Fordham Urban Law Journal

Volume 4 *4*
Number 1

Article 9

1975

Environmental Interest Litigants Are Not Entitled to an Award of Fees for Promoting Public Interests Absent Statutory Authorization. Alyeska Pipeline Service Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).

Michael T. Cornacchia III

ENVIRONMENTAL LAW—Attorneys' Fees—Environmental Interest Litigants Are Not Entitled to an Award of Fees for Promoting Public Interests Absent Statutory Authorization. *Alyeska Pipeline Service Co. v. Wilderness Soc'y,* 421 U.S. 240 (1975).

The Wilderness Society and other interested groups brought suit in the district court,[1] seeking to enjoin construction of the Trans-Alaskan Pipeline[2] on the grounds that: (1) the right of way granted the defendant violated the width restrictions of Section 28 of the Mineral Lands Leasing Act of 1920[3] and (2) the environmental impact statement required under Section 4321 of the National Environmental Policy Act[4] [NEPA] was inadequate.[5]

The district court, after granting a preliminary injunction,[6] reversed itself by dissolving the preliminary injunction and denying permanent relief.[7] The Court of Appeals for the District of Columbia Circuit reversed,[8] holding that the Secretary of the Interior lacked the power to grant permits to projects which violated provisions of the Mineral Lands Leasing Act.[9]

The merits of the action were effectively mooted by Congress, which passed legislation authorizing the pipeline project as it stood.[10] Shortly thereafter, plaintiffs moved in the court of appeals

---

1. Wilderness Soc'y v. Hickel, 325 F. Supp. 422 (D.D.C. 1970).

2. The discovery of these rich oil deposits set off a political chain reaction of which litigation is only a small part. For a review of the history of this discovery and its after-effects see N.Y. Times, July 18, 1973, at 1, col. 1; *id.*, March 20, 1973, at 83, col. 2; *id.*, Dec. 17, 1972 at 63, col. 3; *id.*, Dec. 7, 1972, at 63, col. 3; *id.*, Jan. 19, 1971, at 22, col. 1; *id.*, Jan. 14, 1971, at 1, col. 2; *id.*, Sept. 12, 1970, at 63, col. 1; *id.*, Sept. 11, 1970, at 1, col. 3.

3. 30 U.S.C. § 185 (1970), *as amended*, 30 U.S.C. § 185(d) (Supp. III, 1973).

4. 42 U.S.C. §§ 4321-47 (1970).

5. Wilderness Soc'y v. Morton, 479 F.2d 842, 846 (D.C. Cir.), *cert. denied*, 411 U.S. 917 (1973).

6. 325 F. Supp. at 424.

7. This decision is unreported. *See* 479 F.2d at 846.

8. *Id.* at 891-93.

9. *Id.*

10. The Mineral Lands Leasing Act was amended by Title I of the Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, 87 Stat. 576 (1973), *amending* 30 U.S.C. § 185 (1970) (codified at 30 U.S.C. § 185 (Supp. III, 1973)) to allow the granting of the permits sought by Alyeska and an increase in width limitations at the discretion of the Secretary of the Interior. 30 U.S.C. §§ 185(d), (e) (Supp. III, 1973), *amending* 30 U.S.C. § 185 (1970). The Congress also declared that no further action was necessary before construction of the pipeline could begin. Trans-Alaska Pipeline Authorization Act, tit. II, § 203(d), Pub. L. No. 93-153, 87 Stat. 584 (1973) (codified at 43 U.S.C. § 1652 (Supp. III, 1973)).

for an award of attorneys' fees. The motion was granted,[11] and fees were awarded against defendant Alyeska Pipeline Service Company.[12] In granting the motion, the appellate court implemented the "private attorney general exception" to the so-called American rule, which normally protects a party to litigation from liability for his opponent's attorneys' fees.[13] This exception springs from the rationale that, in certain instances, a private plaintiff's suit may become a vehicle for the vindication of a public right. In such cases, the reasoning follows, courts generally express the sentiment that the plaintiff should not be forced to bear his own expenses. Of course, the right vindicated must be public, rather than private; the interest furthered one of general concern, rather than personal.[14]

The court of appeals credited the environmentalists with focusing the attention of Congress on the critical issue of whether the oil pipeline should take a trans-Alaska or trans-Canadian route,[15] and forcing Congress to implement needed changes in the Mineral Lands Leasing Act.[16]

The suit and appeal were characterized as a "catalyst" ensuring that the Department of the Interior drafted an impact statement[17] which provided thorough and complete information about the pipeline's environmental consequences, and holding the Department

11. 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, 421 U.S. 240 (1975).

