

1974

Private Attorney General Fees Emerge from the Wilderness

Timothy R. Graham

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Timothy R. Graham, *Private Attorney General Fees Emerge from the Wilderness*, 43 Fordham L. Rev. 258 (1974).

Available at: <https://ir.lawnet.fordham.edu/flr/vol43/iss2/5>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

PRIVATE ATTORNEY GENERAL FEES EMERGE FROM THE WILDERNESS

I. INTRODUCTION

In 1968 oil reserves were discovered on the North Slope of Alaska. Although extensive plans were made by a consortium of major oil companies to transport the oil by pipeline to a port on the ice-free Pacific shore, environmental groups brought suit to enjoin¹ the construction of the pipeline on the grounds that the right-of-way approved by the Secretary of the Interior was granted in violation of the width restrictions of section 28 of the Mineral Lands Leasing Act of 1920,² and that the environmental impact statement required by the National Environmental Policy Act of 1969 (NEPA)³ was inadequate. Although the district court refused to grant a permanent injunction, the United States Court of Appeals for the District of Columbia Circuit reversed on a literal reading of section 28.⁴ Thereafter, Congress passed legislation⁵ which effectively set aside the decision of the court and the case was dismissed. Subsequently plaintiffs, a foundation funded public interest law firm, moved for and obtained an award of attorney fees.⁶

II. THE RESTRICTIVE AMERICAN RULE AND ITS EXCEPTIONS

The courts have granted attorney's fees on the basis of three exceptions to the general American rule which denies to the successful litigant attorney fees "in the absence of a statute or enforceable contract providing therefor."⁷ A departure from English common law, which has for centuries granted such fees to the prevailing party,⁸ the rule has been criticized for denying the successful claimant full compensation for damage since his "recovery would

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

2. Act of Feb. 25, 1920, ch. 85, § 28, 41 Stat. 449; Act of Aug. 21, 1935, ch. 599, § 1, 49 Stat. 678; Act of Aug. 12, 1953, ch. 408, 67 Stat. 557, codified at 30 U.S.C. § 185 (1970). For subsequent amendments, see note 5 infra.

3. 42 U.S.C. § 4332(c) (1970).

4. *Wilderness Soc'y v. Morton*, 479 F.2d 842 (D.C. Cir.) (en banc), cert. denied, 411 U.S. 917 (1973). Title of the case changed on appeal as a result of the resignation of Secretary Hickel and the appointment of a new Secretary of the Interior.

5. Mineral Lands Leasing Act § 28, 30 U.S.C.A. § 185 (1973); Trans-Alaskan Pipeline Authorization Act, 43 U.S.C.A. §§ 1651 et seq. (1973).

6. *Wilderness Soc'y v. Morton*, 495 F.2d 1026 (D.C. Cir. 1974), cert. granted, sub nom. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 43 U.S.L.W. 3185 (U.S. Oct. 15, 1974) (No. 73-1977) [hereinafter cited as *Alyeska*]. *Alyeska Pipeline Service Company* eventually was forced to pay one half of plaintiff's attorney fees. *Id.* at 1036.

7. *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 94 S. Ct. 2157, 2163 (1974), quoting *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967).

8. Goodhart, *Costs*, 38 Yale L.J. 849, 851-53 (1929) [hereinafter cited as *Costs*]; Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 U. Colo. L. Rev. 202, 204-07 (1966) [hereinafter cited as *Stoebuck*]. The historical genesis for this American revision can be traced to the early settlers' suspicion of the lawyer, and their concept of the law as an easily understandable body of rules. See, e.g., *Costs* 873; McLaughlin, *The Recovery of Attorney's Fees: A New Method of Financing Legal Services*, 40 Fordham L. Rev. 761, 780 (1972).

always be diminished by the cost of his legal representation."⁹ Nevertheless the American rule maintains its good standing in the federal courts.

The rationale used by the courts in upholding this rule is four-fold. First, it has been reasoned that it is unfair to penalize a party which has elected to prosecute or defend a suit in good faith.¹⁰ In addition, the granting of such costs may deter those plaintiffs who are fearful of incurring additional costs, should they be unsuccessful.¹¹ Furthermore, the additional court time and expense involved in determining such fees "would pose substantial burdens for judicial administration."¹² Finally, there has been a concern that court ordered fees may threaten "the principle of independent advocacy,"¹³ as lawyers might improperly defend their clients while attempting to appease the judge.

The American rule, however, has never been a complete bar to an award of fees. Over the years several major exceptions to the rule have developed from "the inherent power of a court"¹⁴ to do " 'equity in a particular situation.' "¹⁵ The oldest of these exceptions is the bad faith doctrine, under which a court may award fees to either party as a means of punishing abuse of the judicial process. For example, courts have awarded fees to a plaintiff who was forced to secure compliance with a prior judgment by initiating civil contempt proceedings.¹⁶ Moreover, where either party has acted " 'vexatiously, wantonly, or for oppressive reasons,' "¹⁷ the courts have awarded fees as an additional fine on the defiant party.¹⁸ The courts generally have refrained from using the

9. *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 94 S. Ct. 2157, 2164 (1974). See generally Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 *Calif. L. Rev.* 792 (1966); Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 *Iowa L. Rev.* 75 (1963); McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 *Minn. L. Rev.* 619 (1931); Stoebuck 202; Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 *U. Pa. L. Rev.* 636 (1974) [hereinafter cited as *Equal Access to the Courts*]; Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 *Vand. L. Rev.* 1216 (1967).

10. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967).

11. *Id.*; cf. *Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227, 235 (1964).

12. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967); *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 94 S. Ct. 2157, 2165 (1974).

13. *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 94 S. Ct. 2157, 2165 (1974).

14. *Delaware Citizens for Clean Air, Inc. v. Stauffer Chem. Co.*, 62 *F.R.D.* 353, 354 (D. Del. 1974).

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

16. See, e.g., *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (1923); *First Nat'l Bank v. Dunham*, 471 F.2d 712 (8th Cir. 1973). But see, *Lichtenstein v. Lichtenstein*, 481 F.2d 682 (3d Cir. 1973), cert. denied, 414 U.S. 1144 (1974).

