of the beneficiary class in *Mills*. Straightforward application of the fund fee-shifting theory to the *Mills* facts rests, at least implicitly, upon the tenuous assumption that the class of beneficiaries was composed of all Electric Auto-Lite stockholders. Thus one commentator has contended that

the assertion that *Mills* does not involve true fee shifting fails to make sense in light of the fact situation. Here over fifty per cent of the stockholders were opposed to enforcement of the Securities Exchange Act regulations. Where the majority of the stockholders has an interest opposed to the litigation, the payment of fees by the corporation represents true fee transfer.<sup>195</sup>

There can be little doubt that the self-interests of the Electric Auto-Lite majority were disserved by the *Mills* litigation. Nevertheless, they *did* receive benefit as a result of plaintiff's efforts—the benefit, accruing to all stockholders and all citizens, of enforcement of the federal securities laws. Indeed, the Court stated that the substantial benefit generated by litigation of the proxy violation question emanated from "the stress placed by Congress on fair and informed corporate suffrage."<sup>196</sup> Viewed in this perspective,<sup>197</sup> *Mills* reinforced the emphasis which *Piggie Park* had attached to vindication of congressional policy as a favorable determinant of fee-shifting.<sup>198</sup> Addi-

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<sup>195</sup> Comment, *The Allocation of Attorney's Fees After Mills v. Electric Auto-Lite Co.*, 38 U. CHI. L. REV. 316, 333 (1971).

<sup>196</sup> 396 U.S. at 396.

<sup>197</sup> Many federal courts have chosen to read *Mills* in this light. See, e.g., *Natural Resources Defense Council, Inc. v. EPA*, 484 F.2d 1331, 1334 (1st Cir. 1973); *Lee v. Southern Home Sites Corp.*, 444 F.2d 143, 145 (5th Cir. 1972); *Stanford Daily v. Zurcher*, 366 F. Supp. 18, 22 (N.D. Cal. 1973); *Pyramid Lake Paiute Tribe v. Morton*, 360 F. Supp. 669, 670 (D.D.C. 1973); *Sims v. Amos*, 340 F. Supp. 691, 694 (M.D. Ala.), *aff'd*, 409 U.S. 942 (1972). But see *Bradley v. School Bd.*, 472 F.2d 318, 329 (4th Cir. 1972), *vacated and remanded*, 416 U.S. 696 (1974).

<sup>198</sup> Fund fee-shifting involves the distribution of litigation expense among those benefitted thereby. Since the majority of Electric Auto-Lite's stockholders were averse to the litigation, the stockholders, as a whole, were not directly benefitted by the *Mills* plaintiffs' success. Yet, because the fee award was assessed against the corporation, all stockholders shared in the cost of the plaintiffs' efforts. The majority stockholders may be said to have reaped benefit through triumph of the rule of law, but the same type of benefit extends to all who are affected by the securities laws. Therefore, the *Mills* fee award did not effect the precise matching of cost to benefit which is the hallmark of classic fund fee-shifting. See notes 126-36 *supra* and accompanying text. Thus the *Mills* result cannot receive its justification from the application of pure fund theory. The "true" fee-shifting of *Mills* is instead explained by the law enforcement value—the public interest value—of the litigation. See generally Comment, *The Allocation of*

tionally, *Mills* went beyond *Piggie Park*, augmenting the Court's retreat from the retrograde thrust of *Fleischmann*. The *Mills* Court cursorily distinguished *Fleischmann*<sup>199</sup> and had no difficulty finding a sufficiently strong congressional policy to justify the award of fees to private litigants enforcing § 14(a) of the Securities Exchange Act of 1934. This aspect of the *Mills* decision is particularly noteworthy because Congress had made no provision for fee awards in § 14(a) cases and, in fact, had not even expressly authorized a private right of action under § 14(a).<sup>200</sup> Thus, in tandem, *Piggie Park* and *Mills* can be read to comprise the conceptual foundation for a new equitable fee-shifting doctrine with principal importance accorded to the magnitude of public benefit resultant from the activity of certain private litigants. The task of synthesizing those two Supreme Court decisions and thereby fashioning the private attorney general exception to the no-fee rule was undertaken by numerous lower federal courts.

## B. Federal District Courts and Courts of Appeals: Fee Awards to Private Attorneys General

### 1. The Private Attorney General Exception in Racial Discrimination Cases.

The private attorney general equitable fee-shifting doctrine was first articulated in a series of cases involving racial discrimination during the early 1970's. Of these cases,<sup>201</sup> it was *Lee v. Southern Home Sites Corp.*,<sup>202</sup> which first breathed real life into the private attorney general doctrine. Southern Home Sites Corporation was a

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*Attorney's Fees After Mills v. Electric Auto-Lite Co.*, 38 U. CHI. L. REV. 316, 326-34 (1971).

<sup>199</sup> The remedial provisions of the 1934 Act are far different from those of the Lanham Act . . . . Since Congress in the Lanham Act had "meticulously detailed the remedies available to a plaintiff who proves that his valid trademark has been infringed," the Court in *Fleischmann* concluded that the express remedial provisions were intended "to mark the boundaries of the power to award monetary relief in cases arising under the Act." . . . . By contrast, we cannot fairly infer from the Securities Exchange Act of 1934 a purpose to circumscribe the courts' power to grant appropriate remedies. . . . The Act makes no provision for private recovery for a violation of § 14(a), other than a declaration of "voidness". . . .

396 U.S. at 391 (citations omitted). The Court made no mention that Congress had expressly provided for fee awards in §§ 9(e) and 18(a) of the 1934 Act, a potentially telling factor under the tenor of the *Fleischmann* opinion. See note 183 *supra*.

<sup>200</sup> The private right of action under § 14(a) was implied in *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964).

<sup>201</sup> See *Cooper v. Allen*, 467 F.2d 836 (5th Cir. 1972); *Knight v. Auciello*, 453 F.2d 852 (1st Cir. 1972); *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1972); *NAACP v. Allen*, 340 F. Supp. 703 (M.D. Ala. 1972); *Brown v. Ballas*, 331 F. Supp. 1033 (N.D. Tex. 1971); *Lyle v. Teresi*, 327 F. Supp. 683 (D. Minn. 1971).

<sup>202</sup> 444 F.2d 143 (5th Cir. 1972).

real estate development firm in Mississippi. In order to stimulate the sale of lots in "Ocean Beach Estates," one of its developments, Southern Home Sites mailed numerous form letters which offered each addressee the opportunity to purchase a home site for a fraction of the purportedly usual \$600.00 selling price. The letters stipulated that only whites were eligible to avail themselves of the offer contained therein. The plaintiff Lee, who was black, had received one of the form letters. He tendered \$49.50, the form letter offer price, to Southern Home Sites in an attempt to purchase a lot. Southern Home Sites refused to consummate the transaction. Lee, alleging that the corporation had violated 42 U.S.C. § 1982,<sup>203</sup> sued for injunctive relief and requested reimbursement of his attorney's fees.

The district court enjoined further racially discriminatory sales practices by Southern Home Sites and ordered that Lee be permitted to purchase a lot. However, the court declined to make a fee award.<sup>204</sup> The Fifth Circuit reversed the lower court's decision to not shift fees. Judge Wisdom, writing for the court, opined that, in the aftermath of the Supreme Court's decision in *Jones v. Alfred H. Mayer Co.*,<sup>205</sup> the illegality of the defendant's conduct was sufficiently well established that Southern Home Sites demonstrated bad faith by prolonging the litigation.<sup>206</sup> But that observation was interjected only "in passing" and was not the basis for the court's fee-shifting decision. Instead, Judge Wisdom found a "broader ground" upon which to rest the court's holding that "attorney's fees are part of the effective remedy a court should fashion to carry out the congressional policy embodied in section 1982."<sup>207</sup>

In elucidating the "broader ground" for fee-shifting in *Lee*—that the plaintiff had functioned as a private attorney general—Judge Wisdom initially recounted the teaching of the *Alfred H. Mayer* case. He stated that the Supreme Court had therein held that § 1982 "barred private racial discrimination in the sale of housing and that federal courts should fashion an effective remedy to enforce the rights declared by Congress in the Statute."<sup>208</sup> Judge Wisdom then turned to *Mills*. He first conceded that, due to the language employed by the

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<sup>203</sup> 42 U.S.C. § 1982 (1970).

<sup>204</sup> The district court judge declined to make a fee award on the ground that the bad faith exception was not applicable. 444 F.2d at 144.

<sup>205</sup> *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). The Supreme Court therein held that § 1982's prohibition of racial discrimination in property transactions applies to private parties as well as public entities.

<sup>206</sup> 444 F.2d at 144.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 143 (emphasis added).

Court, the *Mills* decision was ostensibly grounded upon the fund fee-shifting rationale. But he then explained that, because the *Mills* litigation benefitted the stockholders of all corporations,<sup>209</sup> another rationale underlay the decision to award attorney's fees in that case. He interpreted *Mills* to represent recognition of the need to encourage the furtherance of congressional policy through private litigation:

Therefore the Court's decision is better understood as resting heavily on its acknowledgement of 'overriding considerations,' that private suits are necessary to effectuate congressional policy and that awards of attorney's fees are necessary to encourage private litigants to intimate such suits.<sup>210</sup>

Having given such a broad reading to *Mills*, Judge Wisdom then stated that "here as in *Mills* there is a strong congressional policy behind the rights declared in section 1982."<sup>211</sup> To illumine the strength of the policy behind § 1982, which was enacted in 1866, Judge Wisdom focused upon more recently enacted federal legislation of a similar nature.<sup>212</sup> He found that other statutes which embrace the policies embodied in § 1982, including the Fair Housing Law,<sup>213</sup> make express provision for fee-shifting. Judge Wisdom reasoned that

in fashioning an effective remedy for the rights declared by Congress one hundred years ago, courts should look not only to the policy of the enacting Congress but also to the policy embodied in closely related legislation. Courts work interstitially in an area such as this.<sup>214</sup>

This exercise in statutory comparison led to the conclusion that

the effective remedy for securing the rights declared in § 1982 should include the award of attorney's fees to successful plaintiffs such as provided in the Fair Housing Law . . . The same policies supporting Congress' provision for attorney's fees in that statute apply to

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<sup>109</sup> The Court reasoned that the situation was not too different from the typical derivative action, where it is appropriate for the corporation to pay the attorney's fees because the corporation receives a benefit from the suit. But the benefit that the court focused on is conferred on all shareholders in the country, and therefore established derivative action considerations do not seem to apply to the situation.

*Id.* at 145.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* Judge Wisdom added that "[a]warding attorney's fees to successful plaintiffs would facilitate the enforcement of that policy through private litigation." *Id.*

<sup>212</sup> *Id.* at 146-47.

<sup>213</sup> 42 U.S.C. § 3612(c) (1970). Judge Wisdom also mentioned two of the fee-shifting provisions of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(b), 2000e-5(k) (1970).

fair housing suits under § 1982.<sup>214</sup>

Finally, Judge Wisdom presented a discussion of *Piggie Park* as further reinforcement of the fee-shifting decision in *Lee*. He found that the considerations marshalled by the *Piggie Park* Court in support of its holding were paralleled in *Lee*. In particular, he emphasized that “against private discrimination § 1982 is today ‘enforceable only by private parties acting on their own initiative,’ ”<sup>216</sup> and that *Piggie Park* had stressed that Title II enforcement must come through private action.<sup>217</sup> Thus the Fifth Circuit felt that the conceptual similarities of *Piggie Park* and *Lee* were far more compelling than the difference in language of the statutes invoked in those two cases:

We think the factors relied on in *Piggie Park* in interpreting the provision for awarding attorney’s fees apply also to suits under § 1982. The policy against discrimination in the sale or rental of property is equally strong. The statute, under present judicial development, depends entirely on private enforcement. Although damages may be available, . . . in many cases there may be no damages or damages difficult to prove. *To ensure that individual litigants are willing to act as “private attorneys general” to effectuate the public purposes of the statute, attorney’s fees should be . . . available*  
 . . . .<sup>218</sup>

The brilliant exposition of the private attorney general doctrine in *Lee* became the touchstone for fee-shifting in many cases concerning racial discrimination. In *Knigh v. Auciello*,<sup>219</sup> the First Circuit accepted the reasoning of *Lee*, holding that the successful § 1982 plaintiff therein was entitled to an award of attorney’s fees. The defendant had discriminated against the black plaintiff by “knowingly [using a] false pretext in refusing to lease an apartment.”<sup>220</sup> The district court rendered a damage judgment in favor of the plaintiff, but denied his request for fee-shifting. In reversing the lower court’s disposition of the attorney’s fees issue, the First Circuit said:

The violation of an important public policy may involve little by way of actual damages, so far as a single individual is concerned, or little in comparison with the cost of vindication, as the case at

<sup>214</sup> 444 F.2d at 146.

<sup>215</sup> *Id.* at 147.

<sup>216</sup> *Id.* at 146, quoting *Jones V. Alfred H. Mayer Co.*, 392 U.S. 409, 417 (1968).

<sup>217</sup> 444 F.2d at 147.

<sup>218</sup> *Id.* at 147-48 (emphasis added).

<sup>219</sup> 453 F.2d 852 (1st Cir. 1972).

<sup>220</sup> *Id.* at 852.

bar illustrates. . . . In such instances public policy may suggest an award of costs that will remove the burden from the shoulders of the plaintiff seeking to vindicate the public right. We regard this as such a case.<sup>221</sup>

The principle announced in *Lee* is also directly applicable to civil actions concerning unlawful racially discriminatory conduct in areas other than real property transactions. For example, the Fifth Circuit in *Cooper v. Allen*<sup>222</sup> applied the private attorney general doctrine to an action brought pursuant to 42 U.S. C. § 1981.<sup>223</sup> The plaintiff had been denied a position as a golf professional due to racial bias. And in *NAACP v. Allen*,<sup>224</sup> a case instituted under 42 U.S.C. § 1983,<sup>225</sup> the court awarded attorney's fees to plaintiffs who had served as private attorneys general by vigorously challenging practices which operated to prevent the employment of blacks by the Alabama State Patrol.

## 2. Private Attorney General Fee-Shifting in Cases Involving Other Substantive Rights.

The private attorney general exception to the no-fee rule, as articulated in *Lee* and its progeny, is not limited in application to civil actions instituted to curtail racial discrimination. The doctrine has been invoked in actions involving a wide-ranging variety of substantive rights. The lower federal courts have utilized private attorney general fee-shifting to encourage the enforcement of constitutionally protected civil rights by private litigants.

