

STUDENT COMMENT

LIABILITY FOR ATTORNEY'S FEES IN THE FEDERAL COURTS— THE PRIVATE ATTORNEY GENERAL EXCEPTION

INTRODUCTION

In recent years, private enforcement of civil rights has proven to be an effective method of vindicating constitutional and legislative guarantees of freedom and equality. Pro bono litigation has also shown itself effective in areas such as environmental and consumer protection, which in the last decade have very nearly grown into a national preoccupation.¹ In face of administrative stonewalling and legislative delay, public interest suits have "speeded court definition of what is required of Federal agencies under environmental protection statutes. The suits have forced greater sensitivity in both government and industry to environmental considerations. Furthermore, they have educated lawmakers and the public to the need for new environmental legislation."² The courts have kept pace by gradually liberalizing traditional rules of standing to allow claims of actual injury to essentially non-economic values such as the aesthetic appeal of the outdoors.³ However, not a small part of the growth is due to encouragement of these private actions in the public interest through the award of attorney's fees to successful plaintiffs in the federal courts.

In a civil suit in the United States, engaging a lawyer is the first step in a journey through the courts which may assume transcontinental proportions,⁴ and, in view of present day docket congestion and delay, may not be completed for several years. During that time several trips up and down the appellate ladder, to the Supreme Court if necessary and appropriate, may further draw out the time between the violation of legal rights and their ultimate vindication. Throughout, both plaintiff and defendant will employ legal counsel,⁵ and under what is traditionally referred to as the "American

¹ See Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 Colum. L. Rev. 612, 612-13 (1970).

² U.S. Council on Environmental Quality, *Environmental Quality: Second Annual Report* 155-56 (1971).

³ E.g., *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 686-90 (1973); *Sierra Club v. Morton*, 405 U.S. 727, 741-43, 751-52 (1972) (Douglas, J., dissenting).

⁴ The metaphor is highly appropriate. In *Wilderness Soc'y v. Morton*, 495 F.2d 1026 (D.C. Cir. 1974), plaintiffs defeated a motion in the district court for a change in venue from Washington, D.C. to Juneau, Alaska, a move which would have involved not only great cost and inconvenience, but loss of their highly skilled, Washington-based pro bono publico lawyers as well. *Id.* at 1037-38 n.9.

⁵ For the purposes of this comment, "employment" will be used to mean any arrangement for the provision of legal services involving a lawyer-client relationship. The significance of there being no obligation to pay for those services is discussed at note 17 *infra*.

Rule," each litigant usually will be fully responsible for paying his own attorney's fees.⁶ Precisely because it is traditional, the American Rule stands in our present day juristic thought as though it is a tower of steel.⁷ On the other hand, English law has long afforded its courts the discretion to impose costs, including necessary attorney's fees, upon the losing litigant.⁸ Furthermore, as commentators have frequently observed, it was standard practice in many American courtrooms, up through the middle of the last century, for the prevailing party to recover at least a part of his attorney's fee from his opponent,⁹ but "[n]o adequate historical explanation for the departure has ever been advanced, and in any event, the reasons commonly given—the spirit of individualism in frontier societies, the conception in earlier times of lawsuits as sporting contests, and the widespread hostility toward lawyers—are not persuasive now."¹⁰

The English Rule allows the shifting of liability for the prevailing party's attorney's fees to someone else, usually but not always the unsuccessful opponent.¹¹ This rule, however, is not entirely foreign to the American legal system. It may be found embodied in various statutes on both the federal¹² and state levels.¹³ Curiously, the English Rule is the tradition in the stockholder's derivative action¹⁴ and in admiralty cases.¹⁵ However, its most significant and

⁶ E.g., *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717-18 (1963). There are, of course, exceptions, certain of which are treated throughout this comment.

⁷ The Supreme Court regarded the American Rule as firmly entrenched (which was not really the case) at the time of its first encounter in that tribunal. *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796). It was recently reaffirmed in *F.D. Rich Co. v. United States ex rel Industrial Lumber Co.*, 417 U.S. 116 (1974): "[A]ttorney's fees 'are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.'" 417 U.S. at 126, quoting *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967). See notes 30-32 *infra* and accompanying text.

⁸ *Ehrenzweig, Shall Counsel Fees Be Allowed?*, 26 Calif. St. B.J. 107, 110 (1951). The Statute of Gloucester, 6 Edw. I., c. 1 (1275), gave to plaintiffs, and the Statute of Westminster, 4 Jac. I., c. 3 (1607), gave to defendants the full necessary costs of the suit dependent only upon success in court. Not until 1875 did an element of discretion enter into the award in law courts. Supreme Court of Judicature Act of 1875, 38 & 39 Vict., c. 77. In equity, costs were always in the discretion of the court. *Riggall v. Hereford County Council*, [1972] 1 W.L.R. 171, 174-75 (D.C.); *Knight v. Clifton*, [1971] 1 Ch. 700, 706-14 (C.A.); *Goodhart, Costs*, 38 Yale L.J. 849, 852-54 (1929).

⁹ E.g., *Ehrenzweig, supra* note 8, at 110-14; *Ehrenzweig, Reimbursement of Counsel Fees and the Great Society*, 54 Calif. L. Rev. 792, 798-99 (1966). An excellent summary of the historical basis for the American Rule is found in Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 Vand. L. Rev. 1216, 1217-21 (1967).

¹⁰ Dawson, *Lawyers and Involuntary Clients: Attorney's Fees from Funds*, 87 Harv. L. Rev. 1597, 1598 (1973).

¹¹ See text at notes 42-49 *infra*.

¹² E.g., Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1365(d) (Supp. II, 1972); Clean Air Amendments of 1970, 42 U.S.C. § 1857h-2(d) (1970). See statutes cited in *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 721 n.17 (1963).