12. For an explanation of the corporate character of Alyeska Pipeline Service Company see Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).

13. 495 F.2d at 1036.

14. *See* text accompanying notes 30-32 *infra*.

15. 495 F.2d at 1035.

16. The court of appeals discussed several new requirements in Title II of the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. §§ 1651-55 (Supp. III, 1973). The statute provides for strict liability on the part of the piepline's operator for any claims resulting from use of the right of way, *id.* § 1653(c)(1), and for a strict liability fund of $100,000,000 to be set up and maintained by the operator, *id.* § 1653(c)(5).

Title I of the Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, 87 Stat. 576 (1973), *amending* 30 U.S.C. § 185 (1970) (codified at 30 U.S.C. § 185 (Supp. III, 1973)), was passed to accomodate the construction of the pipeline. New features mandate that the issuing agency receive the "fair market rental value" for the right of way and not allow free usage as in the past. 30 U.S.C. § 185(l) (Supp. III, 1973), *amending* 30 U.S.C. § 185 (1970). The Act also provides that the applicant reimburse the United States for costs incurred in processing the application and in monitoring the construction, operation, and maintenance of the right of way. *Id.*

17. DEP'T OF THE INTERIOR, FINAL ENVIRONMENTAL IMPACT STATEMENT: PROPOSED TRANS-ALASKA PIPELINE Vol. I App. (1972).

responsible for refining various stipulations to protect the environment.[18] After finding the award of attorneys' fees to be justified, the court ordered Alyeska to pay one-half of the total fees awarded,[19] but no fees were ordered to be paid by either the United States government[20] or the state of Alaska.[21]

The Supreme Court reversed the court of appeals, holding that adoption of any exception to the American rule was beyond the power of the courts, and that only the legislature could alter the substantive law in this manner.[22] The decision curbs what has been an expanding tendency of federal courts to award attorneys' fees[23] to victorious plaintiffs in a variety of situations. Prior to *Alyeska* this tendency had elicited much judicial and scholarly support.[24]

The traditional American rule[25] is that absent statutory or contractual authorization, attorneys' fees are not normally recoverable.[26] While there has been much discussion and criticism of this view,[27] courts have traditionally only recognized two deviations from

18. 495 F.2d at 1034.

19. Alyeska was ordered to pay one half of the fees awarded because they were held to be "a major and real party at interest in this case, actively participating in the litigation along with the Government . . . ." *Id.* at 1036.

20. Although the Department of the Interior technically violated the Mineral Lands Leasing Act by granting rights of way in excess of the Act's width restrictions and it was the Department's failure to comply with NEPA that was challenged on appeal, 28 U.S.C. § 2412 (1970) provides that attorney's fees cannot be imposed against the United States. 495 F.2d at 1036.

21. The court of appeals felt that it would be "inappropriate" to tax fees against the State of Alaska because they had voluntarily entered the case to give a different version of the implications of the pipeline. An award against Alaska, it was felt, would only undermine the goal of ensuring adequate spokesmen for public interests. 495 F.2d at 1036 n.8.

22. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975). Justice White delivered the opinion of the Court, in which Chief Justice Burger, and Justices Stewart, Blackmun, and Rehnquist joined. Justices Brennan and Marshall filed dissenting opinions. Justices Douglas and Powell took no part in the decision.

23. F.D. Rich Co., Inc. v. Industrial Lumber Co., Inc., 417 U.S. 116 (1974) (bad faith); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) (common benefit or fund); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 (1923) (contempt of court order).

24. King & Plater, *The Right To Counsel Fees in Public Interest Environmental Litigation*, 41 TENN. L. REV. 27 (1973); Note, *Awarding Attorney and Expert Witness Fees in Environmental Litigation*, 58 CORNELL L. REV. 1222 (1973).

25. The American rule is the opposite of the English rule, which provides for the recovery of attorneys' fees by a successful litigant.

26. McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN. L. REV. 619, 621 (1931).

27. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CAL. L. REV. 792 (1966); Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75

the general rule: the "bad faith"[28] and the "common fund or benefit"[29] exceptions. The former provides that the court may shift an innocent party's legal expenses to an adversary who knowingly attempts to avoid his clear legal duties or who engages in harassment. The latter operates where a litigant in a representative or individual capacity creates, preserves, or increases a fund whose benefits extend to a definite class of persons. The court may then order that the successful litigant's legal expenses be paid out of that fund, thereby spreading the cost of the litigation over the true beneficiaries.

The third and most recent exception, based on a so-called "private attorney general" concept, has been fashioned for situations in which private citizens bring suits to compel the proper enforcement of the law.[30] The private attorney general exception has been applied in several areas[31] and has been recognized in the prolific field of environmental litigation.[32]

The American rule grew out of the fear that the payment of counsel fees to the opposing party might serve as a deterrent to litigation, the rationale being that defendants faced with a costly and possibly losing suit would opt to settle out of court, rather than hazard an award of attorneys' fees to their opponents.[33]

(1963); McLaughlin, *The Recovery of Attorney's Fees: A New Method of Financing Legal Services*, 40 FORDHAM L. REV. 761 (1972); Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 U. COLO. L. REV. 202 (1966).

28. Vaughan v. Atkinson, 369 U.S. 527 (1962); Monroe v. Board of Comm'rs, 453 F.2d 259 (6th Cir.), *cert. denied*, 406 U.S. 945 (1972); Rolax v. Atlantic Coast Line R.R., 186 F.2d 473 (4th Cir. 1951).

29. Mills v. Electric Auto-Lite Co., 396 U.S. 375, 392-95 (1970); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 167 (1939).

30. This exception was first articulated in a civil rights case, Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968).

31. Hoitt v. Vitek, 495 F.2d 219 (1st Cir. 1974) (prisoners' rights); Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971) (racial discrimination); Sims v. Amos, 340 F. Supp. 691 (M.D. Ala.), *aff'd*, 409 U.S. 942 (1972) (reapportionment).

32. La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972), *aff'd*, 488 F.2d 559 (9th Cir. 1973). *But see* Sierra Club v. Lynn, 502 F.2d 43 (5th Cir. 1974), *reversing in part* 364 F. Supp. 334 (W.D. Tex. 1973) where the court of appeals reversed the trial court's award of attorneys' fees on the ground that the private developer was an innocent party. As it was the governmental agency which was forced to comply with NEPA and not the private developer, the court found that it would be inequitable to charge attorneys' fees against the party who was "innocent of any wrongdoing." *Id.* at 66.

33. Kihneman v. Humble Oil & Ref. Co., 312 F. Supp. 34, 38 (E.D. La. 1970); *accord*, Conte v. Flota Mercante Del Estado, 277 F.2d 664, 672 (2d Cir. 1960), where the point is made that the American rule originated in the colonies' distrust of lawyers and continued out of

Despite the American rule, however, it had long been held that the courts had power to award attorneys' fees in equity.[34] The recognition of the traditional power is illustrated in *Sprague* v. *Ticonic National Bank*,[35] where a lower federal court had denied a request for attorneys' fees.[36] The Supreme Court reversed, stating that "[a]llowance of such costs in appropriate situtations is part of the historic equity jurisdiction of the federal courts."[37]

In *Mills* v. *Electric Auto-Lite Co.*,[38] the Supreme Court held that attorneys' fees should be awarded in a shareholders' derivative suit, notwithstanding the fact that the plaintiffs' action had produced no concrete sum certain.[39] In an expansion of the common benefit exception,[40] the Court justified the award on the basis that the plaintiffs conferred non-monetary benefits and services upon the corporation and its shareholders.[41] The Court recognized that expenses incurred by one shareholder in vindication of a corporate right of action can be spread among all shareholders, through an award against the corporation, regardless of whether an actual money award has been obtained in the corporation's favor.[42]

Less than three years ago, the Supreme Court held in *Hall* v. *Cole*[43] that attorneys' fees should be awarded in a suit brought under a provision of the Labor-Management Reporting and Disclosure Act of 1959.[44] The award was granted because not only did the suit in

---

the belief that the English practice of awarding fees favored the wealthy litigants and penalized the poor. *See generally* 1 S. SPEISER, ATTORNEYS' FEES 467 (1973).