In *Sims v. Amos*,<sup>226</sup> a § 1983 case, a three-judge district court awarded attorney's fees to plaintiffs who had sued to redress their deprivation of equal suffrage. The court found that "although the 1970 dicennial [sic] census demonstrated that the Alabama Legislature was egregiously malapportioned, the Legislature unyielding refused to perform the mandate imposed on it by both the State and Federal Constitutions."<sup>227</sup> But despite the defendants' exhibition of bad faith, the court chose to ground its fee-shifting decision on the private attorney general doctrine.<sup>228</sup> Speaking of private litigants who

<sup>221</sup> *Id.* at 853 (footnote omitted).

<sup>222</sup> 467 F.2d 836 (5th Cir. 1972).

<sup>223</sup> 42 U.S.C. § 1981 (1970).

<sup>224</sup> 340 F. Supp. 703 (M.D. Ala. 1972).

<sup>225</sup> 42 U.S.C. § 1983 (1970).

<sup>226</sup> 340 F. Supp. 691 (M.D. Ala.), *aff'd*, 409 U.S. 942 (1972).

<sup>227</sup> *Id.* at 694.

<sup>228</sup> [A] finding of bad faith is not always a prerequisite to the taxing of attorneys' fees against defendants, and in this case, despite the availability of that ground, the

contribute to the realization of congressional policy, the court asserted that "under such circumstances, the award of fees loses much of its discretionary character and becomes a part of the effective remedy a court should fashion to encourage public-minded suits . . . and to carry out congressional policy."<sup>229</sup> However, unlike the situation in *Lee* and kindred racial discrimination cases, the *Sims* court did not have the benefit of recent legislation through which it might discern the strength of congressional policy regarding the defendants' violation. The *Sims* court nevertheless found that the requisite policy in favor of enforcement emanated from the essential nature of the right which plaintiffs had vindicated:

The present case clearly falls among those meant to be encouraged under the principles articulated in *Piggie Park Enterprises, Inc.* and *Mills*, and expanded upon in *Southern Home Sites* . . . . The benefit accruing to the plaintiffs' class cannot be overemphasized. No other right is more basic to the integrity of our democratic society than is the right plaintiffs assert here to free and equal suffrage. In addition, congressional policy strongly favors the vindication of federal rights violated under color of state law, 42 U.S.C. § 1983, and, more specifically, the protection of the right to a nondiscriminatory franchise.<sup>230</sup>

Since the plaintiffs had undertaken costly litigation to safeguard a fundamental right suffused with strong congressional policy, the court determined that such private legal action should be encouraged and that, therefore, "an award of attorneys' fees is essential."<sup>231</sup>

The language of *Sims* indicates that the court felt constrained to find a strong congressional policy in order to justify its implementation of the private attorney general doctrine. Of course, the existence of a strong congressional policy favoring enforcement of the particular right in issue was an important constituent of the fee-shifting approach used in *Lee*.<sup>232</sup> The Fifth Circuit's confirmation that such a policy exists with respect to § 1982 actions was facilitated in *Lee* by the enactment of related federal legislation which included

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Court has decided to base its award on far broader considerations of equity.

In instituting the case *sub judice*, plaintiffs have served in the capacity of "private attorneys general" . . . . If, pursuant to this action, plaintiffs have benefited their class and have effectuated a strong congressional policy, they are entitled to attorneys' fees regardless of defendants' good or bad faith.

*Id.* (citations and footnote omitted).

<sup>229</sup> *Id.* (citations omitted).

<sup>230</sup> *Id.* (citations omitted).

<sup>231</sup> *Id.* at 695.

<sup>232</sup> See notes 211-15 *supra* and accompanying text.

express authorization of fee-shifting. However, there are no recent federal enactments which courts may use to explore, by comparison and analogy, the strength of congressional policy regarding many of the types of litigation which arise under § 1983. Nevertheless, it has been suggested that examination of congressional policy is unnecessary in assessing the propriety of private attorney general fee-shifting in "constitutional litigation,"<sup>233</sup> and, by and large, the lower federal courts conformed to this view in § 1983 cases subsequent to *Sims*. Thus, for example, in recently affirming a private attorney general fee award in a § 1983 case, the Sixth Circuit perfunctorily observed that the plaintiffs, "in bringing this action, vindicated constitutional rights strongly favored by congressional policy," and the court offered no further discussion of the point.<sup>234</sup> Other courts disposed of the "congressional policy" matter in a similarly summary manner or declined to mention it at all in § 1983 fee-shifting cases.<sup>235</sup>

An additional area in which lower federal courts demonstrated receptivity to the private attorney general doctrine as a basis for fee-shifting was that of environmental litigation. The seminal case in this area was *La Raza Unida v. Volpe*.<sup>236</sup> The plaintiffs in *La Raza* had obtained injunctive relief against continued construction of California Highway Project 238, which had failed to comply with the prescriptions of several federal statutes.<sup>237</sup> Thereafter the plaintiffs moved for assessment of their litigation expenses as costs against several of the defendants. District Judge Peckham, thoughtfully exploring the three extant grounds for equitable fee-shifting, determined that neither the

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<sup>233</sup> Attorneys' fees ought to be awarded, as a matter of course, in all cases in which the successful party vindicates civil or constitutional rights. In all such cases, the successful litigant is, indeed, acting as a "private attorney general" vindicating rights of the "highest priority." . . . In the case of constitutional litigation, . . . the courts lack legislative determination of the importance of the policies vindicated. However, there is no need for legislative determination of the importance of constitutional policies. That is one determination the courts can make themselves, without fear of engaging in wholesale revision of the general American practice on fees, because of the unique position of the Constitution.

Falcon, *Award of Attorneys' Fees in Civil Rights and Constitutional Litigation*, 33 MARYLAND L. REV. 379, 419 (1973) (footnote omitted).

<sup>234</sup> *Taylor v. Perini*, 503 F.2d 889, 905 (6th Cir. 1974), *vacated and remanded*, 95 S. Ct. 1985 (1975).

<sup>235</sup> See, e.g., *Skehan v. Board of Trustees*, 501 F.2d 31 (3d Cir. 1974) *vacated and remanded*, 95 S. Ct. 1986 (1975); *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974); *Stanford Daily v. Zurcher*, 366 F. Supp. 18 (N.D. Cal. 1973); *Jinks v. Mays*, 350 F. Supp. 1037 (N.D. Ga. 1972); *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972).

<sup>236</sup> 57 F.R.D. 94 (N.D. Cal. 1972).

<sup>237</sup> In undertaking construction of Project 238, the defendants violated federal enactments dealing with both environmental protection and housing displacement and relocation assistance; none of the statutes involved contained fee-shifting provisions. *Id.* at 95-96.

bad faith nor fund exception was applicable but that plaintiffs were nonetheless entitled to an award of fees for having served as private attorneys general.

Placing primary reliance upon *Lee*, Judge Peckham explained the private attorney general exception as follows:

The rule briefly states is that whenever there is nothing in a statutory scheme which might be interpreted as precluding it, a "private attorney-general" should be awarded attorneys' fees when he has effectuated a strong Congressional policy which has benefited a large class of people, and where further the necessity and financial burden of private enforcement are such as to make the award essential.<sup>238</sup>

Having announced this tripartite test, Judge Peckham discussed each element in turn. First, stating that "[f]ew public policies are accorded the weight and priority of those present in this lawsuit," he quoted several sources indicating that congressional policy favored the objectives and results of plaintiffs' action.<sup>239</sup> He then turned to the second element of the test he had formulated and found that "plaintiffs have conferred various benefits on numerous people in varying degree," nothing that although the salutary impact of plaintiffs' efforts was felt most directly by local residents, "all of society" received some measure of benefit.<sup>240</sup> Finally, Judge Peckham found that the third requisite of his test—the necessity and financial burden of private enforcement—was met in *La Raza*. Observing that "[t]he only public entities that might have brought suit in this case were named as defendants . . . and vigorously opposed plaintiffs' contentions,"<sup>241</sup> he stated that awesome financial disincentives inhibit the institution of such actions by private parties.<sup>242</sup>

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<sup>238</sup> *Id.* at 98 (footnote omitted).

<sup>239</sup> *Id.* at 99. Judge Peckham offered a quotation from the concurring opinion of Mr. Justice Black in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 421 (1971), as proof that public policy strongly favors protection of the environment. With respect to the strength of the policy which favors relocation assistance, Judge Peckham merely quoted the policy statements of two statutes, 23 U.S.C. § 501 (1970) and 42 U.S.C. § 4621 (1970), dealing with relocation of persons displaced by federal programs. This aspect of the *La Raza* opinion has been criticized on the ground that Judge Peckham failed to demonstrate that unusually strong congressional policies underlay the statutes enforced by the plaintiffs. See Note, *Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest*, 24 *HAST. L.J.* 733, 754 (1973).

<sup>240</sup> 57 F.R.D. at 100.

<sup>241</sup> *Id.* at 101.

<sup>242</sup> Only a private party could have been expected to bring this litigation, and yet a private party is least able to bear the tremendous economic burdens. To force the private litigants to bear their own costs here would be tantamount to a penalty,

Judge Peckahm's analysis of the *La Raza* situation revealed that, in essence, the litigation undertaken by the plaintiffs was of a type which warranted encouragement and that an acceptable method of encouraging such actions is to minimize the financial obstacles confronting private litigants by allowing them to recover attorney's fees as costs. The same approach was adopted by other lower federal courts which authorized fee awards to private attorneys general who had contested unlawful abuses of environmental quality.<sup>243</sup>

### 3. Standards for Private Attorney General Fee-Shifting

In many of the cases in which the private attorney general exception was applied, fee-shifting could have been justified by reliance upon one or both of the older equitable exceptions to the no-fee rule.<sup>244</sup> However, in other cases, courts invoked the private attorney general doctrine to support fee awards after expressly holding that neither of the traditional fee-shifting grounds were applicable.<sup>245</sup> Thus it is clear that in the contemplation of the lower federal courts which embraced it, the private attorney general doctrine did constitute a distinct, integral exception to the no-fee rule. The existence of additional factors in a particular case may have buttressed a court's decision to make a fee award, but satisfactions of the requirement of the private attorney general doctrine was, without more, sufficient to justify such a decision.

The precise nature of the standards for application of the private attorney exception is much less clear. It is not possible to ascertain a definitive catalogue of the doctrine's components, nor can any universal rule of applicability be distilled through a synthesis of the deci-

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and it seems somewhat inequitable to punish litigants who have policed those charged with implementing and following Congressional mandates.

*Id.*

<sup>243</sup> See, e.g., *Wilderness Soc'y v. Morton*, 495 F.2d 1026 (D.C. Cir.) *rev'd sub nom.*, *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 95 S. Ct. 1612 (1975); *Natural Resources Defense Council v. EPA*, 484 F.2d 1331 (1st Cir. 1973); *Sierra Club v. Lynn*, 364 F. Supp. 834 (W.D. Tex. 1973), *rev'd*, 502 F.2d 43 (5th Cir. 1974). See also *Pyramid Lake Paiute Tribe v. Morton*, 360 F. Supp. 669 (D.D.C. 1973).

<sup>244</sup> See, e.g., *Knight v. Auciello*, 453 F.2d 852 (1st Cir. 1972); *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971); *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972); *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala.), *aff'd*, 409 U.S. 942 (1972). In some cases in which the elements of more than one equitable ground have been present, the fee-shifting grounds have not been made entirely clear. See, e.g., *Milburn v. Huecker*, 500 F.2d 1279 (6th Cir. 1974); *Rainey v. Jackson St. College*, 481 F.2d 347 (5th Cir. 1973).

<sup>245</sup> See *Wilderness Soc'y v. Morton*, 495 F.2d 1026 (D.C. Cir.), *rev'd sub nom.*, *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 95 S. Ct. 1612 (1975). *La Raza Unida v. Volpe*, 57 F.R.D. 94, 97 (N.D. Cal. 1972). See also *Bond v. White*, 508 F.2d 1397, 1401 (5th Cir. 1975); *Jinks v. Mays*, 350 F. Supp. 1037 (N.D. Ga. 1972).

sions in which private attorney general fee-shifting has been discussed. Various lower federal courts, in describing the requisites of the private attorney general exception, stressed one or more of a variety of factors. Among those factors were strength of congressional policy,<sup>246</sup> widespread societal benefit,<sup>247</sup> benefit to a particular class<sup>248</sup> necessity of private enforcement,<sup>249</sup> unavailability of monetary damages,<sup>250</sup> and obstacles facing private litigants.<sup>251</sup> It seems that judicial focus upon these factors was directed toward answering two primary questions in each particular case: (a) whether the successful litigation by the plaintiff had promoted the public interest, and (b) whether, because of the litigants involved, fee-shifting was a rational and fair means of encouraging further socially beneficial private legal action.

a. The public interest value of the litigation.

It is a fundamental premise of the private attorney general doctrine that certain types of litigation generate unusually far-reaching and profound public impact. Thus the initial step of a private attorney general fee-shifting analysis is a determination whether the litigation has served the public interest. In making such determinations, the lower federal courts examined two factors: (1) the congressional policies at issue in the litigation, and (2) the extent to which litigation benefits were enjoyed by non-parties. In some cases,<sup>252</sup> courts have structured their opinions such that inquiries into congressional policy and extent of benefit to non-litigants were presented as separate ele-

<sup>246</sup> See, e.g., *Lee v. Southern Home Sites Corp.*, 444 F.2d 143, 146-47 (5th Cir. 1971); *La Raza Unida v. Volpe*, 57 F.R.D. 94, 99 (N.D. Cal. 1972).

<sup>247</sup> See, e.g., *Wilderness Soc'y v. Morton*, 495 F.2d 1026, 1032-34 (D.C. Cir.), *rev'd sub nom.* *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 95 S. Ct. 1612 (1975). *Wyatt v. Stickney*, 344 F. Supp. 387, 409 (M.D. Ala. 1972).

<sup>248</sup> See, e.g., *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974); *Sims v. Amos*, 340 F. Supp. 691, 695 (M.D. Ala.), *aff'd*, 409 U.S. 942 (1972).

<sup>249</sup> See, e.g., *Bond v. White*, 508 F.2d 1397, 1401-02 (5th Cir. 1975); *Stanford Daily v. Zurcher*, 366 F. Supp. 18, 24 (N.D. Cal. 1973).

<sup>250</sup> See, e.g., *Lee v. Southern Home Sites Corp.*, 444 F.2d 143, 148 (5th Cir. 1971), *Sims v. Amos*, 340 F. Supp. 691, 695 (M.D. Ala.), *aff'd*, 409 U.S. 942 (1972).