17. *Hall v. Cole*, 412 U.S. 1, 5 (1973), quoting 6 J. Moore, *Federal Practice* ¶ 54.77[2], at 1709 (2d ed. 1972).

18. See, e.g., *Vaughan v. Atkinson*, 369 U.S. 527, 530-31 (1962); *Stolberg v. Board of Trustees*, 474 F.2d 485, 490-91 (2d Cir. 1973); *McEnteggart v. Cataldo*, 451 F.2d 1109, 1112 (1st Cir. 1971), cert. denied, 408 U.S. 943 (1972); *Bell v. School Bd.*, 321 F.2d 494, 500 (4th Cir.

bad faith exception because of its punitive nature.¹⁹ Recently, however, they have demonstrated a greater willingness, especially in racial discrimination cases,²⁰ to expand the scope of this exception based on the need for "judicial prodding"²¹ of reluctant defendants.²²

The second major exception to the American rule, the common fund doctrine, is based on the unfairness of burdening the individual litigant with the entire cost of the action when his initiative has either created or preserved a fund for the benefit of others as well as himself.²³ As a means of avoiding such unjust enrichment, the courts have implied an agency relationship between the plaintiff and the beneficiaries in order to spread the costs of the action, including legal fees, proportionately among all who benefit.²⁴ The common fund doctrine has received broader application in recent years as courts have allowed fees to plaintiffs even though no actual fund was recovered but the judgment or settlement "has conferred a substantial benefit on a class of persons and the court's shifting of fees operates to spread the cost proportionately among the members of the benefitted class."²⁵ For instance, in

1963). See generally Note, Awards of Attorney's Fees to Legal Aid Offices, 87 Harv. L. Rev. 411, 418-19 (1973).

19. See Equal Access to the Courts 645-46.

20. See, e.g., Note, Awarding of Attorneys' Fees in School Desegregation Cases: Demise of the Bad-Faith Standard, 39 Brooklyn L. Rev. 371 (1972); Note, Allowance of Attorney Fees in Civil Rights Actions, 7 Colum. J.L. & Soc. Prob. 381 (1971); 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 (1972) [hereinafter cited as Attorney Fees in Civil Rights Litigation]. See generally Note, Awards of Attorney's Fees to Legal Aid Offices, 87 Harv. L. Rev. 411 (1973).

21. *Cato v. Parham*, 403 F.2d 12, 14 (8th Cir. 1968).

22. See *Fairley v. Patterson*, 493 F.2d 598, 606 (5th Cir. 1974). See also Attorney Fees in Civil Rights Litigation.

23. *Kahan v. Rosenstiel*, 424 F.2d 161, 165-66 (3d Cir.), cert. denied, 398 U.S. 950 (1970) (stock transaction). See *Detroit v. Grinnell Corp.*, 495 F.2d 448, 469 (2d Cir. 1974) (antitrust class action). See generally Dawson, Lawyers and Involuntary Clients: Attorney Fees from Funds, 87 Harv. L. Rev. 1597 (1974).

24. *Trustees v. Greenough*, 105 U.S. 527, 532-37 (1882) (action to enjoin fraudulent sale of trust assets). See also *Rude v. Buchhalter*, 286 U.S. 451, 461 (1932) (preservation of trust fund); *Washington Gas Light Co. v. Baker*, 195 F.2d 29, 32-34 (D.C. Cir. 1951) (consumer class action); *McCormick*, Damages § 157, 623-24 (1935); Note, Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest, 24 Hastings L.J. 733, 736 (1973) [hereinafter cited as Judicial Green Light].

25. *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 94 S. Ct. 2157, 2165 (1974). The necessity for actually recovering a fund was obviated only recently in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), where Justice Harlan adopted the rationale of *Bosch v. Meeker Coop. Light & Power Ass'n*, 257 Minn. 362, 101 N.W.2d 423 (1960) in defining "substantial benefit" as "something more than technical in its consequence . . . 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." 396 U.S. at 396 (citations omitted). See also Note, The Allocation of Attorney's Fees After *Mills v. Electric Auto-Lite Co.*, 38 U. Chi. L. Rev. 316 (1971) [hereinafter cited as Allocation of Attorney's Fees]; Note, Attorneys' Fees: What Constitutes a "Benefit" Sufficient to

Hall v. Cole,²⁶ a union free speech case, the Court awarded fees, stating: [B]y vindicating his own right, the successful litigant dispels the 'chill' cast upon the rights of others. . . . Thus . . . reimbursement of respondent's attorneys' fees out of the union treasury simply shifts the costs of litigation to 'the class that has benefited from them and that would have had to pay them had it brought the suit.'²⁷

Despite the broad language in *Hall*, the use of this exception is restricted by the necessity of having both an ascertainable class of beneficiaries and a joint resource common to the class from which the court may make an award. Its application, however, to areas such as civil rights and environmental protection would seem to be of doubtful validity. Nevertheless, several courts²⁸ and commentators²⁹ have suggested that awards in these areas may be based on a common fund rationale. It is conceptually inconsistent, however, to apply an exception based on "the fair matching of the costs and benefits of the litigation"³⁰ to situations where society in general has benefited. The benefit, in this instance, to any individual would be minute and it would be extremely difficult to distribute or tax a pro rata share.³¹

III. THE PRIVATE ATTORNEY GENERAL EXCEPTION

Two Supreme Court decisions have proven to be seminal in the development of a new, private attorney general exception to the restrictive American rule.³² In *Newman v. Piggie Park Enterprises, Inc.*,³³ plaintiffs successfully brought a class action to enjoin racial discrimination under Title II of the Civil Rights Act of 1964.³⁴ Under this statute a court, "in its discretion," may

Award Fees From Third Party Beneficiaries, 1972 Wash. U.L.Q. 271 [hereinafter cited as Third Party Beneficiaries].

26. 412 U.S. 1 (1973).

27. *Id.* at 8-9 (footnote omitted). See, e.g., *Yablonski v. UMW*, 466 F.2d 424, 431 (D.C. Cir. 1972), cert. denied, 412 U.S. 918 (1973); *Gartner v. Soloner*, 384 F.2d 348, 354-55 (3d Cir. 1967), cert. denied, 390 U.S. 1040 (1968).