¹³ E.g., Mass. Gen. Laws ch. 93A, § 11 (Supp. 1974); ch. 151, § 1B (1971); N.Y. Civ. Prac. §§ 8303(a)(2), 8303(a)(4) (McKinney 1963).

¹⁴ See Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 Harv. L. Rev. 658, 667 (1956); Hornstein, *The Counsel Fee in Stockholder's Derivative Suits*,

controversial inroad has been in the area of discretionary equitable relief where, though always available to some extent (usually as a punitive measure in cases of bad faith), only recently has it begun to be used creatively. It has been less than ten years since the Supreme Court approved the award of attorney's fees to plaintiffs acting as "private attorneys general."¹⁶ Just five years ago the Supreme Court acknowledged that much greater benefit than a monetary fund for the benefit of the corporation could accrue to individual stockholders, corporate directors, and the business community in general as a result of a successful derivative suit.¹⁷ These and subsequent decisions of the federal courts have enabled small plaintiffs to challenge large corporate and public defendants in the face of otherwise prohibitively large legal fees.¹⁸

This comment will examine the so-called "equitable exceptions" to the American Rule as they affect the growing area of environmental and civil rights litigation. It is here that a method of recovering attorney's fees as taxable costs from the losing party would go far towards both protecting national commitments from the atrophy of disuse and ameliorating the austerity with which pro bono plaintiffs and lawyers are faced when they embark upon a suit in the public interest.

39 Colum. L. Rev. 784, 786 (1939). Such awards are based on the "common fund" theory and do not therefore represent the "losing defendant" type of fee shift. Because of the nature of corporate ownership, however, the result in such cases is analytically the same as if a nominal defendant were to pay the fee, except that the fee is limited generally to a percentage of the amount recovered for the fund, and the plaintiff himself "pays" a proportionate share, as a beneficiary of the fund. See section I(B) in text at notes 42-46 *infra*.

¹⁵ E.g., *Vaughan v. Atkinson*, 369 U.S. 527, 530-31 (1962); *The Apollon*, 22 U.S. (9 Wheat.) 362, 379 (1824).

¹⁶ *Newman v. Piggie Park Enterps., Inc.*, 390 U.S. 400, 402 (1968). The award was statutorily authorized by 42 U.S.C. § 2000a-3(b) (1970), but the discretionary provision previously had been given a restrictive interpretation encompassing only bad faith and delaying tactics. 390 U.S. at 400-01. See text at notes 59-73, *infra*.

¹⁷ *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 394-96 (1970). Such funds, however, have run into the millions. See Hornstein, *The "Salvage" Factor in Counsel Fee Awards*, 69 *Harv. L. Rev.* 658, 668 (1956).

¹⁸ 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 mem.*, 409 U.S. 942 (1972).

It is true that the prospect of attorneys' fees does not discourage the litigant from bringing suit when legal representation is provided without charge. But the entity providing the free legal services will be so discouraged, and an award of attorneys' fees encourages it to bring public-minded suits when so requested by litigants who are unable to pay.

Brandenburger, 494 F.2d at 889. The gratuitous provision of legal services is not a valid basis for denying a request for an award of attorney's fees where the award is otherwise appropriate. *Fairley v. Patterson*, 493 F.2d 598, 606-07 (5th Cir. 1974). All that is necessary is that there has existed an attorney-client relationship, which can exist quite independently of compensation. *Miller v. Amusement Enterps., Inc.*, 426 F.2d 534, 538 (5th Cir. 1970). See *Natural Resources Defense Council v. Environmental Protection Agency*, 484 F.2d 1331, 1338 n.7 (1st Cir. 1973) [hereinafter cited as *NRDC v. EPA*]; *La Raza Unida v. Volpe*, 57 F.R.D. 94, 98 n.6 (N.D. Cal. 1972); *Clark v. American Marine Corp.*, 320 F. Supp. 709, 711 (E.D. La. 1970), *aff'd* 437 F.2d 959 (5th Cir. 1971).

I. THE AMERICAN RULE AND ITS EXCEPTIONS

Not unexpectedly, such a basic departure from our English common law heritage has engendered considerable debate in legal journals and legal proceedings alike.¹⁹ On the one hand, proponents of the American Rule argue: plaintiffs and defendants who are responsible only for the cost of adequately presenting their respective views on an issue in controversy are less likely to fear adjudication of their legal rights, for which the penalty to the losing party or parties, under the English Rule, would include not only the adverse judgment but also an additional set of costs.²⁰ Parties under the American Rule enter the courtroom as litigative equals, in that they are each financially responsible to their own counsel for every plea, every motion, and every delay effected on their behalves, as well as those occurring naturally. Moreover, economic self-interest will presumably induce litigants to avoid unnecessary steps rather than incur an expense therefor.²¹

By contrast, the English Rule is seen to effectively "raise the stakes"²² of the litigation by placing the burden of supporting lawyers for both parties on the shoulders of one party, whose identity before final judgment, or more properly, final resolution on appeal without remand, is presumably unknown. Turning to their advantage that which is anathema to the American tradition, the supporters of the English Rule point to the increased stakes as an additional inducement to an amicable settlement, thus saving both court time and further expense.²³ Prevailing parties are made whole by bringing them back financially to as good a position as they occupied prior to the litigation, exclusive of whatever pecuniary benefit they may have received from the suit by way of damages. Plaintiffs are less apt to bring groundless lawsuits, and defendants less likely to interpose tenuous defenses, than under the American

¹⁹ See, e.g., Nussbaum, *Attorney's Fees in Public Interest Litigation*, 48 N.Y.U.L. Rev. 301 (1973); Avilla, *Shall Counsel Fees Be Allowed?*, 13 Calif. St. B.J. 42 (1938). See generally *F.D. Rich*, 417 U.S. at 128 n.15.