<sup>251</sup> See, e.g., *Taylor v. Perini*, 503 F.2d 899, 905 (6th Cir. 1974), *vacated and remanded*, 95 S. Ct. 1985 (1975); *Skehan v. Board of Trustees*, 501 F.2d 31, 44 (3d Cir. 1974); *Knight v. Auciello*, 453 F.2d 852, 853 (1st Cir. 1972) *vacated and remanded* 95 S. Ct. 1986 (1975).

<sup>252</sup> It has been stated that "a 'private attorney-general' should be awarded attorneys' fees when he has effectuated a strong Congressional policy which has benefited a large class of people . . ." *La Raza Unida v. Volpe*, 57 F.R.D. 94, 98 (N.D. Cal. 1972) (emphasis added). And another court wrote that private attorneys general are "plaintiffs [who] have benefited their class and have effectuated a strong congressional policy . . ." *Sims v. Amos*, 340 F. Supp. 691, 694 (M.D. Ala.), *aff'd*, 409 U.S. 942 (1972) (emphasis added).

ments of a private attorney general fee-shifting analysis. However, these factors did not seem to constitute independent analytical requirements for fee awards. Rather, it appears they should more properly be envisioned as mere indicia of the public interest value of a given piece of litigation.

If there are persuasive recent manifestations of congressional policy favoring zealous protection of the right which a plaintiff has vindicated, such legislative expressions may well evidence that the plaintiff has served the public interest. Certainly that was the effect of the cognate statutes cited by the *Lee* court.<sup>253</sup> Congressional policy *may*<sup>254</sup> be an excellent barometer of public policy and thus of the public interest, but it is not the only one. Hence there was no room for unwavering insistence that promotion of a strong congressional policy be discovered before the private attorney general exception might be invoked.<sup>255</sup> The § 1983 cases demonstrated that the existence of a strong and explicit congressional policy which had been served by the relevant litigation was not indispensable to an award of attorney's fees under the private attorney general doctrine. In some of those cases, congressional policy was not mentioned;<sup>256</sup> in others, a policy sufficiently strong to support fee-shifting was inferred from the mere existence of the century-old statute.<sup>257</sup> Thus one court found a "congressional indication" that federal courts should award attorney's fees to successful § 1983 plaintiffs because "[t]he *raison d'etre* of 42 U.S.C. § 1983 is to encourage the vindication of constitutional rights, to promote litigation of the rights involved, and to give the courts leeway to fashion appropriate remedies."<sup>258</sup>

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<sup>253</sup> See notes 211-15 *supra* and accompanying text.

<sup>254</sup> See generally Tunney, *Foreward: Financing the Cost of Enforcing Legal Rights*, 122 U. PA. L. REV. 632 (1974).

<sup>255</sup> One commentator has aptly observed that an immutable demand that a strong congressional policy be served as a prerequisite to private attorney general fee-shifting would seem unacceptable in that it is both unnecessarily restrictive in one sense and overly broad in another. It is unnecessarily limited because it requires that the action be brought pursuant to a federal statute. Such a requirement would seem to imply that policies codified in federal statutes possess some unique quality. . . . Nevertheless, it is difficult to conceive of what this quality might be, or how it generally would distinguish such suits from public interest actions brought, for example, to vindicate constitutional rights which are not otherwise codified. . . . The second deficiency . . . [is the] apparent willingness to award fees in *all* suits brought to enforce certain federal statutes. . . .

Note, *Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest*, 24 HAST. L.J. 733, 756 (1973) (emphasis in original; footnote omitted).

<sup>256</sup> See *Donahue v. Staunton*, 477 F.2d 475, 482-83 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973); *cf. Wyatt v. Stickney*, 344 F. Supp. 387, 409 (M.D. Ala. 1972).

<sup>257</sup> See *e.g.*, *Taylor v. Perini*, 503 F.2d 899, 905 (6th Cir. 1974), *vacated and remanded*, 95 S. Ct. 1985 (1975); *Brandenburger v. Thompson*, 494 F.2d 885, 889 (9th Cir. 1974).

<sup>258</sup> *Stanford Daily v. Zurcher*, 366 F. Supp. 18, 24 (N.D. Cal. 1973).

Correspondingly, judicial examination of the nature and scope of benefit flowing to non-litigants is an additional method of gauging the public interest value of litigation. But utilization of the private attorney general exception did not depend upon rigorous inquiry into the specific effects of a piece of litigation. Benefit to non-litigants need not be either directly or immediately felt by a large portion of the populace. As noted in *La Raza*, "it has become exceedingly difficult to trace the benefits of litigants to their ultimate beneficiaries. . . ." <sup>259</sup> Rather than attempt to do so, the lower federal courts were instead satisfied to ascertain whether a given piece of litigation had necessarily benefited the public-at-large in some meaningful way. This determination could often be made only through the exercise of judicial common sense. Therefore, the federal courts were willing to take note of the obvious—that some types of litigation, such as that which challenges official disregard for constitutional rights<sup>260</sup> or which curbs abuse of the environment,<sup>261</sup> naturally engender great public benefit.

Thus the initial stage of the private attorney general fee-shifting analysis was an examination of the importance of the particular litigation to the general public. The requisite degree of importance of public interest value could be revealed by manifestations of congressional policy, by the self-evident emanation of public benefit from the litigation, or by some combination of the two.<sup>262</sup> Legal action which

<sup>259</sup> *La Raza Unida v. Volpe*, 57 F.R.D. 94, 98 (N.D. Cal. 1972).

<sup>260</sup> See, e.g., *Wyatt v. Stickney*, 344 F. Supp. 387, 409 (M.D. Ala. 1972), where the court had no difficulty in concluding that litigation which spurred improvement of treatment and facilities at state mental institutions was "in the best interest of all Alabamians."

<sup>261</sup> See *La Raza Unida v. Volpe*, 57 F.R.D. 94, 100 (N.D. Cal. 1972), where Judge Peckham surmised that "environmental protection, housing relocation and highway construction are nearly everyone's business, and that almost all of society is better off when public policies in these areas have been strengthened." See also *Widerness Soc'y v. Morton*, 495 F.2d 1026, 1033-34 (D.C. Cir.), *rev'd sub nom. Alyeska Pipeline Serv. Co. v. Widerness Soc'y*, 95 S. Ct. 1612 (1975). But see *Sierra Club v. Lynn*, 502 F.2d 43 (5th Cir. 1974), *rev'g* 364 F. Supp. 834 (W.D. Tex. 1973). The trial court had awarded attorney's fees to plaintiffs because "even though the plaintiffs may have . . . technically lost this lawsuit, nevertheless, a very important service has been performed in creating a greater public awareness of the dangers of pollution . . ." 364 F. Supp. at 847. The Fifth Circuit, which was quite active in the development of the private attorney general exception, reversed on the ground that plaintiffs had not served the public interest sufficiently to support a fee award where they were unable to prevail on an issue of law. 502 F.2d at 64-66. For a favorable treatment of the lower court's *Sierra Club* decision, see Comment, *Balancing the Equities in Attorney's Fees Awards: Losing Plaintiffs and Private Defendants*, 62 GEO. L.J. 1439 (1974).

<sup>262</sup> See e.g., *Bond v. White*, 508 F.2d 1397, 1401 (5th Cir. 1975); *Taylor v. Perini*, 503 F.2d 899, 905 (6th Cir. 1974), *vacated and remanded*, 95 S. Ct. 1985 (1975); *Skehan v. Board of Trustees*, 501 F.2d 31, 44 (3d Cir. 1974) *vacated and remanded*, 95 S. Ct. 1986 (1975); *Knight v. Auciello*, 453 F.2d 852, 853 (1st Cir. 1972); *Lee v. Southern Home Sites Corp.*, 444 F.2d

promotes the public interest is desirable, indeed essential, where alternatives to litigation are unavailing. Therefore, once it was found that a particular piece of litigation had served the public interest, the second stage of a private attorney general fee-shifting analysis was undertaken to determine whether stimulation of further public interest litigation could be effected by an award of attorney's fees.

b. The litigants: encouragement of public interest litigation through the award of attorney's fees.

In order to determine the propriety of a fee award in public interest litigation, a lower federal court would look at the parties to the litigation, particularly the successful plaintiff. Private attorney general fee-shifting was deemed warranted in public interest litigation where three circumstances respecting the actual parties coalesced. First, the plaintiff who had vindicated the public interest should have been a party who was under no duty to act on the behalf of non-litigants. There is no need to use fee-shifting as a means of encouraging litigation by a party under a continuing legal obligation to undertake the prosecution of public interest actions. Thus the first circumstance existed whenever the successful public interest plaintiff was a person who had voluntarily initiated legal action. Such a party is truly a *private* attorney general.<sup>263</sup>

Second, there must have been a valid reason for commencing private action rather than relying on public authorities to initiate suit. That is, there should have been a demonstrable "necessity . . . of private enforcement"<sup>264</sup> of the right vindicated by the plaintiff. Such necessity is present where the cause of action is exclusively private<sup>265</sup> or where the relevant prosecutorial agencies are named as defendants.<sup>266</sup> Furthermore, private action against private entities may be necessary where public agencies, although empowered to take action, are unable or unwilling to discharge their mandated duties.<sup>267</sup> No one

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143, 146-47 (5th Cir. 1971), *Stanford Daily v. Zurcher*, 366 F. Supp. 18, 23-24 (N.D. Cal. 1973); *La Raza Unida v. Volpe*, 57 F.R.D. 94, 99-100 (N.D. Cal. 1972); *Wyatt v. Stickney*, 344 F. Supp. 387, 409 (M.D. Ala. 1972).

<sup>263</sup> See generally *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968).

<sup>264</sup> *La Raza Unida v. Volpe*, 57 F.R.D. 94, 100 (N.D. Cal. 1972).

<sup>265</sup> See, e.g., *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala.), *aff'd*, 409 U.S. (N.D. Cal. 1972).

<sup>266</sup> "Like *La Raza*, no remedial action can be expected from public officials, as they are named as defendants in the action." *Stanford Daily v. Zurcher*, 366 F. Supp. 18, 24 (N.D. Cal. 1973). See *La Raza Unida v. Volpe*, 57 F.R.D. 94, 101 (N.D. Cal. 1972).

<sup>267</sup> The Supreme Court has often acknowledged that private enforcement of federal statutes is necessary even though public agencies are empowered to sue. For example, in implying a private right of action under § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1970), the Court explained:

should be expected to forego legal action, docilely enduring deprivation of his legal rights, merely because public authorities charged with a duty of enforcement decline to act expeditiously. In such a situation, private litigation is mandated.<sup>268</sup>

Third, there must have appeared to be financial obstacles inhibiting prosecution of the type of private action undertaken by the plaintiff. The lower federal courts recognized that many sorts of private interest litigation entail great expense and that resources available to prospective public interest plaintiffs are severely limited. In essence, the courts found that there existed financial impediments to litigation where a public interest plaintiff could envision no realistic possibility of substantial damage recovery. If the chances of gaining a monetary judgment are slight or nonexistent, the prospect of a fee award may nonetheless spur the investment of money or energy necessary to promote the public interest through private litigation.<sup>269</sup> Therefore, courts did not probe the financial wherewithal of particular plaintiffs.<sup>270</sup> Nor was it deemed relevant that a plaintiff had been spared the hardship of out-of-pocket cost because legal services were furnished without charge; in such cases, fees would be awarded directly to whomever supplied the plaintiff with legal assistance.<sup>271</sup> It

The achievement of the Act's laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General. . . . The Attorney General has a limited staff. . . . It is consistent with the broad purpose of the Act to allow the individual citizen to insure that his city or county government complies . . . .

Allen v. Board of Elections, 393 U.S. 544, 556-57 (1969). See also authorities cited in note 390 *infra*.

<sup>268</sup> Cf. Bond v. White, 508 F.2d 1397 (5th Cir. 1975). Despite the fact that the federal government was statutorily charged with enforcement, and although the United States Attorney General had in fact intervened in the plaintiffs' private Voting Rights Act suit, the Fifth Circuit reversed the trial court's determination that plaintiffs were not entitled to a fee award under the private attorney general doctrine. *Id.* at 1402.

<sup>269</sup> There is a need for private enforcement . . . and awarding attorneys' fees encourage private enforcement actions. *This is particularly vital here since damages are not available.*

Bond v. White, 508 F.2d 1397, 1402 (5th Cir. 1975) (emphasis added); accord, Stanford Daily v. Zurcher, 366 F. Supp. 18, 24 (N.D. Cal. 1973); Sims v. Amos, 340 F. Supp. 691, 695 (M.D. Ala.), *aff'd*, 409 U.S. 942 (1972). See also Lee v. Southern Home Sites Corp., 444 F.2d 143, 147-48 (5th Cir. 1971).

<sup>270</sup> Given the primary goal of encouraging public interest litigation it would seem to make little sense to distinguish among private attorneys general on the basis of relative economic strength. *But cf.* Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 672 (1974). Note, *Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest*, 24 HAST. L.J. 733, 758 (1973).

<sup>271</sup> See Lee v. Southern Home Sites Corp., 444 F.2d 143, 147 n. 3 (5th Cir. 1971); La Raza Unida v. Volpe, 57 F.R.D. 94, 98 n. 6 (N.D. Cal. 1972). Federal courts have usually awarded

was enough that discretionary resources, necessarily limited in amount, had been expended in pursuit of the public interest.

Thus the second stage of the private attorney general fee-shifting analysis was an examination of the situation faced by the public interest plaintiff at the time litigation was commenced. This examination was not comprehensive. In a sense, it comprised an objective appraisal of the factors which may have affected the decision whether to litigate. The goal of this examination was to ascertain whether an award of fees could stimulate further desirable private action by ameliorating the financial barriers which confront public interest plaintiffs. If a plaintiff who has served the public interest was under no duty to initiate legal action, if private litigation was seemingly required for timely vindication of the public interest, and if there was no apparent financial incentive for the plaintiff to bring suit, then the plaintiff has truly functioned as a private attorney general. An award of fees to such a plaintiff will encourage others to become private attorneys general by obviating the financial disincentives to public interest litigation.