28. *Natural Resources Defense Council, Inc. v. EPA*, 484 F.2d 1331, 1333 n.1 (1st Cir. 1973) (environment); *Brewer v. School Bd.*, 456 F.2d 943, 951-52 (4th Cir.), cert. denied, 409 U.S. 892 (1972) (school busing—quasi-application of the common fund doctrine).

29. See, e.g., Note, *Awarding Attorney and Expert Witness Fees in Environmental Litigation*, 58 Cornell L. Rev. 1222, 1236-37 (1973) [hereinafter cited as *Awarding Attorney Fees in Environmental Litigation*]; *Allocation of Attorney's Fees* 328-31; *Third Party Beneficiaries* 284.

30. *Equal Access to the Courts* 673.

31. *Brewer v. School Bd.*, 456 F.2d 943, 952-54 (4th Cir.) (Winter, J., concurring), cert. denied, 409 U.S. 892 (1972).

32. The rapid growth of the exception has led at least one court to state that it may "emasculate the general rule against fee awards and inject more unpredictability into the judicial process." *Bradley v. School Bd.*, 472 F.2d 318, 330 (4th Cir. 1972), vacated and remanded, 94 S. Ct. 2006 (1974), quoting 50 Texas L. Rev. 204, 209 (1971). The Supreme Court has twice declined to rule specifically on the validity of this exception. *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 94 S. Ct. 2157, 2165 (1974); *Hall v. Cole*, 412 U.S. 1, 5-6 n.7 (1973).

33. 390 U.S. 400 (1968) (per curiam); accord, *Northcross v. Memphis Bd. of Educ.*, 412 U.S. 427 (1973) (per curiam).

34. 42 U.S.C. §§ 2000a-3(a)-6(b) (1970).

award a "reasonable attorney's fee" to the prevailing party.³⁵ In rejecting a narrow interpretation of the statute as permitting the award of fees only on a showing of bad faith, the Supreme Court emphasized that Title II suits were "private in form only"³⁶ and concluded:

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 attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts.³⁷

Two years later, in *Mills v. Electric Auto-Lite Co.*,³⁸ the Supreme Court affirmed and expanded the rationale of *Piggie Park*. In *Mills*, minority shareholders successfully sued the corporation for a violation of the proxy regulations under the Securities Exchange Act of 1934.³⁹ The Court initially determined that no actual fund need be recovered in order to grant fees under a common fund rationale.⁴⁰ Then, however, it awarded fees on a "hybrid" doctrine based on both the *Piggie Park* decision and the reasoning of the common fund doctrine, stating:

[R]egardless of the relief granted, private stockholders' actions of this sort 'involve corporate therapeutics', and furnish a benefit to all shareholders by providing an important means of enforcement of the proxy statute. To 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 on the class that has benefited from them and that would have had to pay them had it brought the suit.⁴¹

The rationale behind such an award of fees to a stockholder—protecting other stockholders—and thereby upholding the federal securities laws can easily be analogized to the citizen plaintiff who, in bringing actions which enhance strong congressional and social policies confers substantial benefits on other citizens.

Following *Piggie Park*, the lower federal courts limited the use of the public interest exception to cases where there was a public interest clearly defined by Congress.⁴² In the last two years, however, the courts have begun to award fees in cases where no clear statutory authority existed.⁴³ Some of these courts have employed their traditional equity power to grant appropriate relief if

35. Id. § 2000a-3(b) (1970).

36. 390 U.S. at 401.

37. Id. at 402 (footnote omitted).

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

39. 15 U.S.C. § 78n(a) (1970).

40. 396 U.S. at 392-93.

41. Id. at 396-97 (footnotes omitted).

42. See, e.g., *Lee v. Southern Home Sites Corp.*, 444 F.2d 143, 144-45 (5th Cir. 1971) (housing); *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421, 429-30 (8th Cir. 1970) (employment); Nussbaum, *Attorney's Fees in Public Interest Litigation*, 48 N.Y.U.L. Rev. 301, 321-31 (1973) [hereinafter cited as Nussbaum]; *Judicial Green Light* 742-48.

43. See note 47 *infra*.

“ ‘overriding considerations’ ” indicated the need for such a recovery.⁴⁴ As a result, although no hard and fast rule has been established, several court decisions have indicated:

[W]henver there is nothing in the statutory scheme which might be interpreted as precluding it, a ‘private attorney-general’ should be awarded attorneys’ fees when he has [1] effectuated a strong Congressional policy [2] which has benefitted a large class of people, and [3] where further the necessity and financial burden of private enforcement are such as to make the award essential.⁴⁵

This rationale has been increasingly relied upon in granting attorney’s fees to plaintiffs in a wide range of public interest lawsuits.⁴⁶

IV. *Wilderness Society v. Morton*—WEIGHING THE PUBLIC INTEREST

In *Alyeska*, the court was confronted with the propriety of assessing attorney’s fees against defendant pipeline company. Unlike prior decisions which have adopted a more structured approach to determine whether such an award should be granted,⁴⁷ Judge Wright, defining a private attorney general as one who vindicates “ ‘a policy that Congress considered of the highest priority,’ ”⁴⁸ stressed the “broad equitable power” of the federal courts to shift fees when the interests of justice so require.⁴⁹ He then concluded that

44. See, e.g., *Sierra Club v. Lynn*, 364 F. Supp. 834, 847 (W.D. Tex. 1973) (environment), quoting *Hall v. Cole*, 412 U.S. 1, 4-5 (1973).

45. *La Raza Unida v. Volpe*, 57 F.R.D. 94, 98 (N.D. Cal. 1972) (footnote omitted) (environment); accord, *Stanford Daily v. Zurcher*, 366 F. Supp. 18 (N.D. Cal. 1973) (unconstitutional search).

46. See, e.g., *Sierra Club v. Lynn*, 364 F. Supp. 834, 851 (W.D. Tex. 1973) (environment); *Ross v. Goshi*, 351 F. Supp. 949, 955-56 (D. Hawaii 1972) (unconstitutional restriction of political campaign signs); *Newman v. Alabama*, 349 F. Supp. 278, 286 (M.D. Ala. 1972) (inadequate medical treatment of prisoners); *Wyatt v. Stickney*, 344 F. Supp. 387, 409-11 (M.D. Ala. 1972) (improper treatment of mental health); *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala. 1972), *aff’d mem.*, 409 U.S. 942 (1973) (reapportionment).