²⁰ See *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717-18 (1963); *Wilderness Soc'y v. Morton*, 495 F.2d 1026, 1031 (D.C. Cir. 1974). However, it is important to note that unsuccessful litigants are still liable for certain costs of the suit even under the American Rule. 28 U.S.C. § 1920 (1970). See note 21 *infra*.

²¹ American lawyers are under an ethical duty to expedite the case and avoid undue delay, in the interests of both the client and the legal system. ABA, *Code of Professional Responsibility* DR 7-102(A)(1) (1970). Nor can one party impose added expense upon an opposing party with impunity in the hope of wearing down his opponent. The Federal Rules of Civil Procedure contain specific sanctions with regard to certain bad faith tactics. Fed. R. Civ. P. 37(a)(4), 37(b)(2)(E), 37(c), 37(d), 56(g). Sanctions include the shifting of attorney's fees attendant to the delay or inconvenience caused. In addition, the federal courts may always exercise their equity powers to discipline the obstinate or vexatious litigant. 6 J. Moore, *Federal Practice* ¶ 54.77 [2], at 1709-10 (2d ed. 1974).

²² *Wilderness Soc'y v. Morton*, 495 F.2d 1026, 1032 (D.C. Cir. 1974).

²³ See Geller, *Unreasonable Refusal to Settle and Calendar Congestion—Suggested Remedy*, 1962 Proceedings of ABA Section on International and Comparative Law 134, 135 (1963).

Rule, where liabilities for attorney's fees normally are not nearly as great.

From a positive point of view, under the English Rule, aggrieved persons need not hesitate to vindicate their legal rights, for to do so will entail no liability for legal fees.²⁴ On the other hand, the spectre of multiple liability may, as the supporters of the American Rule fear, discourage parties from bringing meritorious claims or from defending against groundless charges out of fear that a judge or jury might hold against them.²⁵

Thus, these are the basic arguments in the debate over the American and English rules as to liability for attorney's fees.²⁶ They clearly indicate a common concern with the financial demands of justice in a modern legal system, but they also demonstrate a philosophical split as to how those burdens are best allocated among the interested parties. Each system will vindicate a worthy litigant's rights. However, only the English system will make the vindication complete.²⁷

It is not the posture of this comment that the English Rule is the best mode of financing all legal representation, or that it should completely supplant the American Rule. It is submitted that fee shifting is the more desirable practice with regard to allocating the full costs of litigation. Undoubtedly, there are instances where the practice of fee shifting would be highly inappropriate, if not unnecessary. For example, the considerations which argue for fee

²⁴ Costs in the English courts are taxed by a Taxing Master, who reviews, and if necessary holds hearings on, an itemized bill submitted by the prevailing party's lawyer. While English costs rarely include the whole payment actually made to one's lawyers, they also cover many items not allowable in the United States. See Goodhart, *supra* note 8, at 856-59.

²⁵ In response to this criticism, one commentator has noted: "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." *Id.* at 877.

²⁶ Two other objections to the English Rule are worthy of note. If fees are awarded to a party, the court must still decide what is reasonable. This sometimes difficult and time consuming task, *Wilderness*, 495 F.2d at 1031 n.1, though not totally foreign to the courts, is obviated where a party has contracted for the legal services beforehand. This contractual fee will not be reviewed unless the client himself challenges it directly.

There is also the consideration of the effect on an independent bar of "having the earnings of the attorney flow from the pen of the judge before whom he argues." *F.D. Rich*, 417 U.S. at 129.

²⁷ Indeed, it has been suggested that resistance to lawyers early in our history and a resulting lack of true commitment to making a successful litigant "whole" by compensating him for what were, at that time, thought to be unnecessary expenses were the leading factors in the 19th century atrophy of many state statutes providing for recovery of nominal attorney's fees as taxable costs. See Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 Vand. L. Rev. 1216, 1220 (1967). Typically, these statutes set fixed dollar amounts for services, which soon were outstripped by the actual cost of legal services, and were consequently "forgotten." But see Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 Calif. L. Rev. 792, 798 (1966) (describing the setting of fixed amounts for "reasonable fees" as a legislative mistake). Note also that some federal courts today do not intend the award of attorney's fees to make the client whole. *NRDC v. EPA*, 484 F.2d 1331, 1339 (1st Cir. 1973); *Sierra Club v. Lynn*, 364 F. Supp. 834, 851 (W.D. Tex. 1973).

shifting in the adversary situations are absent in uncontested probate proceedings, real estate transactions where none of the parties default on their obligations, or the preparation of financial statements for business purposes. Employment of legal counsel in such situations arises not from controversy as to legal rights but simply in the course of compliance with legal requirements aimed primarily at orderly transactions and transitions. There is no initial allegation of wrongdoing in such cases, litigation may not be involved, and resort to the legal system will be primarily an administrative matter.

One party may still assume the fees generated by such legal business but this would be an instance of contractual arrangement rather than a concomitant of social policy. Should true controversy arise, appropriate fee shifting mechanisms may come into play.²⁸ Indeed, in the commercial area there are now cogent reasons for providing explicitly for attorney's fee liability in contracts should such protection be desired, where the contract rights derive from federal laws which are silent as to fee awards.²⁹

That the English Rule can co-exist with the American Rule in the same legal system is illustrated by a number of exceptions to the American Rule which have evolved over the years within the equitable jurisdiction of the federal courts. Of course, an award of attorney's fees may be made when explicitly authorized by statute³⁰ or where required by an enforceable contract or by contracts among the parties to the litigation.³¹ However, courts of equity have traditional powers to fashion relief in accord with overriding considerations of justice, including an award of reasonable attorney's fees.³²

²⁸ Probate proceedings actually involve a shifting of necessary attorney's fees to the beneficiaries of the personal probate estate, since the decedent's personal representative will charge the estate prior to any distribution. See, e.g., Mass. Gen. Laws ch. 190, § 2 (1958). The notion that a trust must assume the reasonable costs of its administration is the origin of the "common fund" equitable exception. *Trustees v. Greenough*, 105 U.S. 527, 532-33 (1881), and text accompanying note 42 *infra*.