34. Smoot v. Fox, 353 F.2d 830, 832 (6th Cir. 1965), *cert. denied* 384 U.S. 909 (1966); Rolax v. Atlantic Coast Line R.R., 186 F.2d 473, 481 (4th Cir. 1951); SPEISER, *supra* note 33, at 485.

35. 307 U.S. 161 (1939).

36. *Id.* at 162. In this case, the plaintiff succeeded in establishing her lien on bonds for the amount of the trust deposits she had in a defaulting bank. It was held that the plaintiff had vindicated the rights of fourteen other similarly situated depositors. *Id.* at 164.

37. *Id.*

38. 396 U.S. 375 (1970).

39. *Id.* at 392.

40. *Id.* at 395. The common fund or benefit exception had previously been used in situations where pecuniary benefits were involved, *i.e.*, where a sum of money was created, preserved, or conferred upon a group of individuals who would in turn pay for the costs of the necessary litigation.

41. *Id.* at 381-85. The benefit conferred by the plaintiffs in this case was the enforcement of a proxy statute. The plaintiffs claimed that the proxy solicitation for a merger by Auto-Lite's management was materially misleading and violated the Securities and Exchange Act of 1934. *Id.*

42. *Id.* at 394.

43. 412 U.S. 1 (1973).

44. 29 U.S.C. § 411(a)(2)(1970).

question foster the Congressional intent of protecting the rights of employees, but also because absent such award the union member would lack the resources necessary to seek a remedy in litigation.[45]

A review of these cases shows that the Court has not dwelt upon strict statutory construction when considering fee awards, but has rather looked to the extent of public benefit conferred by the particular litigation. This practice, however, has apparently come to an end with the decision in *Alyeska*.

In stemming this expansion of the equity power of federal courts in the area of counsel fees, the Court emphasized the problems engendered by widespread acceptance of non-statutory fee-shifting.[46] The Court noted that absent statutory authorization, judges would have little guidance on the mechanics of awarding fees. Questions as to whether the award should be mandatory or discretionary and whether it should go to the prevailing party or to prevailing plaintiffs only would require *ad hoc* determination.[47]

The Court also noted the problem of determining which public policies are sufficiently important to justify an award of fees. The Court seemed moved by a "flood gates" argument, and hypothesized that recognition of non-statutory awards of counsel fees would lead to universal fee shifting in section 1983 cases,[48] for example, where fundamental constitutional rights and policies are litigated.

The Court warned of potential conflict between the private attorney general theory, which might encourage citizen suits against

---

45. The Court, opined:

> It is difficult for individual members of labor unions to stand up and fight those who are in charge. The latter have the treasury of the union at their command and the paid union counsel at their beck and call while the member is on his own . . . . An individual union member could not carry such a heavy financial burden. Without counsel fees the grant of federal jurisidiction is but a gesture for few union members could avail themselves of it.

412 U.S. at 13.

46. Fee-shifting, refers to a process of removing the cost of certain litigation from the shoulders of the plaintiffs. The theory is that certain suits are in the public interest and should thus be encouraged. *See* 412 U.S. at 9 (1973).

47. 421 U.S. at 264.

48. *Id.* 42 U.S.C. § 1983 (1970) provides:

> Every person who, under color of any statute, oridinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

public officials, and 28 U.S.C. § 2412 which proscribes the recovery of attorneys' fees from the U.S. government.[49] In light of the Congressional practice of "carving out" exceptions to the American rule and the direct prohibition of section 2412, the Court reasoned[50] that the federal courts had no general discretionary power to award attorneys' fees and specifically had no power to award them in the present case.[51]

Although federal fee statutes have been construed in the past to allow courts to exercise their equity power and award attorneys' fees in certain situations,[52] the Court stated that Congress has not granted any discretionary power to the judiciary to make such awards.[53] Congress has recognized and accepted the general American rule, and made specific provision for the awarding of counsel fees under certain statutes.[54]

The Supreme Court began its analysis of the fee-shifting question with the Fee Bill of 1853,[55] and examined succeeding legislation designed to limit the situations in which attorneys' fees may be shifted from one party to another. The Revised Statutes of 1874,[56] the Judicial Code of 1911,[57] and the present Code of 1948, sections