47. See, e.g., *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972); *NAACP v. Allen*, 340 F. Supp. 703 (M.D. Ala. 1972), *aff’d* 493 F.2d 614 (5th Cir. 1974). It is interesting to note that many of the earlier cases which extended the private attorney general exception were written by two judges, Chief Judge Johnson of the Middle District of Alabama and Judge Peckam of the Northern District of California. In Chief Judge Johnson’s earlier opinions there was a marked three-step rationale. See *NAACP v. Allen*, 340 F. Supp. at 709-10; *Sims v. Amos*, 340 F. Supp., 691, 694-95 (M.D. Ala. 1972), *aff’d mem.*, 409 U.S. 942 (1973). In his later opinions, however, a much broader approach is evident. See *Yelverton v. Driggers*, 370 F. Supp. 612, 621 (M.D. Ala. 1974). Judge Peckam, who first applied the private attorney general exception to award fees in the environmental area, was impressed by Chief Judge Johnson’s earlier opinions. See his opinion in *La Raza Unida v. Volpe*, 57 F.R.D. at 98. Nevertheless he emphasized the “discretion” of the court and the possibility that other factors could trigger such an award. *Id.* at 99. See *Stanford Daily v. Zurcher*, 366 F. Supp. 18 (N.D. Cal. 1973). Other courts have followed a more flexible approach. *Brandenburger v. Thompson*, 494 F.2d 885, 888 (9th Cir. 1974) (welfare); *Sierra Club v. Lynn*, 364 F. Supp. 834, 847 (W.D. Tex. 1973).

48. 495 F.2d at 1029, quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).

49. 495 F.2d at 1029-30.

the equities of the case—substantial public interest⁵⁰ and the deterrent effect of *not* awarding fees on this as well as other public interest litigation⁵¹—weighed heavily in favor of granting an award. Unlike prior courts which had failed to discuss the issue, Judge Wright emphasized that the fear of inhibiting good faith litigation because of the increased cost is “remote if not nonexistent” in cases such as *Alyeska*, “[w]here the interest at stake is many times greater than the expected cost of one’s opponent’s attorney’s fees.”⁵²

A. *The Public Interest Factor*

In reaching its decision the court in *Alyeska* felt that the litigation involved public interest on several levels. First, in terms of constitutional law, the suit involved a question of the integrity of the federal system *i.e.*, the primary responsibility of the Congress to regulate the use of public lands and the duty of the executive to observe the restrictions imposed by the legislative branch.⁵³ Secondly, the case had served as a “catalyst” in bringing about a legislative policy consistent with the current national “commitment to improving and protecting our natural environment.”⁵⁴ Furthermore, the suit focused the attention of the public and Congress “on the major issue raised—the relative merits of a trans-Canadian versus a trans-Alaskan route.”⁵⁵ This had the practical effect of guaranteeing a “thorough and complete”⁵⁶ environmental impact statement as required by the NEPA and the “therapeutic” effect of amending an outdated statute thereby establishing greater environmental safeguards on the construction and operation of the pipeline.⁵⁷

Although in *Alyeska* substantial benefit accrued to the general public by the protection of the environment and the proper functioning of the government,⁵⁸ a question that the *Alyeska* court did not answer was:

[W]hich 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.⁵⁹

Although it can be argued that almost every lawsuit advances both an individual goal and furthers public interest in clarifying and maintaining the rule of law,⁶⁰ several characteristics can be suggested as basic criteria to

50. *Id.* at 1032-36.

51. *Id.* at 1030-31.

52. *Id.* at 1032.

53. *Id.* at 1032-33.

54. *Id.* at 1034.

55. *Id.* at 1035 (emphasis omitted).

56. *Id.* at 1032-35 & n.6.

57. *Id.* at 1033-34.

58. Cf. *Hall v. Cole*, 412 U.S. 1, 8 (1973); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 396 (1970). See also *Third Party Beneficiaries* 284.

59. *Bradley v. School Bd.*, 472 F.2d 318, 329 (4th Cir. 1972), vacated and remanded, 94 S. Ct. 2006 (1974).

60. See generally Nussbaum 304; Hearings on Legal Fees Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 798 (Oct. 4, 1973) (Statement of J. Kline, Esq., of Public Advocates, Inc.) [hereinafter cited as Hearings].

determine whether a lawsuit should be classified as in the public interest and, therefore, eligible under the private attorney general theory for the awarding of fees. A primary consideration is whether the issues which are the basis for the suit are of substantial importance.⁶¹ In *Alyeska*, the underlying issue was the protection of the Alaskan environment. In this area,⁶² as in that of racial discrimination,⁶³ there has been a great deal of legislation and litigation. Both areas, currently considered by the Congress and the courts to be of great importance, would thus fit within the category of "public interest."

With the expansion of public interest litigation, however, the lower federal courts have not limited the award of fees to instances where the legislative branch has clearly defined a substantial public interest. Taking the initiative, the courts have awarded fees in welfare cases,⁶⁴ and other areas involving constitutionally protected activities.⁶⁵ The awarding of attorney's fees in these cases can be justified by the inherent importance of these issues. For instance, deprivation of welfare assistance threatens the indigent's existence,⁶⁶ and

61. See Nussbaum 304-05.

62. See, e.g., National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq. (1970); Clean Air Act, 42 U.S.C. § 1857 (1970); Federal Water Pollution Control Act, 33 U.S.C. § 1251 (Supp. II, 1972); Noise Control Act of 1972, 42 U.S.C. §§ 4901-18 (Supp. II, 1972); Federal Environmental Pesticide Control Act of 1972, 7 U.S.C. § 136 (Supp. II, 1972); *Sierra Club v. Morton*, 405 U.S. 727 (1972) (standing in environmental litigation); *Scientists' Institute v. AEC*, 481 F.2d 1079 (D.C. Cir. 1973) (suit under NEPA demanding a detailed impact statement for deployment of nuclear reactors); *Environmental Defense Fund v. EPA*, 465 F.2d 528 (D.C. Cir. 1972) (action under Federal Insecticide, Fungicide and Rodenticide Act challenging failure to suspend registration of economic poisons); *Scenic Hudson Preservation Conf. v. FPC*, 453 F.2d 463 (2d Cir. 1971), cert. denied, 407 U.S. 926 (1972) (challenge of FPC license for power plant).