²⁹ Cf. *F.D. Rich*, 417 U.S. at 126-28. As long as it does not resemble a penalty clause, a provision for the payment of attorney's fees to the party who must go to court to seek enforcement of a contract, and succeeds, will preserve the value of the bargain and provide an additional incentive to both sides to perform fully. However, it should be noted that the Supreme Court has stated that the solemnity of a contract itself provides the only necessary and allowable incentive to performance. *Priebe & Sons v. United States*, 332 U.S. 407, 413 (1947), citing *Restatement of Contracts* § 339, comment f at 554 (1932); see *Kothe v. R.C. Taylor Trust*, 280 U.S. 224, 226 (1930). The Supreme Court has indicated that it considers "everyday commercial litigation" beyond the reach of available exceptions to the American Rule. *F.D. Rich*, 417 U.S. at 130. See text at note 98 *infra*. Thus, fee shifting in that area will be limited of necessity to situations where there is statutory or contractual authorization.

³⁰ The federal legislation is of two types: (1) mandatory fee award to the successful plaintiff, e.g., 15 U.S.C. § 15 (1970); 29 U.S.C. § 216(b) (1970), and (2) discretionary fee award to the prevailing party, e.g., 15 U.S.C. §§ 77k(e), 77www(a), 78i(e), 78(r)a (1970); 42 U.S.C. §§ 2000a-3(b), 2000e-5(k), 3612(c) (1970).

³¹ E.g., *Merola v. Atlantic Richfield Co.*, 493 F.2d 292, 297 (3d Cir. 1974); *Alland v. Consumers Credit Corp.*, 476 F.2d 951, 955-56 (2d Cir. 1973).

³² *Hall v. Cole*, 412 U.S. 1, 5 (1973); *Fleischmann Distilling Corp. v. Maier Brewing*

These exceptions are of paramount importance in the areas of environmental and civil rights litigations where substantial damage awards are unlikely,³³ the expense of litigation is great,³⁴ plaintiffs are often poor, and therefore attorney's fees cannot be met or generated in the normal fashion. "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."³⁵

There are basically three "equitable exceptions" which the federal courts have utilized to overcome the inhibitions attendant to the American Rule, the barrier which has long limited the practice of public interest law to stoics and other brave souls.³⁶

Co., 386 U.S. 714, 718 (1967). In a large and vital class of cases, the federal courts have awarded attorney's fees to the successful plaintiff in a statutory cause of action where the statute neither explicitly authorizes such awards nor conclusively limits the relief available thereunder. Typically, the statute will authorize such relief as is necessary, either at law or in equity. See, e.g., *Hall v. Cole*, supra, at 10 (Labor-Management Reporting & Disclosure Act, 29 U.S.C. § 412 (1970)); *Brandenburger v. Thompson*, 494 F.2d 885, 888 (9th Cir. 1974) (Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970)); *Gates v. Collier*, 489 F.2d 298, 302 (5th Cir. 1973) (Civil Rights Act of 1871, supra); *Calnetics Corp. v. Volkswagen of America, Inc.*, 353 F. Supp. 1219, 1224 (C.D. Calif. 1973) (Clayton Act, 15 U.S.C. § 26 (1970)). However, where the statute presents an intricate description of remedies that does not include an award of attorney's fees, Congress will be deemed to have proscribed such relief. *Fleischmann*, 386 U.S. at 719-21 (Lanham Act, 15 U.S.C. § 1117 (1970)). An award of attorney's fees has also been found a logical corollary to the right to bring a citizen's suit under a federal statute. *NRDC v. EPA*, 484 F.2d at 1337 (Clean Air Amendments to the National Environmental Policy Act, 42 U.S.C. § 1857c-5(f)(2)(B) (1970)). Because the "implicit statutory authorization" approach necessarily involves a consideration of the equitable power to award attorney's fees, the discussion in this comment of the "equitable exceptions" is for practical purposes wholly applicable to these cases.

Until the recent *F.D. Rich* decision, awards of attorney's fees in Miller Act construction bond litigation generally followed the comparable state practice, since the Miller Act, providing the federal equivalent of state public works lien laws for subcontractors and materialmen on federal construction projects, is silent on the matter. 40 U.S.C. §§ 270a et seq. (1970). In *F.D. Rich*, Justice Marshall, writing for the Supreme Court in an 8-1 decision, refused to "judicially obviate the American Rule in the context of *everyday commercial litigation* . . ." 417 U.S. at 130-31 (emphasis added). Furthermore, "[t]he Miller Act provides a federal cause of action, and the scope of the remedy as well as the substance of the rights created thereby are matters of federal, not state law." *Id.* at 127. Thus, the Court disposed of a long line of lower federal court Miller Act decisions and indicated at least one limit on the expansion of fee shifting under the equity powers. See cases collected in Annot., 4 A.L.R. Fed. 685 (1970).

³³ *Knight v. Auciello*, 453 F.2d 852, 853 (1st Cir. 1972); *Sims v. Amos*, 340 F. Supp. 691, 694 (M.D. Ala.), *aff'd mem.*, 409 U.S. 942 (1972). This may also be true of certain antitrust actions. *Calnetics Corp. v. Volkswagen of America, Inc.*, 353 F. Supp. 1219, 1224 (C.D. Cal. 1973) (Clayton Act, § 7, 15 U.S.C. § 18 (1970)).