49. 421 U.S. at 265. Similar problems confront awards of counsel fees against state governments. Presently, the eleventh amendment protects the states from such a levy. In Edelman v. Jordan, 415 U.S. 651 (1974), the Supreme Court held that the amendment precluded the recovery of damages against the state where the award would be taken from the state treasury. A similar result ensued in Harrisburg Coalition Against Ruining the Environment v. Volpe, 381 F. Supp. 893 (M.D. Pa. 1974). Here, counsel fees were sought to be recovered from federal, state, and city officials. The district court held that the federal officials were immune by virtue of 28 U.S.C. § 2412, and that the state officials were shielded by the eleventh amendment. Although the city officials were the only parties against whom fees could be charged, the court declined to do so, noting that they had the least active role and possessed limited resources. 381 F. Supp. at 900. *See generally* Comment, *The Eleventh Amendment: Bar to Attorney's Fees for Successful Citizen-Plaintiffs in Litigation Commenced Against a State,* 9 SUFFOLK U. L. REV. 794 (1975).

50. 421 U.S. at 267.

51. *Id.* at 269.

52. *See* cases cited in note 23 *supra.*

53. 421 U.S. at 260.

54. *Id. See, e.g.*, Bankruptcy Act, 11 U.S.C. §§ 104(a)(1), 641, 642, Act, 15 U.S.C. § 15 (1970); Unfair Competition Act, *id.* § 72; Securities Act of 1933, *id.* § 77k(e); Securities Exchange Act of 1934, *id.* §§ 78i(e), 78r(a); Truth in Lending Act, *id.* § 1640(a); Copyright Act, 17 U.S.C. § 116 (1970).

55. Act of February 26, 1853, ch. 80, 10 Stat. 161-69.

56. Revised Statutes of 1874, §§ 823-24, 18 Stat. 154.

57. The Judicial Code of 1911, ch. 231, 36 Stat. 1087. The repealing provisions did not repeal Rev. Stat. §§ 823-24 and kept them in force under its general language.

1920[58] and 1923(a)[59] continue intact the "general statutory rule that allowances for counsel fees are limited to the sums specified by the costs statute."[60] The Court's opinion noted several cases in which it had upheld the general rule that, absent statutory authorization, attorneys' fees are not recoverable.[61]

Although the Supreme Court in *Alyeska* emphasized the difficulties involved in the application of the private attorney general concept, it has not felt restrained from utilizing it in the past.[62] Justice Marshall, in his dissenting opinion, culled from previous cases three factors which would guide an equity court in determining whether or not to award attorneys' fees.[63] He stated:[64]

---

58. 28 U.S.C. § 1920 (1970) reads as follows:
Taxation of costs.—A judge or clerk of any court of the United States may tax as costs the following:
(1) Fees of the clerk and marshal;
(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
(3) Fees and disbursements for printing and witnesses;
(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
(5) Docket fees under section 1923 of this title. A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

59. 28 U.S.C. § 1923 (1970) reads as follows:
Docket fees and costs of briefs.—
(a) Attorney's and proctor's docket fees in courts of the United States may be taxed as costs as follows: $20 on trial or final hearing (including a default judgment whether entered by the court or by the clerk) in civil, criminal, or admiralty cases, except that in cases of admiralty and maritime jurisdiction where the libellant recovers less than $50 the proctor's docket fee shall be $10;
$20 in admiralty appeals involving not over $1,000;
$50 in admiralty appeals involving not over $5,000;
$100 in admiralty appeals involving more than $5,000;
$5 on discontinuance of a civil action;
$5 on motion for judgment and other proceedings on recognizances;
$2.50 for each deposition admitted in evidence.
(b) The docket fees of United States attorneys shall be paid to the clerk of court and by him paid into the Treasury.
(c) In admiralty appeals the court may allow as costs for printing the briefs of the successful party not more than:
$25 where the amount involved is not over $1,000; $50 where the amount involved is not over $5,000; $75 where the amount involved is over $5,000.

60. 421 U.S. at 255.
61. *Id.* at 257.
62. *See* text accompanying notes 34-45 *supra*.
63. 421 U.S. at 272-82 (Marshall, J., dissenting).
64. *Id.* at 284-85.