63. See, e.g., *The Civil Rights Act of 1964*, 42 U.S.C. § 2000(b) (1970) (public facilities); *id.* § 2000(e) (1970) (employment); *The Civil Rights Act of 1968*, *id.* §§ 3601-19 (1970) (fair housing); *Curtis v. Loether*, 415 U.S. 189 (1974) (right to jury trial under fair housing statute); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972) (community interest in maintaining balanced racial atmosphere gives whites standing to sue); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (affirmative measures required to integrate school system).

64. In *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974), an indigent plaintiff was awarded fees following the entry of a consent judgment in which Hawaii's one-year residential requirement for receipt of welfare benefits was waived. Cf. *Ojeda v. Hackney*, 452 F.2d 947 (5th Cir. 1972) (*per curiam*) (attorney fees granted to plaintiff under common fund rationale).

65. See, e.g., *Donahue v. Staunton*, 471 F.2d 475 (7th Cir. 1972), cert. denied, 410 U.S. 955 (1973) (infringement on free speech); *Callahan v. Wallace*, 466 F.2d 59 (5th Cir. 1972) (unconstitutional tribunal to try traffic violations); *Council of Orgs. on Police Accountability & Responsibility v. Tate*, 357 F. Supp. 1289 (E.D. Pa. 1973) (revising civilian complaint procedures concerning unconstitutional police procedures); *Stanford Daily v. Zurcher*, 366 F. Supp. 18 (N.D. Cal. 1973) (unconstitutional search of college newspaper office); *Ross v. Goshi*, 351 F. Supp. 949 (D. Hawaii 1972) (free speech—selective prohibition of political signs). But see *Baltic Indep. School Dist. v. South Dakota High School Activities Ass'n*, 362 F. Supp. 780, 786 (D.S.D. 1973) (despite holding of denial of equal protection, attorney fees were not awarded because no coherent class was benefitted).

66. See, e.g., *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974), where the court noted: "The plaintiff benefitted a significant class, persons who are both potential welfare recipients and interstate travelers, by vindicating the federally protected right of interstate travel free from the forfeiture of welfare benefits." *Id.* at 888-89.

constitutional litigation suits vindicate basic freedoms.

Alyeska involved two important competing public interests, the protection of the environment and the development of a domestic oil supply. In granting fees to the plaintiff environmental groups, the court put into issue the legitimacy of the judiciary choosing which public policy warrants the encouragement of such fees. As Judge Wilkey said in his dissent:

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 gauge, feeling that 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* on the United States of America.⁶⁷

Admittedly, it can be argued that the legislative branch, not the judiciary, is the proper forum for resolution of important public issues because of the range of effects and solutions.⁶⁸ Nevertheless, as in *Alyeska*, once a court has taken jurisdiction of such a dispute, the necessity of a careful judicial consideration of the public issues raised warrants the granting of fees to plaintiff's attorneys.

B. *The Potential Impact Factor*

A second criterion for the courts to apply in determining when to grant fees is what the impact of the award will have not only on the individual plaintiff but also on others. In this category a class action suit would not be essential. It might be an individual suit whose stare decisis effect would benefit a wide group. For example, a plaintiff who brings an action based on a violation of his civil rights vindicates not only his own rights but also the rights of others who are similarly situated.⁶⁹ In addition, the deterrent effect of an award of fees would serve to inhibit further discrimination. Although such an effect was not achieved in *Alyeska* due to direct intervention⁷⁰ by Congress, in other areas involving the enforcement of vital public interests such as the environment, consumer affairs, civil rights, constitutional issues, and protection of the indigent citizen's rights, an award of fees would not only benefit a substantial number of people but would act to deter future violations.

It appears arguable that, under the potential impact rubric, the plaintiff need not prevail in the suit in order to be awarded attorneys fees.

67. 495 F.2d at 1042 (Wilkey, J., dissenting).

68. See Cramton & Boyer, *Citizen Suits in the Environmental Field: Peril or Promise?*, 2 Ecology L.Q. 407, 412 (1972). But see the numerous recent statutes in which Congress has authorized an award of attorney fees to successful plaintiffs in environmental actions: Federal Water Pollution Control Act Amendments of 1972 § 505(d), 33 U.S.C. § 1365(d) (Supp. II, 1972); Marine Protection, Research, and Sanctuaries Act of 1972 § 105(g)(4), 33 U.S.C. § 1415(g)(4) (Supp. II, 1972); Noise Control Act of 1972 § 12(d), 42 U.S.C. § 4911(d) (Supp. II, 1972).

69. See Nussbaum 304-05.

70. See note 5 *supra*. For a full discussion of the chronology of this case, see Dominick & Brody, *The Alaska Pipeline; Wilderness Society v. Morton and the Trans-Alaska Pipeline Authorization Act*, 23 Am. U.L. Rev. 337 (1973).

This Court is firmly convinced that even though the plaintiffs may have, at this stage, technically lost this lawsuit, nevertheless, a very important service has been performed in creating a greater public awareness of the dangers of pollution threatening this very valuable natural resource⁷¹

C. The Representation Factor

Another rationale for awarding fees exists in the fact that procedurally, "justice demands"⁷² equal representation of issues before the court. As Justice Brennan stated in *NAACP v. Button*,⁷³ "[litigation] is . . . a form of political expression. . . . [U]nder the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances."⁷⁴

Another ground for granting fees relied upon by the court in *Alyeska* was the economic deterrent and consequent potential impact that not granting an award would have had on this and other citizen suits.⁷⁵ It has been acknowledged widely that these suits are important because they provide the courts with the opportunity to consider the "public interest" factor in its decision.⁷⁶ In addition, private attorney general actions "guard the guardians"⁷⁷ in that they "[p]olice" those charged with implementing and following Congressional mandates.⁷⁸ Furthermore, "[b]ecause of the limited resources and potentially conflicting interests within and among governmental entities"⁷⁹

71. *Sierra Club v. Lynn*, 364 F. Supp. 834, 847 (W.D. Tex. 1973); cf. *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421, 430 (8th Cir. 1970). See also *McEnteggart v. Cataldo*, 451 F.2d 1109 (1st Cir. 1971), cert. denied, 408 U.S. 943 (1972), where losing plaintiff was awarded fees on another ground.