³⁴ *Wilderness Soc'y v. Morton*, 495 F.2d 1026, 1032 (D.C. Cir. 1974).

³⁵ *Id.* at 1030. "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." *La Raza Unida v. Volpe*, 57 F.R.D. 94, 101 (N.D. Cal. 1972).

³⁶ See *NAACP v. Allen*, 340 F. Supp. 703, 710 (M.D. Ala. 1972). Fee shifting is not, however, solely for the pecuniary benefit of the lawyer. Rather, it is "to enable litigants to obtain competent counsel worthy of a contest with the caliber of counsel available to their opposition and to fairly place the economical burden of . . . litigation." *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 719 (5th Cir. 1974).

A. *The Bad Faith Exception*

Equity traditionally takes cognizance of both the manner in which parties to a suit conduct themselves before the court and the manner in which they conducted themselves previously so as to make the suit necessary. A plaintiff or defendant who is found to have acted in bad faith in instituting or untenably defending a suit may be punished by an assessment of attorney's fees.³⁷ Where a state legislature failed to enact a reapportionment in line with constitutional demands,³⁸ a school board inadequately desegregated its schools,³⁹ or a state employer forced a professional employee to go to court to obtain a statement of reasons for the state's failure to renew her contract,⁴⁰ courts have found an award of reasonable attorney's fees appropriate in view of the "obdurate obstinacy" of the defendants in necessitating the institution of the action to procure that which was clearly owing as of right.⁴¹

However, a finding of bad faith or vexatiousness is not always a prerequisite to an award of fees, and indeed there are broader equitable grounds upon which to predicate such relief.

B. *The Common Fund and Equitable Fund Exceptions*

Sometimes, the successful prosecution of a suit will inure to the pecuniary advantage of persons not parties to the actions, who are neither financially responsible for the action nor bound by its result. In *Trustees v. Greenough*,⁴² the Supreme Court, noting that a trust estate must bear the necessary expenses of its administration, held that one who in good faith maintains the necessary litigation to preserve a common fund, in which he shares with others not parties to the litigation, is entitled in equity to recover his attorney's fees either out of the fund so preserved or out of proportionate contributions from the other "beneficiaries" of the litigation.⁴³

The Court had occasion to further develop this exception to the

³⁷ See *Hall v. Cole*, 412 U.S. 1, 5 (1973); *IUEW v. Peerless Pressed Metal Corp.*, 489 F.2d 768, 769 (1st Cir. 1973); Note, Awarding Attorney and Expert Witness Fees in Environmental Litigation, 58 Cornell L. Rev. 1222, 1230 (1973).

³⁸ *Sims v. Amos*, 340 F. Supp. 691, 693 (M.D. Ala. 1972).

³⁹ *Bell v. School Bd.*, 321 F.2d 494, 500 (4th Cir. 1963); cf. *Clark v. Board of Educ.*, 369 F.2d 661, 671 (8th Cir. 1966).

⁴⁰ *McEnteggart v. Cataldo*, 451 F.2d 1109, 1112 (1st Cir. 1971).

⁴¹ *Bradley v. School Bd.*, 416 U.S. 696, 705-08 (1974) (citing decisions below). See cases cited in *id.* at 706-07 n.9.

⁴² 105 U.S. 527 (1881).

⁴³ *Id.* at 532, 533. The Court established a right in the plaintiff to recover his attorney's fees from beneficiaries of the fund. It went a step further in *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885), where it gave attorneys themselves a right to recover reasonable fees from beneficiaries of a fund created or preserved for a client-beneficiary by their efforts. *Id.* at 127. Accord, *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 165 (3d Cir. 1973). At least one commentator is highly critical of the *Pettus* development and argues it has been maintained solely due to fraternal concern from the bench. Where the nominal plaintiff is under contract with the attorney, the award against the fund serves only to augment the lawyer's income. Dawson, *supra* note 10, at 1614, 1653.

general prohibition against fee shifting in *Sprague v. Ticonic National Bank*.⁴⁴ The plaintiff had successfully prosecuted a suit against an insolvent bank. As a result of the suit, the plaintiff acquired a lien on funds earmarked for repayment of sums deposited by her in trust. A by-product of this litigation was that she established, by collateral estoppel, an identical right for fourteen other non-participating depositors. Formalities were deemed to give way to the inherent power of equity: the plaintiff did not, and need not, purport to sue for a class, nor formally establish a fund available to the class. Where the practical effect is to create a fund beneficial to others, then the court may "do equity."⁴⁵

The common fund exception does not place the burden of the fee award on the defendant, unless he is also among the beneficiaries of the fund; or, as in the case of a corporate defendant, unless he is a representative of the shareholder-beneficiaries. Moreover, it is not necessary that a monetary fund exist or be created in order to trigger the essentially equitable exception; any substantial benefit, including an intangible one, may warrant fee shifting, as made abundantly clear in *Mills v. Electric Auto-Lite Co.*,⁴⁶ in the context of a private shareholder's derivative action against the corporation for circulating misleading proxy statements in violation of section 14(a) of the Securities Exchange Act of 1934.⁴⁷ The "therapeutic effect" of the lawsuit upon fellow shareholders and corporate officials alike was deemed a sufficient benefit to warrant spreading the cost of counsel over all shareholders by taxing the corporation, the nominal defendant.⁴⁸ It is also unnecessary for the suit to have reached final judgment, and a settlement out of court will suffice if its terms can be ascribed to the pressure of a lawsuit.⁴⁹

The pro bono publico lawyer often faces the same large and powerful opponents as the shareholder's attorney, and therefore the same magnitude of expense. However, he often lacks the fee shifting advantage traditional in the shareholder's suit.⁵⁰ Environmental litigation on the regional or national scale involves public policy issues of serious concern; all the more so where it is predicated not

⁴⁴ 307 U.S. 161 (1939).