## VI. THE ALYESKA PIPELINE CASE

### A. *The Events Preceding the Alyeska Pipeline Case*

The 1968 discovery of vast oil reserves on Alaska's North led to preparations for the construction of a trans-Alaska pipeline to facilitate commercial exploitation of the new oilfield.<sup>272</sup> A consortium of petroleum firms created the Alyeska Pipeline Service Company to undertake construction and operation of such a pipeline.<sup>273</sup> The pro-

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attorneys' fees to organizations providing counsel for successful plaintiffs in actions enforcing the Civil Rights Act of 1964, which includes express provisions for discretionary fee-shifting. See, e.g., *Lea v. Cone Mills Corp.*, 438 F.2d 86, 89 (4th Cir. 1971); *Miller v. Amusement Enterprises, Inc.*, 426 F.2d 534, 539 (5th Cir. 1970); *Clark v. American Marine Corp.*, 320 F. Supp. 709, 711 (E.D. La. 1970). However, fee-shifting has been denied to the extent that a successful plaintiff's representation was furnished by a federally funded legal services office. See *Ross v. Goshi*, 351 F. Supp. 949 (D. Haw. 1972). For discussion of the value of making fee awards to sources of gratuitous legal services, see Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 681-700 (1974); Note, *Awards of Attorney's Fees to Legal Aid Offices*, 87 HARV. L. REV. 411 (1973). See also McLaughlin, *supra* note 7.

<sup>272</sup> A broad discussion of many of the events and developments preceding and attending the dispute over construction of the trans-Alaska oil pipeline is presented in Dominick and Brody, *The Alaska Pipeline*; Wilderness Society v. Morton and the *Trans-Alaska Pipeline Authorization Act*, 23 AM. U.L. REV. 337 (1973).

<sup>273</sup> Alyeska is owned by a consortium of seven petroleum companies. Alyeska, formed in 1970, superseded the Trans-Alaska Pipeline System, which had been organized in 1968. See Dominick and Brody, *supra* note 272, at 337-39.

posed pipeline was to transport oil nearly 800 miles from Prudhoe Bay on the North Slope to Valdez, a port city accessible to oil tankers. Because much of the proposed pipeline route crossed lands owned by the federal government, applications for necessary rights-of-way were filed with the Department of the Interior.

Many environmentalists became alarmed about the possible adverse effects of a trans-Alaska oil pipeline. In early 1970, three environmentalist organizations—Wilderness Society, Friends of the Earth and Environmental Defense Fund, Inc.—filed suit against Secretary of the Interior Walter Hickel. Seeking declaratory and injunctive relief, the plaintiffs contended that the imminent grant of right-of-way permits to Alyeska would violate both the width restrictions of § 28 of the Mineral Lands Leasing Act of 1920<sup>274</sup> and the environmental impact statement requirements of the National Environmental Policy Act of 1969.<sup>275</sup> A federal district court issued a preliminary injunction proscribing the approval of Alyeska's right-of-way applications by Secretary Hickel.<sup>276</sup> Thereafter, Alyeska and the State of Alaska intervened as defendants. The district court subsequently dissolved the preliminary injunction and dismissed the plaintiffs' complaints.<sup>277</sup>

On appeal, the United States Court of Appeals for the District of Columbia reversed the trial court and permanently enjoined the issuance of the right-of-way permits for the pipeline.<sup>278</sup> Although recognizing the importance of ready access to the North Slope oil reserves,<sup>279</sup> the court felt that its decision was compelled by the terms

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<sup>274</sup> 30 U.S.C. § 185 (1970), which provided in part:

Rights-of-way through the public lands . . . of the United States, may be granted by the Secretary of the Interior for pipeline purposes for the transportation of oil or natural gas . . . to the extent of the ground occupied by the said pipe line and twenty-five feet on each side of the same . . .

Since the proposed pipeline was to be four feet in width, plaintiffs contended that Alyeska could not lawfully be granted a right-of-way exceeding fifty-four feet under the terms of the statute. *See Wilderness Soc'y v. Morton*, 479 F.2d 842, 853 (D.C. Cir.), *cert. denied*, 411 U.S. 917 (1973).

<sup>275</sup> 42 U.S.C. § 4332(c)(1970).

<sup>276</sup> *Wilderness Soc'y v. Hickel*, 325 F. Supp. 422 (D.D.C. 1970).

<sup>277</sup> This decision was rendered on August 15, 1972, but it was not reported.

<sup>278</sup> *Wilderness Soc'y v. Morton*, 479 F.2d 842 (D.C. Cir.), *cert. denied*, 411 U.S. 917 (1973). Rogers Morton had supplanted Walter Hickel as Secretary of the Interior during the pendency of the litigation.

<sup>279</sup> Circuit Judge J. Skelly Wright wrote the opinion of the majority. He stated that "we wish to note first that we have . . . an awareness of the severe impacts our ruling will have." 479 F.2d at 847. The opinion further specifically alluded to the importance of the litigation to the oil companies which own Alyeska and to the economic well-being of the State of Alaska and its residents. *Id.*

of § 28 of the MLLA.<sup>280</sup> Since this issue established the plaintiffs' right to relief, the court expressly declined to reach the NEPA question.<sup>281</sup> The merits of the dispute were thereafter mooted by congressional passage of the Trans-Alaskan Pipeline Authorization Act, which amended the MLLA<sup>282</sup> and explicitly exempted the proposed pipeline from the requirements of NEPA.<sup>283</sup>

### B. *The Court of Appeals' Decision to Award Attorney's Fees: The Private Attorney General Doctrine Distended*

Following their prosecution of the injunction action, the plaintiffs requested an award of attorney's fees from the court of appeals. With the court sitting en banc, a bare majority held that fee-shifting was warranted and therefore remanded the case to the district court for determination of the appropriate amount of the fee award.<sup>284</sup> The majority, in an opinion written by Circuit Judge Wright, found that the bad faith and fund exceptions to the no-fee rule were inapplicable but concluded that a fee award was justified under the private attorney

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<sup>280</sup> We base our decision on a literal reading of Section 28, the legislative history of that section, and the settled construction of the administrative regulations. In brief, it is our view that the legislative history clearly indicates that when Congress enacted Section 28 it intended that all construction work take place within the confines of the width limitation of that section—that is, within the area covered by the pipe itself (4 feet) and 25 feet on either side.

*Id.*

Alyeska desired use of federal lands over the course of the pipeline route at a minimum of 100 feet in width. Grant of additional land rights was sought for the northern half of the pipeline route to make possible the construction of a necessary access highway. The original pipeline application was a request for rights-of-way which reflected all of Alyeska's land needs. Subsequently, in an apparent attempt to evade the right-of-way width limitations of the MLLA, Alyeska submitted an amended application. Under the second application, which was the one whose approval was challenged by the plaintiffs, Alyeska sought a single right-of-way fifty-four feet wide but also requested issuance of "Special Land Use Permits" for use of additional lands adjoining the right-of-way. The court of appeals found that the requested Special Land Use Permits, because they were to be irrevocable, were indistinguishable from rights-of-way in the contemplation of the law. Thus, in substance, the amended application was no different from the first, and grant of the requested permits was therefore precluded by §28 of the MLLA. *See id.* at 847, 849-55.

<sup>281</sup> *Id.* at 848. The essence of the plaintiffs NEPA contentions was that, although a six volume impact statement had been produced, the statutory impact statement standards had not been met; that the Department of the Interior had failed to "adequately consider the pipeline route through Canada or the alternative of deferral of a decision until more information on the Canadian alternative can be obtained." *Id.* at 847.

<sup>282</sup> Trans-Alaskan Pipeline Authorization Act, Pub. L. No. 93-153, Title I, § 101, 87 Stat. 576 (1973), amending 30 U.S.C. § 185 (1970), (codified at 30 U.S.C. § 185 (Supp. 1974)).

<sup>283</sup> Trans-Alaskan Pipeline Authorization Act, Title II, § 202(d), 30 U.S.C. § 1651(d) (Supp. 1974).

<sup>284</sup> *Wilderness Soc'y v. Morton*, 495 F.2d 1026 (D.C. Cir. 1974), noted in 36 OHIO ST. L.J. 201 (1975).

ney general doctrine. Three members of the court adamantly disagreed with the reasoning employed by the majority.<sup>285</sup> The fee-shifting decision of the court of appeals is notable, and of questionable soundness, in two aspects: its holding that plaintiffs had served as private attorneys general and its holding that Alyeska was a proper party against whom to assess an award of attorney's fees.

### 1. The Majority's Holding That Plaintiffs Had Served As Private Attorneys General

Judge Wright described the private attorney general doctrine in the following terms:

When violation of a congressional enactment has caused little injury to any one individual, but great harm to important public interests when viewed from the perspective of the broad class intended to be protected by that statute, not to award counsel fees can seriously frustrate the purposes of Congress . . . . Where the law relies on private suits to effectuate congressional policy in favor of broad public interests, attorneys' fees are often necessary to ensure that private litigants will initiate such suits.<sup>286</sup>

The consideration of the necessity of private enforcement,<sup>287</sup> the financial burden of such private action<sup>288</sup> and the absence of pecuniary incentive to undertake litigation received only brief mention in the court's opinion. With respect to the private attorney general analysis, the focal point of the majority's attention, and the primary source of the dissenters' disagreement,<sup>289</sup> concerned whether the plaintiffs had in fact enhanced "broad public interests."

#### a. *The public interest and the Mineral Lands Leasing Act.*

Judge Wright quickly brushed aside the contention that "the width limitation in Section 28 of the Mineral Leasing Act of 1920 does not amount to a congressional policy of preeminent importance."<sup>290</sup> Under the view of the majority, the plaintiffs' successful

<sup>285</sup> Circuit Judges MacKinnon and Wilkey wrote dissenting opinions. Circuit Judges MacKinnon and Robb concurred with the dissent of Judge Wilkey.

<sup>286</sup> 495 F.2d at 1030 (citations omitted).

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* at 1032.

<sup>289</sup> Although they strongly opposed the award of fees to the *Alyeska Pipeline* plaintiffs, the dissenting jurists did *not* express blanket disapproval of the private attorney general fee-shifting doctrine. See generally *id.* at 1039-42 (MacKinnon, J., dissenting), 1042-46 (Wilkey, J., dissenting).

<sup>290</sup> *Id.* at 1032.

prosecution of the § 28 issue did serve broad public interests and thereby engendered widespread benefit. Such benefit did not, however, emanate from the enforcement of the MLLA width restrictions per se. Rather, the court of appeals majority found that the public interest had been served due to two considerations not directly related to the substantive nature of the MLLA.

First, the majority found that the plaintiffs' MLLA contentions and the resultant permanent injunction had vindicated constitutional values. Specifically, the court felt that the injunction had preserved the constitutional apportionment of power among the branches of federal government by preventing the Secretary of the Interior from transgressing a valid congressional mandate.<sup>291</sup> Certainly the public interest is served to some extent whenever constitutional values are protected. But to merely recast litigation issues in constitutional terms, as done by Judge Wright, does not appreciably advance a private attorney general fee-shifting analysis. The verbal escalation of statutory construction to a matter of constitutional proportions, without more, affords no basis for differentiating among the aggregate of civil litigation involving federal statutes. Any such action may be said to enhance constitutional values since a proper decision on the merits tends to ensure that Congress retains primacy—with respect to private parties, governmental entities and the other branches of the federal government—within the sphere of endeavor constitutionally allotted to the legislature. Or, conversely, it ensures that Congress does not exceed the bounds of its constitutional authority.<sup>292</sup>

Second, the majority found that the injunction obtained by the plaintiffs led to the amendment of the MLLA and that the amended version “imposes several important new requirements designed to

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<sup>291</sup> In the final analysis, this case involved the duty of the Executive Branch to observe the restrictions imposed by the Legislative, . . . and the primary responsibility of the Congress under the Constitution to regulate the use of public lands . . . .

The proper functioning of our system of government under the Constitution is, of course, important to every American, and in this sense appellants' suit had great therapeutic value.

*Id.* at 1033 (citations omitted).

<sup>292</sup> Indeed, it might be contended that, to some extent, every lawsuit promotes the public interest in that the rule of law is thereby vindicated. *Cf.* Nussbaum, *supra* note 67, at 604; Note, *Private Attorney General Fees Emerge From the Wilderness*, 43 *FORDHAM L. REV.* 258, 264 (1974). Any properly instituted federal court action could be said to promote *constitutional values*—although neither involving *constitutional issues* nor concerning matters of general public significance—in that it helps to effectuate the federal judiciary's performance of its constitutionally assigned role. Thus the bare incantation of the words “Constitution” or “constitutional” provides an exceedingly shallow basis for a finding of significant public interest value.

protect the public interest."<sup>293</sup> Thus, reasoned the majority, "Forcing Alyeska to go to Congress to amend the 1920 Act certainly was not a sterile exercise in legal technicalities devoid of public significance."<sup>294</sup> Yet, even assuming that the public interest has been advanced in a significant manner by the safeguards included in the MLLA amendments, ameliorative congressional action was not a necessary concomitant of the plaintiffs' victory on the § 28 issue. That is, unlike the circumstances present in other private attorney general fee-shifting cases,<sup>295</sup> the widespread benefit perceived by the majority was not the direct result of the decree earlier obtained by the plaintiffs.<sup>296</sup> Moreover, it seems rather incongruous, in the context of a private attorney general fee-shifting analysis, to attribute to the plaintiffs' efforts the public benefit accruing from legislation enacted to facilitate the very events which the plaintiffs had fervently sought to forestall.

b. *The public interest, NEPA and the importance of "winning"*.

The court of appeals majority also felt that the award of attorney's fees was justified by the plaintiffs' litigation of the NEPA environmental impact statement issue. After generally alluding to the great public interest value of litigation which impedes despoilation of environmental resources, Judge Wright offered:

Nor do we think it of controlling importance that this court did not actually decide the NEPA issues and that Congress has subsequently decided in the pipeline legislation that the impact statement prepared by the Department of the Interior shall be deemed sufficient under NEPA . . . . The advancement of important legislative

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<sup>293</sup> 495 F.2d at 1033. The modernization of the MLLA did include some quite far-reaching changes. Compare 30 U.S.C. § 185 (Supp. 1974) with 30 U.S.C. § 185 (1970).

<sup>294</sup> 495 F.2d at 1033.

<sup>295</sup> In other cases the benefits perceived by the courts granting private attorney general fee awards were intrinsic to the precise merits of the disputes. That is, the plaintiffs in such cases served the public interest by seeking and successfully procuring judicial proscription of offensive conduct. Service to the public interest is, in such a case, virtually apparent on the face of the court's decree; it is the necessary effect of the injunction obtained by the plaintiff—that unlawful activity is thereafter prevented—that engenders widespread public benefit. See, e.g., *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974); *Cooper v. Allen*, 467 F.2d 836 (5th Cir. 1972); *Knight v. Auciello*, 453 F.2d 852 (1st Cir. 1972).