72. *Bradley v. School Bd.*, 53 F.R.D. 28, 42 (E.D. Va. 1971), rev'd, 472 F.2d 318 (4th Cir. 1972), vacated and remanded, 94 S. Ct. 2006 (1974).

73. 371 U.S. 415 (1963).

74. *Id.* at 429-30; see *Flast v. Cohen*, 392 U.S. 83 (1968) (Douglas, J., concurring): "The judiciary is an indispensable part of the operation of our federal system. With the growing complexities of government it is often the one and only place where effective relief can be obtained." *Id.* at 111. See *Equal Access to the Courts* 677.

75. 495 F.2d at 1030-31; cf. *Donahue v. Staunton*, 471 F.2d 475, 483 (7th Cir. 1972), cert. denied, 410 U.S. 955 (1973); *La Raza Unida v. Volpe*, 57 F.R.D. 94, 101 (N.D. Cal. 1972).

76. *Natural Resources Defense Council, Inc. v. EPA*, 484 F.2d 1331, 1334 (1st Cir. 1973); *Office of Communications v. FCC*, 359 F.2d 994, 1003-04 (D.C. Cir. 1966); *Stanford Daily v. Zurcher*, 366 F. Supp. 18, 20 (N.D. Cal. 1973); *La Raza Unida v. Volpe*, 57 F.R.D. 94, 100-01 (N.D. Cal. 1972). See also *Awarding Attorney Fees in Environmental Litigation*.

77. *La Raza Unida v. Volpe*, 57 F.R.D. 94, 101 (N.D. Cal. 1972).

78. *Id.*; see *Stanford Daily v. Zurcher*, 366 F. Supp. 18, 20 (N.D. Cal. 1973); *Pyramid Lake Tribe v. Morton*, 360 F. Supp. 669, 670 (D.D.C. 1973); *Terris, The Hard Years Ahead for Public Interest Law*, *Juris Doctor* 22, 23 (July-Aug. 1974) [hereinafter cited as *Hard Years for Public Interest Law*]; cf. *Wilderness Soc'y v. Morton*, 495 F.2d at 1032-33.

79. *La Raza Unida v. Volpe*, 57 F.R.D. 94, 100 (N.D. Cal. 1972). Concerning the lack of natural resources, a recent article noted: "The [Council on Environmental Quality], which can only spot check the majority of environmental impact statements since it has a staff of less than twenty to review hundreds of statements each year, publishes the 102 MONITOR on its own initiative as a pragmatic attempt to enlist public involvement in federal environmental reviews.

Congress has authorized citizen suits as another method of enforcing public policy in certain areas such as civil rights⁸⁰ and the environment.⁸¹

Although all three facets were present in *Alyeska*, the problem still remains that without the court's grant of fees, or alternatively, without foundation funding, it is questionable whether this suit would ever have been brought.⁸² Justice Wright recognized the inequity of this situation when he stated:

Substantial benefits to the general public should not depend upon the financial status of the individual volunteering to serve as plaintiff or upon the charity of public-minded lawyers.⁸³

D. *The Policy Considerations*

Attorneys who represented the environmental plaintiffs in the *Alyeska* case faced many of the obstacles that have discouraged other attorneys from participating in similar litigation.⁸⁴ Not only are legal proceedings expensive but these costs are increased in public interest suits due to the complexity of the issues.⁸⁵ In public interest litigation plaintiffs generally seek injunctive relief rather than an award of damages. Consequently, the cost of litigation cannot be offset by any possible recovery.⁸⁶ Furthermore, because of the

The practice is a dramatic indication that even well-intentioned government agencies lack adequate resources and sanctions to do their job, requiring the support of citizen plaintiffs as in the present situation and more. In other situations, official inadequacy in enforcing environmental mandates can only be explained in more disingenuous terms: the agency is not energetic in prosecuting violations or fails to act altogether because of political pressure, alignment with the special interests it was intended to regulate, or because the agency is itself promoting the activity that threatens the environment." King & Plater, *The Right to Counsel Fees in Public Interest Environmental Litigation*, 41 *Tenn. L. Rev.* 27, 70 (1973) (footnotes omitted) [hereinafter cited as King & Plater]; cf. J. Goulden, *The Superlawyers* 39-42, 146, 150-224 (1971).

80. 42 U.S.C. § 2000a-3(a) (1970).

81. See Federal Water Pollution Control Act Amendments of 1972 § 505(d), 33 U.S.C. § 1365(d) (Supp. II, 1972); Marine Protection, Research, and Sanctuaries Act of 1972 § 105(g)(4), 33 U.S.C. § 1415(g)(4) (Supp. II, 1972); Clean Air Amendments of 1970 § 304(a), 42 U.S.C. § 1857(h)-2(a) (1970).

82. See *La Raza Unida v. Volpe*, 57 F.R.D. 94, 101 n.10 (N.D. Cal. 1972).

83. 495 F.2d at 1030.

84. See generally Hearings 831-43 (testimony and statement of Dennis Flannery, Esq., of Washington, D.C., who represented plaintiffs in the *Alyeska* case).

85. See, e.g., 495 F.2d at 1032; *Natural Resources Defense Council, Inc. v. EPA*, 484 F.2d 1331, 1334 (1st Cir. 1973); *Stanford Daily v. Zurcher*, 366 F. Supp. 18, 20 (N.D. Cal. 1973). See generally Hearings 799 (statement of J. Anthony Kline, Esq.).