> The reasonable cost of plaintiff's representation should be placed upon the defendant if (1) the important right being protected is one actually or necessarily shared by the general public or some class thereof; (2) the plaintiff's pecuniary interest in the outcome, if any, would not normally justify incurring the cost of counsel; and (3) shifting that cost to the defendant would effectively place it on a class that benefits from the litigation.

In applying these considerations to the facts in *Alyeska,* Justice Marshall found that the award of attorneys' fees by the court of appeals was appropriate.

The Court's decision will not only have strong implications in the environmental field,[65] but will also affect public interest litigation in other areas.[66] The emphasis will be placed upon statutory authorization for an award of fees and not upon the facts of each case or the benefits conferred upon the public by the initiation and litigation of the action.

There are, however, several factors on which a subsequent court might distinguish the *Alyeska* decision. In *Alyeska*, the government, through the Secretary of the Interior, was the true violator and Alyeska subsequently intervened to protect its interest. A situation in which a private violator alone were involved might be decided differently.

The *Alyeska* decision involved the direct clash of two extremely heated political issues—environmental preservation and energy maximization. The pre-emption of the merits by Congress was arguably the result of a decision based on political expediency rather than on the relative merits of a particular legal theory. Thus, possi-

---

65. While the three major environmental groups today, the Environmental Defense Fund, the Sierra Club, and the Natural Resources Defense Council have budgets for litigation, without the incentive provided by the private attorney general exception, litigation which cannot be handled by these groups would seem less likely. *See* King & Plater, *supra* note 24, at 75. In Committee on Civic Rights of the Friends of Newburyport Waterfront v. Romney, 518 F.2d 71 (1st Cir. 1975), one may see an augury of the post-*Alyeska* future. Here, the court of appeals, citing *Alyeska*, denied an award of attorneys' fees based on the private attorney general exception in a suit brought under the National Historical Preservation Act, 16 U.S.C. §§ 470a-m (1970), *as amended*, (Supp. III, 1973) and NEPA, 42 U.S.C. §§ 4321-47 (1970), holding that neither statute provided for a discretionary or mandatory award of fees.

66. The court of appeals has refused to apply the private attorney general concept in two recent cases. In Doe v. Poelker, 515 F.2d 541 (8th Cir. 1975), plaintiffs brought suit to restrain a city hospital's implementation of anti-abortion policies, the court awarded attorneys' fees under the "bad faith" exception. In Wallace v. House, 515 F.2d 619 (5th Cir. 1975), a discriminatory scheme of apportionment for town elections was alleged. The court of appeals vacated the district court's award of attorney's fees in light of the demise of the private attorney general rationale in *Alyeska*. *Id.*

bly with a less heated atmosphere, a future court may have more leeway in the awarding of attorneys' fees.

On the other hand, it can be argued that no future court is likely to reinstate the private attorney general doctrine. The court of appeals seemed to commend the environmentalists' efforts by awarding them fees despite Congress' decisive intervention. The Supreme Court, if it wished, could have distinguished the situation and left the private attorney general doctrine intact.

Courts have adopted the practice of denying attorneys' fees out of fear that doing otherwise would deter litigation. Here, as the court of appeals noted, an award of fees would not have discouraged the oil cartel from defending in court,[67] while a denial of fees might not only have deterred the plaintiffs from bringing this costly action,[68] but also have a chilling effect on similar public interest litigation in the future.

As a result of the *Alyeska* decision, large scale public interest litigation may become economically impossible for most smaller citizen groups. National organizations may also find their ability to challenge controversial government or industrial action extremely limited. Given that non-profit organizations may be priced out of the litigation market just at a time when attorneys' fees are becoming extremely prohibitive, unless some new entity emerges which will utilize the judicial system as a check on congressional or executive branch expediency, the death of the private attorney general rule may well be an insurmountable blow to the environmental movement.

Michael T. Cornacchia III

67. Wilderness Soc'y v. Morton, 495 F.2d 1026, 1032 (D.C. Cir. 1974), *rev'd sub nom.*, Alyeska Pipeline Serv. Co., v. Wilderness Soc'y, 421 U.S. 240 (1975).

68. *Id.*