<sup>296</sup> Although the lawsuit ultimately led to arguably salutary action by Congress, Judge Wright never forthrightly addressed the question of what important public policy was vindicated by the enjoining of the issuance of right-of-way permits to Alyeska. He stated that the suit had vindicated "important statutory rights of all citizens whose interests might be affected by construction of the pipeline," 495 F.2d at 1032, but never fully illumined why the matters in issue were deemed to be "important statutory rights."

policy justifying an award of attorneys' fees can be accomplished even where the plaintiff does not obtain the ultimate relief sought . . . Where litigation serves as a catalyst to effect change and thereby achieves a valuable public service, an award of fees may be appropriate even though a suit never proceeds to a successful conclusion on the merits.<sup>297</sup>

The viewpoint expressed in the above passage finds little direct support in the reported case law. Other courts have required a recipient of a private attorney general fee award to prevail on the merits in order to demonstrate the worthiness of his litigation posture.<sup>298</sup> Some limits must exist for implementation of private attorney general fee-shifting, and it seems that a logical requisite for a fee award would be the vindication of a substantial public policy by enforcing, rather than merely litigating, a legal principle. There are at least two sound reasons why such a threshold requirement might be established. First, whatever the desirability of alleviating the plaintiff's financial burden in prosecuting a particular piece of litigation, some basis must exist for compelling another party to assume that burden. No such basis exists with respect to a party who has not been found to have broken some legal rule relative to the matter litigated.<sup>299</sup> Second, the imposition of a threshold requirement that the plaintiff "win" the principal dispute confines judicial inquiry to the proper side of that line which separates implementation of public policy from active policy-making. At a minimum, it ensures that judicial scrutiny of the beneficial impact of litigation is centered upon matters of policy accorded sufficient weight to warrant their embodiment in principles of law.<sup>300</sup>

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<sup>297</sup> *Id.* at 1034 (citations omitted). Judge Wright had said that "the commitment to improving and protecting our natural environment is one of the most vital of current national policies." *Id.*

<sup>298</sup> *But see* *Sierra Club v. Lynn*, 364 F. Supp. 834 (W.D. Tex. 1973), *rev'd*, 502 F.2d 43 (5th Cir. 1974). In an environmental action brought pursuant to a statute which provided for permissive fee-shifting, a fee award was made to plaintiffs who prevailed on some, but not all, issues in *Natural Resources Defense Council, Inc. v. EPA*, 484 F.2d 1331 (1st Cir. 1973). A federal district court, declining to make a statutorily permitted fee award to a losing environmentalist plaintiff, cautioned that an award to an unsuccessful party, even where authorized by Congress, should be a rarity. *See Delaware Citizens for Clean Air, Inc. v. Stauffer Chemical Co.*, 62 F.R.D. 353 (D. Del. 1974).

<sup>299</sup> *See* *Sierra Club v. Lynn*, 502 F.2d 43, 65 (5th Cir. 1974); *accord*, *Golden v. Kentile Floors, Inc.*, 512 F.2d 838, 850 (5th Cir. 1975); *Sapp v. Renfro*, 511 F.2d 172, 178 (5th Cir. 1975).

<sup>300</sup> Of course Congress may, and in a few instances has, expressly authorized federal courts to shift the fees of a party who has not "won" his case. In a case involving one such statute, § 304(d) of the Clean Air Amendments of 1970, 42 U.S.C. § 1857h-2(d) (Supp. 1974), the court counseled that much circumspection should attend the decision whether a losing party

The court of appeals majority stated that the plaintiff's NEPA appeal "helped focus attention in Congress on the major issue raised—the relative merits of a trans-Canadian *versus* a trans-Alaskan route."<sup>301</sup> Again,<sup>302</sup> a result of this type seems rather remote to admit of judicial consideration in a private attorney general fee-shifting analysis. Instigation of increased congressional awareness of and attention to significant issues may indeed be in the public interest,<sup>303</sup> but there are usually more effective, and proper, methods of arousing legislative concern than litigation.<sup>304</sup>

Judge Wright also suggested that "appellants' lawsuit and appeal served as a catalyst to ensure that the Department of the Interior drafted an impact statement and that the statement was thorough and complete."<sup>305</sup> It is true that no impact statement had yet been produced at the time that the plaintiffs commenced their injunction action. Thus, to the extent that the institution of the lawsuit compelled the government to comply with the law, it may be said that the NEPA litigation was successful.<sup>306</sup> However, the impact statement had been

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should have an award of fees. *See* Delaware Citizens for Clean Air, Inc. v. Stauffer Chemical Co., 62 F.R.D. 353, 354-55 (D. Del. 1974).

<sup>301</sup> 495 F.2d at 1035 (footnote omitted).

<sup>302</sup> This "benefit" seems to be essentially the same as that previously mentioned by the majority, *id.* at 1033, with respect to the amendment of the MLLA. The majority apparently agreed with Judge Wilkey that "in retrospect is precisely the way the award of attorneys' fees is always judged." *Id.* at 1042 (Wilkey, J., dissenting). However, it is suggested by the writer that the public interest value of a lawsuit could be more meaningfully explored without the distortion of hindsight. It is the merit of the suit and the necessary impact of the relief sought, judged at the time an action is filed, which should determine whether the plaintiff is a private attorney general. If the purpose of private attorney general fee-shifting is to encourage certain types of litigation, a plaintiff's eligibility for such an award should be neither enhanced nor hindered by fortuities which occur subsequent to the institution of the lawsuit. *Cf.* Souza v. Trivisono, 512 F.2d 1137, 1139 (1st Cir. 1975).

<sup>303</sup> There is much room for doubt whether it was in the best interest of the country that the dispute in this case finally necessitated congressional action. *See* 495 F.2d at 1039 (MacKinnon, J., dissenting).

<sup>304</sup> The court of appeals majority did not mention that there exist more direct, conventional and acceptable means to "focus attention in Congress" on particular matters. Certainly such is not the usual function of litigation. However, at least one other court has noted the positive value of third party awareness generated by litigation. *See* Sierra Club v. Lynn, 364 F. Supp. 834, 847-49 (W.D. Tex. 1973), *rev'd*, 502 F.2d 43 (5th Cir. 1974). *See also* Comment, *Balancing the Equities in Attorney's Fees Awards: Losing Plaintiffs and Private Defendants*, 62 GEO. L.J. 1439 (1974).

<sup>305</sup> 495 F.2d at 1034.

<sup>306</sup> Where the institution of legal action induces the defendant to conform his behavior to legal standards, the plaintiff has accomplished the objective of litigation even though no formal relief is granted. Such a plaintiff, although not technically a "winner," is nonetheless "successful." *Accord*, Kahan v. Rosenstiel, 424 F.2d 161 (3d Cir. 1970). Thus ultimate victory in the form of a judicial decree may not be vital for an award of attorney's fees. *Cf.* McEnteggart v. Cataldo, 451 F.2d 1109, 1111 (1st Cir. 1971); Delaware Citizens for Clean Air, Inc., 62 F.R.D.

submitted before the trial court's 1972 decision and it was then held sufficient. Later, Congress also decreed that the impact statement did not violate NEPA. Therefore, since the plaintiffs had requested recovery of the attorney's fees incurred on appeal only, the court of appeals majority, in effect, found that the plaintiffs had advanced the public interest by contesting an impact statement which had been determined, both judicially and legislatively, legally acceptable.

*c. An additional factor: the clash of countervailing public policies.*

The court of appeals dissenters, accentuating the importance of policies running counter to those which the environmentally-concerned plaintiffs had attempted to effectuate, vehemently argued that the litigation had disserved the public interest. Circuit Judge MacKinnon focused primarily upon the intent of the plaintiffs, through their NEPA allegations, to force construction of a trans-Canada, rather than a trans-Alaska, pipeline. This objective, he asserted, was in marked derogation of the express national policy<sup>307</sup> favoring independence from foreign nations for American energy needs.<sup>308</sup>

Circuit Judge Wilkey's dissent stressed the more comprehensive public policy in favor of prompt and thorough exploitation of available energy resources. Although not impugning the plaintiffs' sincerity, he opined:

Judging from Congress' most recent action, these plaintiffs have been *frustrating* the policy Congress considers highly desirable and of the utmost urgency.

Nor do we agree that "this litigation may well have provided substantial benefits to particular individuals." . . . It is hard to visualize the average American in this winter of 1973-74, turning down his thermostat and with a careful eye on his auto fuel gage, feeling the warm glow of gratitude to those public-spirited plaintiffs in the Alaska Pipeline case.

. . . By delaying the obtaining of oil from the North Slope of Alaska for several years, the plaintiffs conferred *no public benefit*

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353, 355 (D. Del. 1974). See also King and Plater, *supra* note 32, at 78-79.

<sup>307</sup> Judge MacKinnon cited § 8 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1337 (1970), as the embodiment of this policy. 495 F.2d at 1040.

<sup>308</sup> [The majority judges] seek now to compensate a group whose principal objective . . . was to make our vital energy needs further dependent upon another foreign country. . . . While we must suffer for the substantial delay caused by these misguided decisions, I refuse to concur in paying for the efforts of those who sought to further aggravate the injury.

*Id.* at 1041.

on the United States of America.<sup>309</sup>

Thus this case, perhaps more tellingly than any preceding it,<sup>310</sup> featured the troublesome question of how a private attorney general fee-shifting analysis can accommodate the clash of countervailing public policies. Judge Wilkey advocated a weighing of competing policies, with the court taking cognizance of the "net" benefit, if any, generated by the litigation.<sup>311</sup> The majority, on the other hand, seemed to strain to discount any indication that there existed a creditable public policy in competition with the plaintiffs' environmental goals.<sup>312</sup> It would appear that the better approach for exploring the public interest value of litigation is to simply consider that policy which, as evidenced by the resolution of the merits of a dispute, is favored by the substantive law.<sup>313</sup>

d. *An assessment: the Alyeska Pipeline plaintiffs as private attorneys general.*

Other courts which awarded attorney's fees under the private attorney general doctrine did so on the ground that the plaintiff vindicated the public interest, consequently benefitting numerous non-litigants by enforcing a rule of law suffused with important public policy implications.<sup>314</sup> Where a plaintiff succeeds in having a continuing deprivation of civil rights enjoined, the service to the public interest is obvious: it inheres in the decree of the court which thereafter protects all citizens from similar encroachment upon their

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<sup>309</sup> *Id.* at 1042 (emphasis in original).

<sup>310</sup> The discordant interplay of competing policies seems to be especially prominent in environmental litigation since achievement of environmental goals usually requires that other desirable, often economic, objectives be correspondingly diminished. In civil rights litigation, a court need not retard socially desirable conduct in order to provide needed relief for the meritorious plaintiff. Compare *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972), with *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971).

<sup>311</sup> This stands as plaintiffs' net achievement: the amendment of the 1920 Mineral Leasing Act to authorize a wider right of way, quite the opposite of the plaintiffs' objective to limit the right of way to 25 feet on each side. Against this public service must be weighed the public *disservice* in blocking access to the much needed oil at a critical time in our history, and the enormously higher cost we all must pay. 495 F.2d at 1043 (emphasis in original).

<sup>312</sup> The majority concluded that the plaintiffs had "advanced and protected in a very concrete manner substantial public interests." *Id.* at 1036. The majority opinion never identified with specificity the interests which plaintiffs had served and made no reference to any public policies disserved by the litigation.

<sup>313</sup> See generally *King and Plater*, *supra* note 32, at 66-67.

<sup>314</sup> See, e.g., *Bond v. White*, 508 F.2d 1397 (5th Cir. 1975); *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974); *Donahue v. Staunton*, 471 F.2d 475 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973); *Knight v. Auciello*, 453 F.2d 852 (1st Cir. 1972).

civil rights. The widespread benefit is part and parcel of the court's decision to forbid further offensive behavior.

In the *Alyeska Pipeline* case the plaintiffs did in fact obtain the injunction which they had sought. Yet the court of appeals majority, in its fee-shifting opinion, failed to fully illumine how, if at all, enjoining the issuance of right-of-way permits directly enhanced the public interest. Instead, the majority chose to discern service to the public interest through a series of non-judicial events—events precipitated by the “catalytic” effect of the plaintiffs’ lawsuit. Perhaps, as determined by the majority, the cumulative impact of the incidents spawned by the principal litigation warranted an award of attorney’s fees to the plaintiffs. But it would seem that a far preferable method for gauging the public interest value of a given piece of litigation involves ascertainment of the beneficial impact of the merits of the litigation, *not the mere fact of litigation*. Hence it is suggested that the *Alyeska Pipeline* case presented a much less compelling justification for finding that the plaintiffs functioned as private attorneys general than did the private attorney general fee-shifting cases of other lower federal courts.

## 2. The Majority’s Holding That Alyeska Was a Proper Party Against Whom to Assess an Award of Attorney’s Fees

The second significant aspect of the *Alyeska Pipeline* fee-shifting decision of the court of appeals is that attorney’s fees were assessed against the defendant-intervenor Alyeska. After determining that the case was a proper one for private attorney general fee-shifting, the court held that an award of fees against the Department of the Interior was statutorily proscribed.<sup>315</sup> And the majority believed that forcing defendant-intervenor State of Alaska to share in the burden of the fee award would be inappropriate.<sup>316</sup> The court nevertheless declared that attorney’s fees<sup>317</sup> could properly be assessed against Alyeska because the pipeline company “was a major and real party at interest in this case, actively participating in the litigation along with the Government . . . .”<sup>318</sup>

This portion of the majority’s holding was almost certainly ill-considered. The court noted that the propriety of such an award

<sup>315</sup> 495 F.2d at 1036. See 28 U.S.C. § 2412 (1970).

<sup>316</sup> 495 F.2d at 1036 & n. 8. See notes 324-27 *infra* and accompanying text.

<sup>317</sup> The court held that an award of “only half of the total fees” was proper in view of “the Government’s role in the case” and the statutory bar to fee-shifting against the Department of the Interior. 495 F.2d at 1036.

<sup>318</sup> *Id.*

against Alyeska was open to question since it was the federal government, not Alyeska, which had to be enjoined from violating the MLLA.<sup>319</sup> However, explained the court, the goal of private attorney general fee-shifting is the encouragement of private litigants to protect the public interest rather than to punish law violators. This view, coupled with the fact that Alyeska had intervened in the litigation to protect its "massive interests," led the majority to conclude that assessing a fee award against Alyeska was palatable.