86. See *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-02 (1968); *Stanford Daily v. Zurcher*, 366 F. Supp. 18, 20 (N.D. Cal. 1973); *La Raza Unida v. Volpe*, 57 F.R.D. 94, 101 (N.D. Cal. 1972); *Sims v. Amos*, 340 F. Supp. 691, 693-94 (M.D. Ala.), *aff'd mem.*, 409 U.S. 942 (1972). See also Miller, *Enforcing the Coastal Act—Citizens' Suits and Attorneys' Fees*, 49 *Calif. St. B.J.* 236, 241 (1974) [hereinafter cited as Miller]; Nussbaum 305-06. A recent commentator has suggested two reasons for seeking this type of specific relief: "First, individual damages are difficult to measure and apportion in a large-scale pollution action brought on behalf of the public. Second, federal class actions for damages present jurisdictional problems which can be obviated only if the numerous class members jointly seek specific relief for their common

nature of public interest actions, defendants are generally governmental bodies or large corporate entities both of whom often have unlimited legal resources.⁸⁷

In addition, two substantial segments of the bar have been effectively precluded from participating in large-scale public interest litigation. It is not economically feasible for the attorney in private practice to expend the time required to litigate public interest suits pro bono.⁸⁸ Such activities, as was demonstrated by the southern civil rights cases of the 1960s, also can lead to criticism and a resultant loss of income.⁸⁹ Similarly, attorneys in legal aid programs have been restricted in this area by political pressure,⁹⁰ which has limited their participation in public interest litigation to constitutional issues raised in the context of their traditional role of initiating and defending suits on behalf of the indigent client.⁹¹

When confronted with an environmental case such as *Alyeska*, "[t]he only realistic source of legal representation for citizen groups contemplating major litigation is the foundation-funded public interest law firm."⁹² It appears unlikely that foundations will be able to continue this funding indefinitely.⁹³ In addition, the small number of firms, their lack of resources and the sheer size of such actions militate against their participating in more than a minimal

grievance." Awarding Attorney and Expert Witness Fees in Environmental Litigation 1226 (footnotes omitted).

87. See generally Cahn & Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 *Yale L.J.* 1005, 1006-07 (1970); Halpern & Cunningham, *Reflections on the New Public Interest Law: Theory and Practice at the Center for Law and Social Policy*, 59 *Geo. L.J.* 1095, 1095-97 (1971) [hereinafter cited as Halpern & Cunningham]; *Hard Years for Public Interest Law* 23.

88. See Hearings 855: "Pro bono cases are frequently very complex, requiring massive amounts of research and fact-gathering time. The private lawyer can rarely afford to devote much time to nonpaying work when to do so would limit his ability to handle paying cases. The lawyer must not only limit the number of nonpaying cases he can accept, but also must limit the time he can spend on those he does accept." *Id.* (statement of Armand Derfner, *Lawyers Comm. for Civ. Rights Under Law*).

89. *Id.* Despite Chief Judge Johnson's admonition to the private bar in *Wyatt v. Stickney*, 344 *F. Supp.* 387, 410 (M.D. Ala. 1972) ("It is the duty of members of the legal profession to represent clients who are unable to pay for counsel and also to bring suits in the public interest"), he recognized the economic and social pressures on the private lawyer in *NAACP v. Allen*, 340 *F. Supp.* 703, 710 (M.D. Ala. 1972), *aff'd*, 493 *F.2d* 614 (5th Cir. 1974); see generally Comment, *Balancing the Equities in Attorney's Fees Awards: Losing Plaintiffs and Private Defendants*, 62 *Geo. L.J.* 1439, 1454 (1974); *Wall St. J.*, Aug. 21, 1974, at 28, col. 1.

90. See, e.g., Agnew, *What's Wrong with the Legal Services Program*, 58 *A.B.A.J.* 930 (1972); Note, *Awards of Attorney's Fees to Legal Aid Offices*, 87 *Harv. L. Rev.* 411, 424 (1973). See generally Sullivan, *Law Reform and the Legal Services Crisis*, 59 *Calif. L. Rev.* 1, 25-26 (1971); *Equal Access to the Courts*, *supra* note 9, at 683.

91. See, e.g., *Ross v. Goshi*, 351 *F. Supp.* 949 (D. Hawaii 1972) (selective prohibition against political signs held unconstitutional).

92. Hearings 842 (statement of D. Flannery, Esq.); see *La Raza Unida v. Volpe*, 57 *F.R.D.* 94, 101 n.10 (N.D. Cal. 1972); see generally King & Plater 71-76; Miller 241.

93. Halpern & Cunningham 1112; *Hard Years for Public Interest Law* 29.

number of suits, and many worthy actions are never brought.⁹⁴ Furthermore, because of a lack of resources the public interest lawyer may not be able to raise plausible issues in cases because they are too technical and would be too costly to litigate.⁹⁵

The awarding of fees appears to be the only practical way to encourage the bringing of such meritorious actions. Two objections to such awards have been raised: first, it is inequitable to grant attorney's fees only to plaintiffs;⁹⁶ second, the courts fear an inundation of meritless actions.⁹⁷ As to the first, limiting awards of attorney's fees to prevailing⁹⁸ plaintiffs unquestionably will encourage public interest suits. As Judge Wright pointed out in *Alyeska*, if the defendant recovered fees as the prevailing party, "the possibility of deterrence would be significant and the rationale of the American rule would therefore bar recovery of fees."⁹⁹

As to the second objection, the courts have never been powerless in the face of meritless actions. In *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*,¹⁰⁰ the First Circuit noted that frivolous litigation could be discouraged by awarding "costs of litigation to defendants where the litigation was obviously frivolous or harassing."¹⁰¹ In these circumstances the court also has the option of applying the bad faith exception. Finally, the federal courts, as courts of limited jurisdiction, may exercise their traditional discretion to reject cases on procedural grounds, such as lack of standing¹⁰² or the requirement that plaintiff prove that a private rather than a public cause of action is allowed.¹⁰³

94. Hearings 842 (statement of D. Flannery, Esq.). See also *Equal Access to the Courts* 674-80. Foundation-funded public interest law firms, therefore, are forced to look to cases with wide public appeal in order not only to litigate on the merits but also to educate the public on the issue presented. Interview with Angus Macbeth, Staff Attorney with the National Resources Defense Council of New York, in New York City, Aug. 15, 1974. See also Halpern & Cunningham 1106, 1111.