⁴⁵ Id. at 167.

⁴⁶ 396 U.S. 375, 392 (1970). Accord, *Schechtman v. Wolfson*, 244 F.2d 537, 540 (2d Cir. 1957). The terms "equitable fund" and "common fund" are often used interchangeably.

⁴⁷ 15 U.S.C. § 78n (1970). The Act did not specifically authorize the award of attorney's fees, but neither did it circumscribe the court's power to grant appropriate relief. In addition, the Court recognized the suit as vindicating the strong congressional policy of fair corporate suffrage embodied in § 14(a). *Mills v. Electric Auto-Lite Co.*, 396 U.S. at 396. It would be helpful to compare the foregoing with text at notes 59-72 infra, regarding the "private attorney general" exception in public interest litigation.

⁴⁸ 396 U.S. at 392, 394. The Court also noted that a monetary fund was not expected to arise. Id. at 392. See also Comment, 38 U. Chi. L. Rev. 316, 326-28 (1971).

⁴⁹ See note 91 infra.

⁵⁰ See Sive, Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law, 70 Colum. L. Rev. 612, 618 (1970).

upon common law notions of trespass or riparian rights but on federal statutory law embodying strong congressional mandates.⁵¹ Under a logical extension of the *Mills* rationale (one perhaps invited by the Court's own broad language), a successful environmentalist plaintiff may furnish a significant philosophical, aesthetic, or pecuniary benefit to a group potentially as large as the entire national or world population.⁵²

Assuming that the requisite "substantial benefit" may be shown, the *Mills* "equitable fund" approach still requires the potentially difficult task of identification of beneficiaries and apportionment of the costs among them after identification.⁵³ For example, it is difficult to decide whether the ascertainable class that benefits from a single county school desegregation suit is all persons in the county or in the state. It may even be argued that the beneficiary is the entire nation through vindication of its commitment to constitutional principles as embodied in the Civil Rights Acts.⁵⁴ A definition of ascertainable class presupposes that the class is capable of reasonably certain definition, proportionate to the scope of relief requested. Indeed, in view of the recent Supreme Court decisions restricting the relative ease with which Rule 23 class action suits could be brought in federal courts,⁵⁵ an ascertainable class for *Mills* purposes might require *precise* definition.

In addition to the requirement of identifying an ascertainable class, there is another limitation on the power of courts to award attorney's fees. One large and powerful opponent could be the federal government. At present, a successful suit against a federal regulatory agency cannot result in an award of attorney's fees. This would in effect be an award against the United States, and therefore be barred by sovereign immunity,⁵⁶ though Congress could legislate to provide otherwise.⁵⁷

⁵¹ E.g., National Environmental Policy Act of 1969, 42 U.S.C. § 4331 (1970).

⁵² See *Wilderness Soc'y v. Morton*, 495 F.2d at 1033 n.3, proceeding on the "private attorney general theory." But see the dissenting opinions of Circuit Judges MacKinnon and Wilkey in *Wilderness* which present the obvious "other side" of the environmental coin, the economic dislocation which may result from successful environmentalist struggles. *Id.* at 1039 (dissenting opinions). Compare *Wilderness* with *NRDC v. EPA*, 484 F.2d 1331, 1334 (1st Cir. 1973).

⁵³ These problems may be superficial where a monetary fund exists because the "takers" will either be known by then or will identify themselves out of self interest. A reasonable fee may be allowed out of the fund. *Powell v. Pennsylvania R.R.*, 267 F.2d 241, 242-44 (3d Cir. 1959). Alternatively, the fee may be charged proportionately as claimants appear. *Gibbs v. Blackwelder*, 346 F.2d 943, 946 (4th Cir. 1965).

⁵⁴ 42 U.S.C. §§ 1981 et seq. (1970).

⁵⁵ *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *Zahn v. International Paper Co.*, 414 U.S. 291 (1973); *Snyder v. Harris*, 394 U.S. 332 (1970). For a discussion of the *Eisen* case, see Note, 16 B.C. Ind. & Com. L. Rev. 254 (1975). For a discussion of the *Zahn* case prior to Supreme Court affirmance, see Note, 14 B.C. Ind. & Com. L. Rev. 543 (1973).

⁵⁶ 28 U.S.C. § 2412 (1970) provides in pertinent 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

Mills could also extend into the area of private action directly against the violating party; however, in large scale cases the same problem of identification exists. Because of this problem, it is unnecessary at this point to discuss the further difficulties of apportionment within an ascertained class. One bright note is that where the benefits are largely intangibles, there is likely to be little meaningful difference among the beneficiaries in terms of enjoyment.

One commentator suggests that the formal aspects of the *Mills* equitable fund exception may simply be discarded.⁵⁸ This is unnecessary since there exists an equitable exception to the American Rule which affords a much broader base for fee shifting without resort to even the liberalized language of the *Mills* fund.

C. The "Private Attorney General" Exception

The "private attorney general" exception promises to do for the large scale public interest litigant what years ago the now-familiar contingent fee did for the impoverished personal injury litigant.⁵⁹ Basically, the concept is not new, and flows rather smoothly from the

against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action.

The policy represented by the concept of "sovereign immunity" underlying § 2412, while anachronistic, is so strong that attorney's fees and expenses are not even embraced within the notion of "just compensation" for land taken by eminent domain. *Dohany v. Rogers*, 281 U.S. 362, 368 (1930); *United States v. 23.94 Acres of Land*, 325 F. Supp. 330, 332 (W.D. Va. 1970).