The Fifth Circuit, responsible for a number of notable private attorney general fee-shifting decisions,<sup>320</sup> adopted the opposite view in *Sierra Club v. Lynn*,<sup>321</sup> a case which factually paralleled *Alyeska Pipeline*. In *Sierra Club*, which in part concerned a NEPA environmental impact statement issue, the federal district court assessed an award of attorney's fees against a private developer who had contracted to construct a federally-funded housing development.<sup>322</sup> In reversing the lower court's award of attorney's fees, the Fifth Circuit expressly declined to follow the reasoning employed by the *Alyeska Pipeline* majority.<sup>323</sup> Although agreeing with the trial court's determination that the plaintiffs had served as private attorneys general, the Fifth Circuit found that the Department of Housing and Urban Development was the sole defendant who violated NEPA. Since the private defendant had not been responsible for HUD's failings, the court decided that equity would not countenance an assessment of a fee award against the developer, notwithstanding the fact that HUD was entirely insulated from liability.<sup>324</sup>

The weakness of the *Alyeska Pipeline* court of appeals majority's decision to shift fees against Alyeska was perhaps best demonstrated by their unconvincing attempt to contrast the respective

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<sup>319</sup> "Technically, it is the Interior Department, on Alyeska's application, which violated the Mineral Leasing Act by granting rights-of-way in excess of the Act's width restrictions, and it is the Interior Department's failure to comply with NEPA which was challenged on appeal." *Id.*

<sup>320</sup> See, e.g. *Bond v. White*, 508 F.2d 1397 (5th Cir. 1975); *Fairley v. Patterson*, 493 F.2d 598 (5th Cir. 1974); *Cooper v. Allen*, 467 F.2d 836 (5th Cir. 1972); *Lee v. Southern Home Sites Corp.* 444 F.2d 143 (5th Cir. 1971).

<sup>321</sup> 502 F.2d 43 (5th Cir. 1974).

<sup>322</sup> *Sierra Club v. Lynn*, 364 F. Supp. 834, 847-52 (W.D. Tex. 1973), *rev'd*, 502 F.2d 43 (5th Cir. 1974).

<sup>323</sup> 502 F.2d at 65.

<sup>324</sup> In the absence of proof that the private party controlled the government agency's actions or caused its default, it cannot be cast in judgment as a result of the agency's shortcomings. The fact that the breach of duty involved was committed by one who is immune from liability for financial redress affords no basis for a shifting of fees.

*Id.* at 66.

litigation roles played by Alyeska and the State of Alaska. Both parties had intervened as defendants. But Alyeska was said to have entered the litigation in order to "protect its massive interests,"<sup>325</sup> whereas the State of Alaska "voluntarily participated in this suit, in effect to present to the court a different version of the public interest implications of the trans-Alaska pipeline."<sup>326</sup> Yet Judge Wright himself had noted the tremendous financial stakes which *both* Alyeska and the State of Alaska had in expediting construction of the trans-Alaska pipeline during the court's 1973 decision on the merits.<sup>327</sup> The apparent paucity of foundation for the disparate fashion in which the majority chose to characterize the litigation roles of the two intervenors lends some credence to Judge MacKinnon's assertion that the true ground for decision was that "oil companies are prosperous, appellants are poor, and therefore oil companies should finance both sides of this litigation."<sup>328</sup>

### C. *The Supreme Court Decision in the Alyeska Pipeline Case: The Private Attorney General Interred*

When certiorari was granted in the *Alyeska Pipeline* case,<sup>329</sup> the validity of the private attorney general exception was finally subject to assay by the Supreme Court. It might reasonably have been predicted that the Court would give its imprimatur to the private attorney general doctrine as an acceptable ground for extrastatutory fee-shifting.<sup>330</sup> Much of the doctrine had been derived directly from the Court's *Piggie Park* opinion. Since *Piggie Park* involved a statute which authorizes fee awards, that case did not constitute decisive

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<sup>325</sup> 495 F.2d at 1036.

<sup>326</sup> *Id.* at n. 8.

<sup>327</sup> Any decision further enjoining construction of this project will impose serious costs on the oil companies who plan to build the pipeline and who have made substantial investments that cannot begin to show a return until oil begins to flow from their wells at Prudhoe Bay. The project means much needed jobs and income to the people of the State of Alaska, and development of Prudhoe Bay oil resources will bring forth badly needed revenues for the Alaska State Treasury.

*Wilderness Soc'y v. Morton*, 479 F.2d 842, 847 (D.C. Cir.), *cert. denied*, 411 U.S. 917 (1973).

<sup>328</sup> 495 F.2d at 1042 (MacKinnon, J., dissenting). The majority placed great emphasis upon Alyeska's financial might, declaring that the rationale behind the no-fee rule is weakest where there is a wealthy defendant who would not be intimidated by the prospect of fee-shifting. *Id.* at 1031-32. Though this would appear to be generally true, the presence in a lawsuit of a deep pocket against whom attorney's fees might be assessed certainly does not afford an independent ground for fee-shifting. *Accord*, *Indiana State Employees Ass'n v. Boehning*, 511 F.2d 834, 838 (7th Cir. 1975).

<sup>329</sup> 419 U.S. 823 (1974).

<sup>330</sup> See King and Plater, *supra* note 32, at 55-56.

authority for the validity of extrastatutory private attorney general fee-shifting as an exercise of discretionary equitable power. Yet it appeared that the impact of this key distinction—that under the private attorney general doctrine the courts act without explicit congressional direction—had been effectively ameliorated by *Mills* and by the thoughtful private attorney general decisions in the lower federal courts.

Of course, any discretionary power vested in the judiciary is subject to abuse. Although the essential private attorney general doctrine, as developed and implemented by the lower federal courts, appeared to create a sound basis for the exercise of the federal judiciary's inherent power to award attorney's fees, effective limits for the doctrine's invocation would ultimately have needed to be established. Thus the *Alyeska Pipeline* case seemed a particularly good one for review by the Supreme Court. Because the fee-shifting decision of the court of appeals was questionable in several respects, the case could have been a vehicle for the Court to furnish guidance concerning the parameters of the private attorney general doctrine.

It was not to happen. The Supreme Court reversed the *Alyeska Pipeline* fee-shifting decision of the court of appeals.<sup>331</sup> Although the reversal was not surprising in view of the comparative weakness of the case, the Court went much further and ruled that fee awards to those functioning as private attorneys general are wholly impermissible in the absence of an authorizing statute. After an initial recitation of the *Alyeska Pipeline* facts, the Court found scant need to make reference to the specific situation before it. Nor did the Court reach a full-scale consideration of the intrinsic equitable merit of the private attorney general doctrine. The Court was spared these tasks by its discernment of a more comprehensive ground for decision. The Court, by a five to two margin,<sup>332</sup> held that Congress had circumscribed the power of federal courts to award attorney's fees and that, as a matter of statutory construction, the general discretionary fee-shifting power remaining at the disposal of the federal courts encompassed only the two traditional exceptions to the no-fee rule.

#### 1. Reading the Federal Fee Statutes to Limit the Power of Federal Courts to Award Attorney's Fees

The first, and nearly decisive, prong of the *Alyeska Pipeline*

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<sup>331</sup> *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 95 S. Ct. 1612 (1975).

<sup>332</sup> Justices Marshall and Brennan filed dissenting opinions, and Justices Douglas and Powell did not sit.

Court's opinion dealt with the effect of the federal fee statutes. The Court concluded that the federal costs statute and docket fee statute,<sup>333</sup> collectively denominated the "fee statutes" by the Court, are a congressional foreclosure of extrastatutory fee-shifting by the federal courts. Despite copious documentation of this portion of the Court's opinion, Mr. Justice Marshall aptly characterized the Court's interpretation of the fee statutes when he stated that it "flies squarely in the face of our prior cases."<sup>334</sup>

The Court initially determined that the federal fee statutes represent a codification of the no-fee rule. Although noting that the no-fee rule found its first expression in an early decision of the Supreme Court,<sup>335</sup> the Court went on to recount that during the period from 1789 to 1853 lower federal courts made awards of attorney's fees in accordance with the rules of the states in which they sat. Originally this practice had been mandated by a federal statute,<sup>336</sup> and if continued to be observed long after the expiration of that legislation. Therefore, in the view of the Court, the 1853 enactment of a federal fee-bill statute,<sup>337</sup> the predecessor of today's fee statutes, was a wholesale repudiation of extrastatutory federal court fee-shifting:

The result was a far-reaching act specifying in detail the nature and amount of the taxable items of cost in the federal courts. One of its purposes was to limit allowances for attorneys' fees that were to be charged to the losing parties.<sup>338</sup>

The *Alyeska Pipeline* Court then proceeded to trace the path of the 1853 fee-bill statute through a succession of legislative revisions to its present embodiment in § 1920 and § 1923(a). The current federal fee statutes differ markedly from the original fee-bill statute with respect to terminology. In particular, while the 1853 Act provided that "no other compensation [than that contained in the section's schedule of fees] shall be taxed and allowed," § 1920 now merely states that enumerated items, including the § 1923(a) docket fees,

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<sup>333</sup> 28 U.S.C. §§ 1920, 1923(a) (1970). Section 1920, the costs statute, provides that federal courts "may tax as costs" certain enumerated items, including § 1923 docket fees. Section 1923(a) states, "Attorney's and proctor's docket fees in courts of the United States may be taxed as costs . . ." and then specifies the amount, twenty dollars in most actions, which can be taxed as a docket fee.

<sup>334</sup> 95 S. Ct. at 1629 (Marshall, J., dissenting).

<sup>335</sup> 95 S. Ct. at 1618, quoting *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796).

<sup>336</sup> Federal Judiciary Act of 1789, ch. 21, § 2, 1 Stat. 93.

<sup>337</sup> Act of Feb. 26, 1853, ch. 80, 10 Stat. 161. Prior to a listing of recoverable amounts of attorney's fees, the Act stated "the following and no other compensation shall be taxed and allowed."

"may be taxed as costs." The Alyeska Pipeline Court acknowledged this alteration in phraseology but believed that it had been accomplished "without any apparent intent to change the controlling rules."<sup>339</sup> The accuracy of this belief, though far from being unassailable,<sup>340</sup> need not be countered in order to conclude that the Court misapprehended the nature of those "controlling rules." The Court quoted several century-old decisions<sup>341</sup> in which the 1853 statute had been discussed in order to find indications of the import of the federal fee statutes. From these early cases the Court gleaned that the 1853 Act comprised a "statutory rule that allowances for counsel fees are limited to the sums specified by the costs statute."<sup>342</sup> However, this view of the fee statutes utterly fails to account for the myriad instances of judicial fee-shifting by federal courts, including the Supreme Court, subsequent to these early cases relied upon. It was this matter which the *Alyeska Pipeline* Court next addressed.

The Court, in effect, stated that there had been no proper incidences of extrastatutory fee-shifting. On the contrary, judicial fee-shifting resulted not from the use of inherent equitable power but from statutory construction: "To be sure, the fee statutes have been construed to allow, in limited circumstances, a reasonable attorneys' fee to the prevailing party in excess of the small sums permitted by § 1923."<sup>343</sup> It is true, as noted by the Court,<sup>344</sup> that writers of early fund fee-shifting opinions took care to distinguish costs "as between solicitor and client" from those "as between party and party," since

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<sup>338</sup> 95 S. Ct. at 1619.

<sup>339</sup> *Id.* at 1620-21. The 1853 Act was retained through the statutory revisions of 1874 and 1911. *See id.* & nn. 26-27. The change in the language of the fee statutes occurred during the 1948 updating of the Judicial Code. In essence, the majority's assertion that no material change was intended by the 1948 revisers rested upon the absence of any salient manifestations of such an intent. *See id.* at 1621 n. 29.

<sup>340</sup> *See generally* FED. R. CIV. P. 54(d).

<sup>341</sup> 95 S. Ct. at 1620, quoting *The Baltimore*, 75 U.S. (8 Wall.) 377, 392 (1869); *Flanders v. Tweed*, 82 U.S. (15 Wall.) 450, 452-53 (1872).

<sup>342</sup> 95 S. Ct. at 1620. Although it is true that *The Baltimore* and *Flanders v. Tweed* opinions contained language reflecting an extremely rigid interpretation of the 1853 fee-bill statute, it is nevertheless doubtful that those decisions should be accorded significant weight as indicia of current federal court equitable fee-shifting power. The precedential value of *The Baltimore* has not been great. *See Vaughan v. Atkinson*, 369 U.S. 527 (1962). And in *Flanders*, the Supreme Court's holding was that an award of attorney's fees by a jury was impermissible. Furthermore, during the same era in which those two cases were decided, the Court broadly intimated that federal courts sitting in equity possessed the undiminished powers of the English High Court of Chancery. *See Payne v. Hook*, 74 U.S. (7 Wall.) 425, 430 (1869); *Fontain v. Ravenel*, 58 U.S. (17 How.) 369, 384 (1855).

<sup>343</sup> 95 S. Ct. at 1620.

<sup>344</sup> *Id.*

the former were unquestionably beyond the ambit of the fee-bill statute. The Supreme Court made such a distinction in *Trustees v. Greenough*,<sup>345</sup> thereby avoiding an unnecessary full assessment of the statute's scope. Thus early approval of the fund fee-shifting principle may properly be said to have involved "construction" of the fee-bill statute in the sense that courts rather easily surmised that the statute had no relevance in the fund fee-shifting situation.

However, the *Alyeska Pipeline* Court's reading of the federal fee statutes and their "construction" fails to explain adequately numerous statements in past Supreme Court opinions acknowledging the broad powers of federal courts to award attorney's fees "as between party and party." Only last year the Court stated:

The federal judiciary has long recognized several exceptions to the general principle that each party should bear the cost of its own representation. We have long recognized that attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . . .<sup>346</sup>

Throughout this century, the Supreme Court has often reiterated that federal courts possess the power to award attorney's fees when equitable considerations demand such a result.<sup>347</sup> Such statements do not stand for the proposition, endorsed by the *Alyeska Pipeline* Court,

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<sup>345</sup> 105 U.S. 527 (1882). See notes 128-30 *supra* and accompanying text. The *Greenough* Court, after reviewing English case law, considered the 1853 fee-bill statute:

The fee-bill is intended to regulate only those fees and costs which are strictly chargeable as between party and party, and not to regulate the fees of counsel and other expenses and charges as between solicitor and client, nor the power of a court of equity, in cases of administration of funds under its control, to make such allowance to the parties out of the fund as justice and equity may require. The fee-bill itself expressly provides that it shall not be construed to prohibit attorneys . . . from charging to and receiving from their clients . . . such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties.

105 U.S. at 535. The Court concluded: "[T]he act contains nothing which can be fairly construed to deprive the Court of Chancery of its long-established control over the costs and charges of the litigation, to be exercised as equity and justice may require, including proper allowances to those who have instituted proceedings for the benefit of a general fund." *Id.* at 536 (emphasis added).

<sup>346</sup> *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974).