95. Hearings 833-34 (statement of D. Flannery, Esq.).

96. See generally Miller 239.

97. Cf. *Bradley v. School Bd.*, 472 F.2d 318, 329 (4th Cir. 1972), vacated and remanded, 94 S. Ct. 2006 (1974). See also *Scenic Hudson Preservation Conf. v. Federal Power Comm'n*, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966); King & Plater 81-85.

98. In *Alyeska*, although the court did not explicitly include success as a precondition for recovery of attorney fees, it implied such a condition by denying fees to one plaintiff because they had achieved no success. 495 F.2d at 1028. Such a conclusion appears incorrect, however, since the court should stress the merits of the issues before it and the effectuation of social or congressional policy. See King & Plater 78-81.

99. 495 F.2d at 1032 n.2.

100. 484 F.2d 1331 (1st Cir. 1973).

101. *Id.* at 1338. See generally Miller 342-43.

102. *Sierra Club v. Morton*, 405 U.S. 727 (1972); see, e.g., Cartwright, *Handling of Air and Water Pollution Cases by the Plaintiff*, 9 Forum 639, 640-41 (1974); Comment, *Standing in Environmental Litigation: Let's Get to Merits*, 10 Calif. W.L. Rev. 182 (1973).

103. Compare *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964) (private right of action permitted under the Securities and Exchange Act of 1934) with *Holloway v. Bristol-Myers Corp.* 327 F. Supp. 17 (D.D.C. 1971), *aff'd*, 485 F.2d 986 (D.C. Cir. 1973) (private right of action not allowed under Federal Trade Commission Act).

V. CONCLUSION

In the past two decades there has been a proliferation of public interest litigation as newly formulated rights, new remedies and the exercise of official discretion have been tested in the courts.¹⁰⁴ With the realization that the American rule, which denies fees to successful litigants, has acted as an economic bar to these challenges, some courts have expanded the traditional exceptions to the rule, and granted fees to public interest litigants. Still other courts have granted fees under the newly-formed private attorney general concept.

The rationale underlying the private attorney general concept is amorphous. For example, three circuit courts recently have stressed different factors in awarding fees.¹⁰⁵ At the same time a recent "backtracking" among the courts as to the use of this exception has left questions regarding its continuing validity.¹⁰⁶ It would seem, therefore, that because "developments are proceeding very rapidly in this area,"¹⁰⁷ some guidance is necessary. The Supreme Court, however, has taken no position on the private attorney general exception and has strongly suggested that, when faced with the question of awarding fees, it is willing to leave this responsibility to Congress.

The perspectives of the profession, the consumers of legal services and other interested groups should be weighed in any decision to substantially undercut the application of the American Rule in such litigation. Congress is aware of the issue. Thus whatever the merit of arguments for a further departure from the American Rule . . . those arguments are properly addressed to Congress.¹⁰⁸

Perhaps such a suggestion is not unwise. Although the awarding of fees at the judge's discretion provides a means by which private citizens can overcome the financial obstacles inherent in actions designed to protect broad

104. Cahn & Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 *Yale L.J.* 1005, 1008-16 (1970).

105. *Wilderness Soc'y v. Morton*, 495 F.2d 1026 (D.C. Cir. 1974) cert granted sub nom. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 43 U.S.L.W. 3185 (U.S. Oct. 15, 1974) (No. 73-1977) (balance of equities in favor of an award to plaintiff); *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974) ("an award of attorneys' fees should be made to a litigant who (1) furthers the interests of a significant class of persons by (2) effectuating a strong congressional policy.") *Id.* at 888; *Natural Resources Defense Council, Inc. v. EPA*, 484 F.2d 1331 (1st Cir. 1973) ("[w]hen private litigation vindicates a significant public policy and, at the same time, creates a widespread benefit, policy today favors awarding attorneys' fees against a party who exists to serve or represent the interests of all those benefitted.") *Id.* at 1333. In addition, the Second Circuit has awarded fees in environmental litigation without opinion. *Hudson River Fisherman's Ass'n v. Federal Power Comm'n*, Nos. 73-2258, 73-2259 (2d Cir. Aug. 6, 1974). But see *Bradley v. School Bd.*, 472 F.2d 318 (4th Cir. 1972), vacated and remanded, 94 S. Ct. 2006 (1974).

106. M. Derfner, *Attorneys' Fees in Pro Bono Public Cases 11-12* (1974). This is consistent with the recent trends toward limiting class action suits in general. See *Eisen v. Carlisle & Jacquelin*, 94 S. Ct. 2140 (1974).

107. *Miller* 237.

108. *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 94 S. Ct. 2157, 2166 (1974) (footnote omitted).

public interests, it would also jeopardize the neutrality of the judicial branch by involving the judge in subjective choices as to which public interest should be subsidized by such an award. In addition, public interest litigation encompasses a much wider scope of issues than the ones before the court, and the necessity of broad social remedies involving large allocations of resources are generally beyond the power of the court to enforce. It is time that legislation be passed, either to abolish the restrictive American rule, or to define in what situations and against what defendants¹⁰⁹ fees should be granted. Pending such action, one can expect a rather uneven approach to the question of when such fees should be granted. Nevertheless, it is clear that the restrictive American rule is no longer being applied to claims for private attorney general fees, and that such fees in fact have emerged from the wilderness.

Timothy R. Graham

109. Under common law, a private individual cannot sue the state as sovereign in its own courts unless the state waives its inherent immunity. As for the sovereignty of the individual states, whether fees will be allowed depends on each state's law. See *Natural Resources Defense Council, Inc. v. EPA*, 484 F.2d 1331 (1st Cir. 1973); *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972); *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala.), *aff'd mem.*, 409 U.S. 942 (1972). But see, e.g., *Sincock v. Obara*, 320 F. Supp. 1098 (D. Del. 1970). On the other hand, the federal government is completely immune from an award of fees, 28 U.S.C. § 2412 (1970). The existence of governmental immunity in this area is unfortunate since it deprives the public interest plaintiff of a source of fees and, in turn, decreases the incentive for governmental agencies to enforce the laws. See generally *Knight v. Auciello*, 453 F.2d 852 (1st Cir. 1972) (*per curiam*); *Miller* 344-47.