⁵⁷ E.g., Emergency School Aid Act of 1972, 20 U.S.C. § 1617 (Supp. II, 1972). See *NRDC v. EPA*, 484 F.2d 1331, 1335 (1st Cir. 1973); *Sierra Club v. Lynn*, 364 F. Supp. 834, 849 (W. D. Tex. 1973).

⁵⁸ Comment, 38 U. Chi. L. Rev. 316, 330 (1971). The most recent Supreme Court application of the *Mills* rationale is *Hall v. Cole*, 412 U.S. 1 (1973).

⁵⁹ The contingent fee, a percentage share of the client's monetary recovery, made representation of poor litigants economically feasible. See *Gair v. Peck*, 6 N.Y.2d 97, 103, 188 N.Y.S.2d 491, 494, 160 N.E.2d 43, 46 (1959), cert. denied, 361 U.S. 374 (1960). The contingent fee itself could not provide a working solution to the funding problem in the environmental or civil rights area, for the most appropriate and available remedy in these areas is usually the injunction, which would not generate a fee. See Note, 58 Cornell L. Rev. 1222, 1226-27 & n.32 (1973); Comment, 38 U. Chi. L. Rev. 216, 317 n.6 (1971); Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 Iowa L. Rev. 75, 85-86 (1963). The environmental area has the potential for suits resulting in large damage awards if property damage or personal health impairment is established. E.g., *Zahn v. International Paper Co.*, 53 F.R.D. 430 (D. Vt. 1971), where the district court found that each of four named plaintiffs in the water pollution class suit could meet the minimum \$10,000 amount in controversy jurisdictional requirement of 28 U.S.C. § 1332(a) (1970) (some of the over two hundred other landowners in the class "to a legal certainty" could not meet that requirement, and therefore the suit could not be maintained as a class action). 53 F.R.D. at 431, aff'd, 469 F.2d 1033 (2d Cir. 1972), aff'd, 414 U.S. 291 (1973). See *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870 (1970) (conditioning denial of an injunction against operations causing air pollution upon payment of "permanent damages" to plaintiffs); *Jost v. Dairyland Power Coop.*, 45 Wis. 2d 164, 172 N.W.2d 647 (1970) (remanding for a jury determination of diminished market values of several farms and noting that plaintiffs could return to court for additional damages should injury from the continuing nuisance increase in severity); Mass. Gen. Laws ch. 91, § 59A (1974) (authorizing double damages to property owners injured by negligent oil spills on inland, river, and tidal waters).

traditional willingness of equity to act where overriding considerations of justice exist. "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go where only private interests are involved."⁶⁰

The citizen who brings suit to enforce his rights and the rights of others similarly situated, or to ensure that agencies of the federal government properly discharge their mandated responsibilities, "does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority."⁶¹ It is at once an obvious and yet an inventive device through which the courts may moderate the natural restraint on expensive litigation resulting from adherence to the American Rule, and at the same time effectively promote the participation of more legal talent in the pro bono field. It is obvious, in that "[o]nly a private party [can be] expected to bring [such] litigation, and yet a private party is least able to bear the tremendous burdens."⁶² It is inventive in that whether the courts acknowledge it or not, the party against whom the attorney's fees are taxed acts as a conduit to those segments of the population which receive the ideological and even long range pecuniary benefit of the litigation.⁶³ A governmental defendant not protected by sovereign immunity will be able to spread the burden throughout its citizenry through its power to raise revenue.⁶⁴ A private defendant is likely to pass the burden to

⁶⁰ *Virginia Ry. v. System Federation No. 40*, A.F.L., 300 U.S. 515, 552 (1937).

⁶¹ *Newman v. Piggie Park Enterps., Inc.*, 390 U.S. 400, 402 (1968). "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 compliance with the law." *Id.* at 401. Title II of the Act, 42 U.S.C. § 2000a-3(b) (1970), contains an explicit provision for the discretionary award of counsel fees. Federal courts have subsequently concluded that in cases like *Newman*, where plaintiffs have acted as private attorneys general, "the award 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." *NAACP v. Allen*, 340 F. Supp. 703, 709 (M.D. Ala. 1972); accord, *Brandenburg v. Thompson*, 494 F.2d 885, 889 (9th Cir. 1974) (suit under 42 U.S.C. § 1983 (1970), which is silent on fee awards); *Lee v. Southern Home Sites Corp.*, 444 F.2d 143, 147-48 (5th Cir. 1971); *Lea v. Cone Mills Corp.*, 438 F.2d 86, 88 (4th Cir. 1971).

⁶² *La Raza Unida v. Volpe*, 57 F.R.D. 94, 101 (N.D. Cal. 1972).

⁶³ The so-called "conduit theory" is no stranger to the law. See, e.g., *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 437, 440-41, 240 N.Y.S.2d 592, 595, 597-98, 191 N.E.2d 81, 83, 85 (1963) (majority and dissenting opinions), extending the concept of strict tort liability to the aircraft industry and cushioning the shock by awarding damages in the wrongful death action against the manufacturer of the airplane, rather than the manufacturer of the defective altimeter, under the apparent theory that this manufacturer could better spread the cost of strict liability, in terms of damages awards, to the beneficiaries of the development, all of whom were users of aircraft.

The "conduit theory" analysis in the text does not appear in so many words in any of the decisions found in researching this comment. However, it does appear as a strong undercurrent in the language of many of the courts. See, e.g., *Calnetics Corp. v. Volkswagen of America, Inc.*, 353 F. Supp. 1219, 1225 (C.D. Cal. 1973); cf. *Sims v. Amos*, 340 F. Supp. 691, 694 (M.D. Ala. 1972).