<sup>347</sup> See *Hall v. Cole*, 412 U.S. 1, 4-5 (1973); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967); *Vaughan v. Atkinson*, 369 U.S. 527, 531 (1962); *Universal Oil Prods. Co. v. Root Ref. Co.*, 328 U.S. 575, 580 (1946); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 166-67 (1939); *Kansas City S. Ry. v. Guardian Trust Co.*, 281 U.S. 1, 9 (1930); *Ex parte Peterson*, 253 U.S. 300, 318 (1920).

that Congress has, through the federal fee statutes, forbidden extrastatutory fee-shifting.

The Supreme Court has repeatedly indicated that the inherent federal court equity power to shift fees remains unimpeded by any general<sup>348</sup> congressional enactment. Indeed, even in *Fleischmann Distilling Corp. v. Maier Brewing Co.*,<sup>349</sup> the Court stated that the no-fee rule is a creation of the judiciary<sup>350</sup> and characterized § 1923(a) as an exception to the rule.<sup>351</sup> Furthermore, in no other fee-shifting decision of the Supreme Court during the past decade<sup>352</sup> has reference been made to the federal fee statutes. A mere two years ago, in *Hall v. Cole*,<sup>353</sup> the Court recognized that "even where 'fee-shifting' would be appropriate as a matter of equity, Congress has the power to circumscribe such relief."<sup>354</sup> Yet the Court in that case affirmed a fee award not expressly authorized by a statute without mentioning § 1920 or § 1923(a).

Because those two decisions unquestionably went beyond the fee-shifting rationales of the older case law,<sup>355</sup> it is especially noteworthy that the federal fee statutes were cited in neither *Hall v. Cole* nor *Mills*. The *Alyeska Pipeline* Court insisted that all proper federal court fee-shifting had been in accord with the contemplation of Congress as evidenced by specific grants of fee-shifting authority and by the correct construction of the federal fee statutes.<sup>356</sup> Yet the Court in *Mills*, though certainly breaking new ground with respect to fee awards in the absence of express statutory empowerment, gave no indication that it considered itself engaged in "construction" of the federal fee statutes.<sup>357</sup> And, unlike the *Alyeska Pipeline* Court, the

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<sup>348</sup> The Supreme Court has held that fee-shifting is not proper with respect to a statutory cause of action for which Congress has prescribed "intricate" and "meticulously detailed" remedies. See *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967); cf. *F. D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116 (1974).

<sup>349</sup> 386 U.S. 714 (1967). See notes 176-88 *supra* and accompanying text.

<sup>350</sup> 386 U.S. at 717-18.

<sup>351</sup> *Id.* at 718 n. 11.

<sup>352</sup> *F. D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116 (1974); *Bradley v. School Bd.*, 416 U.S. 696 (1974); *Hall v. Cole*, 412 U.S. 1 (1973); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968).

<sup>353</sup> 412 U.S. 1 (1973).

<sup>354</sup> *Id.* at 9.

<sup>355</sup> See notes 145-59, 191-200 *supra* and accompanying text. Compare Comment, *The Allocation of Attorney's Fees After Mills v. Electric Auto-Lite Co.*, 38 U. CHI. L. REV. 316 (1971), with Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849, 881-900 (1975). See also *id.* at 907-15.

<sup>356</sup> 95 S. Ct. at 1621-23.

<sup>357</sup> See generally *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-97 (1970).

*Hall* Court did not recognize that Congress had curtailed the federal courts' equitable fee-shifting powers:

Although the traditional American rule ordinarily disfavors the allowance of attorneys' fees in the absence of statutory or contractual authorization, *federal courts, in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require*. Indeed, the power to award such fees "is part of the original authority of the chancellor to do equity in a particular situation," . . . and the federal courts do not hesitate to exercise this inherent equitable power whenever "overriding considerations indicate the need for such a recovery."<sup>358</sup>

The *Alyeska Pipeline* Court's reading of the federal fee statutes obviously does not comport with the broad descriptions of federal court fee-shifting power which have repeatedly appeared in modern Supreme Court decisions. Although it has been held that equitable fee-shifting is precluded where Congress manifests an intent that judicial discretion not be exercised,<sup>359</sup> no recent decision prior to *Alyeska Pipeline* has even suggested that the federal fee statutes limit the scope of equitable fee-shifting power.<sup>360</sup> Nevertheless, the *Alyeska Pipeline* Court, without paying more than passing attention to any

<sup>358</sup> *Hall v. Cole*, 412 U.S. 1, 4-5 (1973), quoting *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 166 (1939); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970).

<sup>359</sup> See *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967).

<sup>360</sup> The commentators have largely asserted that the federal courts' inherent equitable power over attorney's fees has not been abated. See, e.g., Dawson, *supra* note 354, at 899-900; King and Plater, *supra* note 32, at 39-40; Nussbaum, *supra* note 67, at 313-14; Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 645 (1974); Note, *Awarding Attorney and Expert Witness Fees in Environmental Litigation*, 58 CORN. L. REV. 1222, 1229-30 (1973); Note, *Awarding Attorney's Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest*, 24 HAST. L.J. 733, 735 (1973); Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216, 1226-27 (1967).

Moreover, it is clear that the ever-increasing number of federal jurists who accepted the private attorney general doctrine as a valid ground for fee awards in the absence of express statutory authorization did not perceive any blanket restrictions on federal equitable fee-shifting discretion. See, e.g., *Souza v. Travisono*, 512 F.2d 1137 (1st Cir. 1975); *Bond v. White*, 508 F.2d 1397 (5th Cir. 1975); *Taylor v. Perini*, 503 F.2d 899 (6th Cir. 1974), *vacated and remanded*, 95 S. Ct. 1985 (1975); *Skehan v. Board of Trustees*, 501 F.2d 31 (3d Cir. 1974), *vacated and remanded*, 95 S. Ct. 1986 (1975); *Fowler v. Schwartzwalder*, 498 F.2d 143 (8th Cir. 1974); *Wilderness Soc'y v. Morton*, 495 F.2d 1026 (D.C. Cir. 1974), *rev'd sub nom.* *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 95 S. Ct. 1612 (1975); *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974); *Morales v. Haines*, 486 F.2d 880 (7th Cir. 1973); *Yelverton v. Driggers*, 370 F. Supp. 612 (M.D. Ala. 1974); *Stanford Daily v. Zurcher*, 366 F. Supp. 18 (N.D. Cal. 1973); *Sierra Club v. Lynn*, 364 F. Supp. 834 (W.D. Tex. 1973), *rev'd*, 502 F.2d 43 (5th Cir. 1974); *Ross v. Goshi*, 351 F. Supp. 949 (D. Haw. 1972); *Jinks v. Mays*, 350 F. Supp. 1037 (N.D. Ga. 1972).

judicial decision rendered within the past 100 years, determined that the award of attorney's fees in the federal courts is entirely a matter of statute. In holding that federal court fee-shifting discretion is available only where authorized by express enactment or by construction of the federal fee statutes, the Court embraced "an extremely narrow view of the independent power of the courts in this area . . . ."<sup>381</sup>

## 2. Finding That Congress Has Not Extended to the Federal Courts the Discretion to Make Private Attorney General Fee Awards in the Absence of Express Statutory Authorization

The significance of the initial prong of the Supreme Court's *Alyeska Pipeline* decision is clear. There has never been any doubt that Congress is capable of limiting federal court fee-shifting discretion.<sup>382</sup> But under the view that there has been no wholesale congressional circumscription of judicial fee-shifting power, the propriety of a fee award in a given situation is primarily a matter of sound equitable discretion. Of course, even in the absence of a general restriction on equitable fee-shifting, Congress might foreclose judicial fee award discretion with respect to particular circumstances or categories of legal disputes.<sup>383</sup> However, since "implied restrictions on the power to do equity are disfavored,"<sup>384</sup> federal courts would, under this view, retain full discretionary power to award attorney's fees save that which had been taken quite clearly from the judiciary. On the other hand, the *Alyeska Pipeline* Court interpretation of the scope of the federal fee statutes results in a different test for the permissibility of discretionary fee-shifting: the touchstone is whether Congress has allowed the courts to retain their discretionary powers in a given area and not whether that power has been unambiguously withdrawn.

Thus the *Alyeska Pipeline* Court proceeded to explore whether

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<sup>381</sup> 95 S. Ct. at 1629 (Marshall, J., dissenting). Mr. Justice Marshall summarized the first portion of the Court's opinion thusly:

In sum, the Court's primary contention—that Congress enjoys hegemony over fee-shifting because of the docketing fee statute and occasional express provisions for Attorneys' fees—will not withstand even the most casual reading of the precedents. The Court's recognition of the several judge-made exceptions to the American Rule demonstrates the inadequacy of its analysis. . . . I think that it is a serious misstep for it to abdicate equitable authority in this area in the name of statutory construction.

*Id.* at 1632.

<sup>382</sup> See *Hall v. Cole*, 412 U.S. 1, 9 (1973).

<sup>383</sup> See *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967).

<sup>384</sup> 95 S. Ct. at 1632 (Marshall, J., dissenting), citing *Hecht v. Bowles*, 321 U.S. 321, 329 (1944).

Congress intended the federal judiciary to wield the discretionary power to make fee awards to private attorneys general in the absence of express statutory authorization. Because of its initial determination that the no-fee rule is a creature of congressional design, the Court needed to expend little additional effort in construing the federal fee statutes to deprive the federal courts of that power.

The Court first explained that Congress had not stripped the federal judiciary of the discretion to shift fees in fund and bad faith situations.<sup>365</sup> The Court then added that this view had been vindicated: "Congress has not repudiated the judicially fashioned exceptions to the general rule against allowing substantial attorney fees; but neither has it retracted, repealed or modified the limitations on taxable fees contained in the 1853 statute and its successors."<sup>366</sup> If recitation of these factors was intended to offer a compelling basis for differentiating between the private attorney general doctrine and the older judicial grounds for fee-shifting, it is wide of the mark. Even accepting the *Alyeska Pipeline* Court's basic interpretation of the federal fee statutes, one might respond: Congress has not repudiated the judicially fashioned private attorney general doctrine despite its use by a substantial number of federal courts as a basis for shifting fees in the absence of express statutory authorization; but neither did it retract, repeal or modify the limitations on taxable fees contained in the 1853 statute and its successors despite the failure of the federal courts to begin implementing the traditional exceptions until several decades after the statute was enacted.

The Court also pointed to 28 U.S.C. § 2412<sup>367</sup> as an indication that Congress did not intend that federal courts undertake private attorney general fee-shifting without explicit statutory permission. Because § 2412 generally immunizes the federal government and its officials from attorney's fees awards, the Court reasoned that the statute is inconsistent with the existence of any broad federal court power to shift the fees of a party who serves the public interest, especially since private attorneys general are often involved in litigation against federal agencies or officials.<sup>368</sup> The Court further noted

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<sup>365</sup> 95 S. Ct. at 1622.

<sup>366</sup> *Id.* at 1623.

<sup>367</sup> 28 U.S.C. § 2412 (1970) provides in part:

Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity . . . .

<sup>368</sup> 95 S. Ct. at 1626.

that some federal statutes expressly render federal government defendants amenable to fee award liability.<sup>369</sup> Although it appears that § 2412 does insulate federal government defendants from assessment of fee awards in the absence of an overriding statute,<sup>370</sup> this factor does not eviscerate the private attorney general doctrine. Fee-shifting would still be available for private attorneys general who redress the wrongs of private defendants.<sup>371</sup> Furthermore, it is not unusual for the law to differentiate between public and private defendants with respect to liability.

The foremost determinant of the *Alyeska Pipeline* Court's decision that private attorney general fee-shifting is not unavailable absent express statutory authorization was the Court's assessment of the import of congressional fee-shifting. Since Congress has created specific statutory grants of fee-shifting authority, the Court found that Congress had not "extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted."<sup>372</sup> This conclusion was buttressed, reasoned the Court, by the fact that the various federal statutes which expressly provide for fee awards contain different standards, some permissive, some mandatory, for the use of fee-shifting.<sup>373</sup>

Although the Court acknowledged that the private attorney general concept underlay many of the express fee-shifting provisions enacted by Congress,<sup>374</sup> this circumstance was not deemed to constitute legislative permission for the judiciary to apply the doctrine on its own initiative. On the contrary, Congress' recognition and use of the private attorney general concept was viewed by the Court as an indication that only legislators have the acumen to determine when the public interest might be sufficiently enhanced by litigation to warrant the possibility of fee-shifting as an inducement for private legal action. The *Alyeska Pipeline* Court therefore said:

[C]ongressional utilization of the private attorney general concept can in no sense be construed as a grant of authority to the Judiciary

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<sup>369</sup> *Id.* at 1626-27, citing 42 U.S.C. § 2000a-3(b) (1970).

<sup>370</sup> *See, e.g.,* *Sierra Club v. Lynn*, 502 F.2d 43, 65-66 (5th Cir. 1974). *But see* 95 S. Ct. at 1634 n. 9 (Marshall, J., dissenting).

<sup>371</sup> It was never conclusively determined whether federal courts could, in the absence of statute, shift fees against state agencies and entities and their officials. *Compare* *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala.), *aff'd*, 409 U.S. 942 (1972), with *Taylor v. Perini*, 503 F.2d 899 (6th Cir. 1974), *vacated and remanded*, 95 S. Ct. 1985 (1975). The matter was not at issue in *Alyeska Pipeline*. 95 S. Ct. at 1627-28 n.44.

<sup>372</sup> *Id.* at 1623.

<sup>373</sup> *Id.* at 1623-24.

<sup>374</sup> *Id.* at 1624.

to jettison the traditional rule against nonstatutory allowances to the prevailing party and to award attorneys' fees whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award.

Congress itself presumably has the power and judgment to pick and choose among its statutes and to allow attorneys' fees under some but not others. But it would be difficult, indeed, for the courts without legislative guidance to consider some statutes important and others unimportant and to allow attorneys' fees only in connection with the former.<sup>375</sup>

Thus the *Alyeska Pipeline* Court found that selective congressional provision for fee-shifting evidences that Congress has systematically considered the proper and desirable incidence of fee awards in the federal courts. Congressional activity in this area was therefore believed to be incompatible with the existence of any broad private attorney general fee-shifting power in the federal judiciary. The determination whether a litigant enforcing a particular substantive provision might function as a private attorney general was labelled "a policy matter that Congress has reserved for itself."<sup>376</sup> Hence the *Alyeska Pipeline* Court concluded:

"Since the approach taken by Congress has been to carve out specific exceptions to a general rule that federal courts cannot award attorneys' fees beyond the limits of 28 U.S.C. § 1923, those courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases."<sup>377</sup>

The *Alyeska Pipeline* Court's disposition of the private attorney general doctrine is reminiscent of the stance earlier adopted by the Fourth Circuit. An expected Supreme Court decision<sup>378</sup> on the validity of fee awards to private attorneys general in the absence of express statutory authorization was averted last year when the Court found a statutory ground for fee-shifting in *Bradley v. School Board*.<sup>379</sup> *Bradley* was a school desegregation case in which the federal district court had awarded attorney's fees to the successful plaintiffs.<sup>380</sup> The

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<sup>375</sup> *Id.* at 1624-25.

<sup>376</sup> *Id.* at 1627.

<sup>377</sup> *Id.*

<sup>378</sup> See King and Plater, *supra* note 32, at 54-55.

<sup>379</sup> 416 U.S. 696 (1974).

<sup>380</sup> *Bradley v. School Bd.*, 53 F.R.D. 28 (E.D. Va. 1971), *rev'd*, 472 F.2d 318 (4th Cir.

trial court's decree rested on the dual bases that the defendant had acted in bad faith and that the plaintiffs had served as private attorneys general. The Fourth Circuit reversed the lower court's fee-shifting decision, finding no bad faith and disapproving the use of the private attorney general doctrine as a basis for fee awards.<sup>381</sup> The Supreme Court vacated the Fourth Circuit's judgment and remanded the case to the trial court. However, the Court's decision in that case rested solely upon the application of § 718 of the Emergency School Aid Act,<sup>382</sup> which authorizes fee-shifting in school desegregation litigation.<sup>383</sup>

In voicing its opposition to private attorney general fee-shifting in the absence of express congressional authorization, the Fourth Circuit *Bradley* majority focused upon the doctrine's substitution of judicial assessment of public interest value for unequivocal congressional declaration of policy. Observing that "determining what is public policy is an issue normally reserved for legislative determination,"<sup>384</sup> the majority felt that judicial exploration of the public interest value of cases in litigation is an unwarranted encroachment upon congressional prerogative. The court stated that acceptance of the judicial private attorney general doctrine "will launch courts upon the difficult and complex task of determining what is public policy, . . . and, even more difficult, which public policy warrants the encouragement of award of fees to attorneys for private litigants who voluntarily take upon themselves the character of private attorneys-general."<sup>385</sup> Such a task was believed to be exclusively within the province of the legislative branch.

The view—first suggested in *Bradley* and now incorporated in the Supreme Court's *Alyeska Pipeline* holding—that the judicial private attorney general doctrine is not consonant with the contemporaneous congressional possession and exercise of private attorney general fee-shifting power appears to be deficient in several respects. First, it assumes that Congress possesses, and attributes to itself, the

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1972), *vacated and remanded*, 416 U.S. 696 (1974).

<sup>381</sup> 472 F.2d at 328-29.

<sup>382</sup> 20 U.S.C. § 1617 (Supp. 1974).

<sup>383</sup> Section 718 provides for discretionary fee-shifting. The Supreme Court had previously held that successful § 718 plaintiffs should receive fee awards in the absence of "special circumstances which would render such an award unjust." *Northcross v. Board of Educ.*, 412 U.S. 427, 428 (1973). In remanding *Bradley*, the Court held that § 718 could be applied to counsel fees incurred by the plaintiffs prior to the statute's enactment.

<sup>384</sup> *Bradley v. School Bd.*, 472 F.2d 318, 329 (4th Cir. 1972), *vacated and remanded*, 416 U.S. 696 (1974).

<sup>385</sup> *Id.*

prescience to anticipate and make provision for all situations in which the issue of fee-shifting might properly arise. Of course, Congress has neither the time nor the ability to foresee and enact legislation which covers in detail each of the varied factual situations which come before the federal courts.<sup>386</sup> Congress functions ponderously and must usually draft broad rules of general applicability.<sup>387</sup> Thus Senator Tunney has suggested that congressional silence with respect to fee-shifting "is merely a by-product of the legislative process and not a conscious signal to the courts of any kind."<sup>388</sup>

Second, while the legislature is ill-equipped to consider the myriad details of real life disputes, it is precisely the duty of the courts to do so. The federal courts are charged with the continuing task of gauging and counterbalancing the competing equities of disputants. Exploration of the public interest is often an important element of the adjudicative process. Indeed Congress has recognized the unique facility of the judiciary for determining the ultimate propriety of fee-shifting in particular cases by enacting statutes providing for permissive fee awards.<sup>389</sup>

Finally, private attorney general fee-shifting is only a further instance of the federal courts' established practice of furnishing appropriate mechanisms to assure the vindication of protected rights. The Supreme Court has been willing to "imply" remedies necessary for the effectuation of important substantive rights: "Thus, in suits for damages based on violations of federal statutes lacking any express authorization of a damage remedy, this court has authorized

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<sup>386</sup> Indeed, *Bradley* is a prime example of Congress' inability to speedily recognize and provide for all situations in which private attorney general fee awards are desirable. The Emergency School Aid Act, which contained the fee-shifting provision the Supreme Court held to be applicable to the *Bradley* litigation, was not enacted until two years after that litigation had been started. See *Bradley v. School Bd.*, 416 U.S. 696 (1974).

<sup>387</sup> Therefore, it seems plausible that congressional silence with respect to fee-shifting should be attributed scant weight in the absence of some overt congressional disapproval of fee awards. However, if it is assumed that congressional silence is significant, is it not reasonable to conclude that Congress, in failing to enact (or amend) statutes with express language proscribing fee-shifting, contemplates full use of the federal courts' equitable power to award attorney's fees? As Mr. Justice Stewart stated in his *Fleischmann* dissent:

The argument that Congress has declined to amend the Act to provide explicitly for counsel fees is hardly determinative. For Congress can be assumed to have known that the federal courts were consistently exercising the power to award counsel fees after the Act's passage. The failure to amend the statute to do away with this judicial power . . . speaks loudly for its recognition . . . .  
*Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 723 (1967) (Stewart, J., dissenting).

<sup>388</sup> Tunney, *supra* note 254, at 633.

<sup>389</sup> See statutes cited in notes 94, 95 & 96 *supra*.

such relief where, in its view, damages are necessary to effectuate the congressional policy underpinning the substantive provisions of the statute."<sup>390</sup> A distinction may be drawn between *enabling* vindication of legal rights by implying a damage remedy and *encouraging* vindication through the award of attorney's fees.<sup>391</sup> However, this distinction pales under close scrutiny. In either case, a court must investigate the policy which underlies a substantive provision, assess the importance of that policy and determine what assortment of judicial powers may properly be invoked to ensure implementation of that policy.<sup>392</sup>

The *Alyeska Pipeline* Court's reading of the federal fee statutes to embody and formalize the no-fee rule substantially impaired the likelihood that the Court would uphold the use of private attorney general fee-shifting in the absence of explicit legislative permission. Yet the Court might still have concluded that Congress had intended for the federal courts to retain and exercise the full measure of their inherent equitable power to control costs in litigation of matters suffused with great public interest value. The enactment of statutes providing for fee awards to private attorneys general might have been seen as legislative signals to the federal courts indicating, by non-exclusive example, the areas of public policy which are sufficiently momentous to warrant judicial fee-shifting. Further support for this "construction" of the federal fee statutes might then have been drawn from the absence of overt and adverse congressional response to the accelerating usage of the judicial private attorney general doctrine. Instead, by holding that the incidence of private attorney general fee-shifting is "a policy matter that Congress has reserved for itself," the *Alyeska Pipeline* Court resurrected and fortified the no-fee barrier to public interest litigation which many lower federal courts have attempted diligently to dissipate.

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<sup>390</sup> *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 402 (1971) (Harlan, J., concurring), citing *J. I. Case v. Borak*, 377 U.S. 426 (1964); *Tunstall v. Brotherhood of Locomotive Firemen & Engineers*, 323 U.S. 210 (1944). See generally Note, *The Phenomenon of Implied Private Actions Under Federal Statutes: Judicial Insight, Legislative Oversight or Legislation by the Judiciary?*, 43 *FORDHAM L. REV.* 441, 441-50 (1974).

<sup>391</sup> See Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 *U. PA. L. REV.* 636, 671 (1974).

<sup>392</sup> See *Bond v. White*, 508 F.2d 1397 (1975). The court held that plaintiffs who had successfully prosecuted a private action enforcing § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1970), were entitled to a private attorney general doctrine fee award. Referring to *Allen v. Board of Elections*, 393 U.S. 544 (1969), in which the Supreme Court implied a private § 5 right of action, the Fifth Circuit stated: "The considerations that the Supreme Court relied upon to imply a private right of action in *Allen* are also relevant in determining the propriety of an award of attorneys' fees under the private attorneys general exception." *Bond v. White*, 508 F.2d 1397, 1402 (5th Cir. 1975).

## CONCLUSION

The no-fee rule is a deeply entrenched constituent of the American legal system. Yet the circumstances which apparently led to adoption of the no-fee rule in the United States have long since receded into history. The persistence of the traditional allocation of attorney's fees among American litigants can be ascribed more to inattention and inertia than to reasoned analysis of the rule's merits:

Often taken for a maxim graven in stone, the American [no-fee] Rule may not only be an historical legislative accident, but may as well owe its continued existence to a fundamental error in the judicial process. For judicial preoccupation with *stare decisis*, not judicial acceptance of the Rule itself, is primarily responsible for the present American Rule of attorney's fees.<sup>393</sup>

Although the federal courts have long acknowledged that they possess the power to award attorney's fees as costs in appropriate situations, the judiciary has severely limited its exercise of that power until the last decade. In the face of mounting criticism of the no-fee rule, the federal judiciary in recent years began to appreciate more fully the potential usefulness of the power to control taxable costs as a method of litigation decisions. In doing so, and in thereby extending their use of fee-shifting power, the federal courts mitigated some of the detrimental effects of the no-fee rule.

The expansion of the bad faith and fund exceptions to the no-fee rule and the ensuring development of the private attorney general fee-shifting doctrine warranted enthusiastic reaction.<sup>394</sup> By implementing these new fee-shifting theories, the federal courts took a commendable step toward freer access to the judicial system for those wishing to press claims of great public importance. Moreover, these fee-shifting developments were consistent with other recent instances

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<sup>393</sup> Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 642 (1974).

<sup>394</sup> In addition to its acceptance by an ever-increasing number of federal courts, the private attorney general exception to the no-fee rule has received generally favorable treatment by commentators. See Falcon, *supra* note 233, at 407-20; King and Plater, *supra* note 32, at 48-57, 62-77; Nussbaum, *supra* note 67; Note, *Awarding Attorney and Expert Witness Fees in Environmental Litigation*, 58 CORN. L. REV. 1222, 1237-46 (1973); Note, *Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest*, 24 HAST. L.J. 733 (1973). See also Comment, *Balancing the Equities in Attorney's Fees Awards: Losing Plaintiffs and Private Defendants*, 62 GEO. L.J. 1439 (1974); Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 655-81 (1974); Note, *Allowance of Attorney Fees in Civil Rights Litigation Where the Action Is Not Based on a Statute Providing For an Award of Attorney Fees*, 41 U. CIN. L. REV. 405 (1973).

of judicial activism, and they substantially coincided with enhanced congressional recognition of the salutary uses of fee awards.<sup>395</sup> The private attorney general doctrine could have been a most efficacious tool for stimulating protection of the public interest by private litigants.

In the *Alyeska Pipeline* case the Supreme Court has again taken a "stunning step backward." The Court has now declared that federal courts do not, after all, possess broad discretionary equitable power to award attorney's fees. Furthermore, the Court stated that the federal courts were stripped of this power more than a century ago. This view is almost certainly irreconcilable with the tenor of Supreme Court decisions in numerous cases of the past several decades—cases which the *Alyeska Pipeline* Court did not see fit to discuss. The private attorney general analysis may continue to prove useful in cases involving statutes which authorize discretionary awards of attorney's fees.<sup>396</sup> But the *Alyeska Pipeline* holding forbids further judicial encouragement of public interest litigation through fee-shifting without explicit congressional sanction.<sup>397</sup> It is imperative that Congress respond to the restrictiveness of the Court's decision.

However, even if private attorney general fee-shifting was legislatively made available to the federal courts on a widespread basis, the doctrine would not seem to pose a serious threat of swallowing

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<sup>395</sup> One court, in awarding attorney's fees to a successful § 1983 plaintiff, noted the general increase in explicit congressional authorization of fee-shifting without making reference to any particular legislation:

[T]his court feels that in equitable suits to remedy violations of fourth amendment rights of those not suspected of criminal activity, an award of attorney's fees as costs is within the court's power and responsibility. Where as here fee shifting is necessary to insure the vindication of important constitutional rights and appropriate because of the inadequate remedies otherwise available, *because it is consistent with a remedy increasingly furnished by Congress*, and because of the high social value placed upon the rights involved, an award of attorney's fees as costs is essential, lest these important rights be relegated to a mere platitude.

Stanford Daily v. Zurcher, 366 F. Supp. 18, 24 (N.D. Cal. 1973) (footnote omitted; emphasis added).

<sup>396</sup> See, e.g., *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968); *Natural Resources Defense Council v. EPA*, 484 F.2d 1331 (1st Cir. 1973).

<sup>397</sup> Of course, some of the lower federal court private attorney general fee-shifting cases involved situations wherein fee awards could have been based on more traditional grounds. See, e.g., *Knight v. Auciello*, 453 F.2d 852 (1st Cir. 1972); *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971); *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala.), *aff'd*, 409 U.S. 942 (1972). In addition, lower federal courts may in the future invoke expanded versions of the traditional exceptions to the no-fee rule. For articulation of a broadened bad faith test, see *Cato v. Parham*, 293 F. Supp. 1375 (E.D. Ark.), *aff'd*, 403 F.2d 12 (8th Cir. 1968). For a "quasi-application" of the fund fee-shifting principle, see *Brewer v. School Bd.*, 456 F.2d 943 (4th Cir.), *cert. denied*, 406 U.S. 933 (1972).

the no-fee rule and thus would not represent a panacea for the rule's alleged inequities. Therefore, the judicial activism demonstrated in lower federal court fee-shifting decisions of the past several years and the sudden cessation of that trend by *Alyeska Pipeline* must not serve to obscure the desirability of taking a fresh look at the allocation of litigants' counsel fees. Instead, these recent developments should accentuate the need for a thoroughgoing examination of the role that the allocation of attorney's fees plays in litigation and potential litigant decision-making and, ultimately, in the quality of American justice. The exigency of such an inquiry, to be followed by whatever legislative action may be appropriate, should inspire concern by all members of the legal profession.<sup>398</sup>

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<sup>398</sup> Cf. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 2.