⁶⁴ In view of the concept of sovereign immunity embraced in the Eleventh Amendment,

consumers of its product or service through the mechanisms of the marketplace, through which consumers in return may be able to register their disfavor with the defendant's activities by simply withholding or reorienting their purchasing customs.⁶⁵ In either case, the benefit received is that of compliance with laws passed for the protection of vital, inalienable rights.⁶⁶

It is evident from the above analysis that the *Mills* equitable fund exception bears a striking resemblance to the private attorney general exception. Comparing the two directly, however, it is immediately evident that the latter is a more intuitive, flexible concept than the *Mills* fund. Most significantly, the private attorney general exception avoids the requirement of an ascertainable class of beneficiaries, and can apparently be satisfied by a finding that a school district,⁶⁷ a city,⁶⁸ a state,⁶⁹ or the entire nation has benefited substantially.⁷⁰ The benefit can be tangible or intangible, or both.⁷¹ More analytical emphasis may be placed upon policy

U.S. Const. amend. XI, there is currently a dispute as to whether fee awards may be levied against state officers in their official capacity, and therefore against the state itself. See text at notes 112-53.

⁶⁵ Two drawbacks do exist to the benefit analysis. Choice among competitive products in the marketplace may insulate beneficiaries of the litigation from the shifted "shifted fee." Where public defendants are involved, powers of taxation may eradicate this inequity of the private sector, though state boundaries may raise a different sort of barrier to full redistribution. Also, under the analysis, innocent private citizens ultimately pay for the transgressions of remote corporations or government officials. It must be remembered, however, that the purpose of the private attorney general theory of fee shifting is redistributive and productive rather than punitive, in the sense of encouraging more "watchdog" activity where vital interests are concerned. This type of public subsidy is perhaps a small price to pay for some assurance that the laws will be at least known, if not faithfully executed and observed.

⁶⁶ This is not to imply that a clean, healthy, safe environment is a "fundamental right" in the constitutional sense. Recent federal decisions have held that it is not. E.g., *Pinkney v. Ohio EPA*, 375 F. Supp. 305, 309-10 (N.D. Ohio 1974); *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 325 F. Supp. 728, 738-39 (E.D. Ark. 1970). The courts are in disagreement as to whether the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et seq. (1970), provides substantive rights beyond the right to have NEPA administered in good faith. See *Cohen & Warren, Judicial Recognition Of The Substantive Requirements Of The National Environmental Policy Act of 1969*, 13 B.C. Ind. & Com. L. Rev. 685 (1972). Compare *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 325 F. Supp. 749, 755 (E. D. Ark. 1971), with the same case on appeal, 470 F.2d 289, 297-300 (8th Cir. 1972). Compare *Morris v. TVA*, 345 F. Supp. 321, 324 (N.D. Ala. 1972), with *Conservation Council v. Froehlke*, 473 F.2d 664, 664-65 (4th Cir. 1973). Note further that the question of national importance does not determine whether an interest is entitled to fundamental right status. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973).

⁶⁷ *Bradley v. School Bd.*, 53 F.R.D. 28, 40-42 (E.D. Va. 1971), aff'd on other grounds, 416 U.S. 696 (1974).

⁶⁸ *La Raza Unida v. Volpe*, 57 F.R.D. 94, 99-100 (N.D. Cal. 1972).

⁶⁹ *Brandenburger v. Thompson*, 494 F.2d 885, 888-89 (9th Cir. 1974).

⁷⁰ *Calnetics Corp. v. Volkswagen of America, Inc.*, 353 F. Supp. 1219, 1225 (C.D. Cal. 1973).

⁷¹ Compare *id.*, with *Wilderness*, 495 F.2d at 1033. Hopefully, the courts will not overwork the distinction, in keeping with the liberalization of standing requirements in recent years by the Supreme Court. See, e.g., *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1969); *United States v. Students Challenging Regulatory Agency*

considerations, because the private attorney general concept devolves not from mechanistic concern with the creation of a fund shared by an ascertainable class but rather from an awareness on the part of the courts that private enforcement of public rights is necessary and should be encouraged.⁷² Clearly, continued development of the private attorney general exception to the American Rule bodes well for the future of pro bono litigation, especially within the field of environmental protection and regulation, wherein the Supreme Court has yet to rule on the issue of fee shifting.

A discussion of several recent decisions, particularly *Wilderness Society v. Morton*,⁷³ may further redefine the application, limitations, and horizons of the private attorney general exception.

II. THE EXCEPTIONS AND THEIR APPLICATIONS

Wilderness Society v. Morton is the latest and penultimate decision in an action originally commenced in 1970 to halt construction of the trans-Alaska oil pipeline.⁷⁴ The appellants Wilderness Society, Environmental Defense Fund, Inc., and Friends of the Earth requested an award of attorney's fees and other expenses and costs related to the litigation, which culminated in a declaration that the proposed pipeline project was undertaken and approved in violation of section 28 of the Mineral Leasing Act of 1920.⁷⁵ Additional alleged violations of the National Environmental Policy Act (NEPA),⁷⁶ were procedurally foreclosed and therefore left undecided.⁷⁷

The appellants sought to obtain the award against the appel-

Procedures, 412 U.S. 669, 686-90 (1973); *Sierra Club v. Morton*, 405 U.S. 727, 741-43, 751-52 (1972) (dissenting opinion).

Calnetics involved an alleged violation of the Clayton Act, and the restoration of competition to the VW air conditioner market is certainly bound to have a beneficial financial impact on national markets. 353 F. Supp. at 1224-25. In *Wilderness*, the role of the plaintiffs in requiring the Department of the Interior to rethink its Alaska pipeline plans and in inducing Congress to lay down more strict mineral development standards resulted in a great therapeutic, intangible and tangible benefit of preserving and sensibly utilizing American land resources. 495 F.2d at 1033-36.

⁷² See *NRDC v. EPA*, 484 F.2d at 1334; *Lee v. Southern Home Sites Corp.*, 444 F.2d 143, 147-48 (5th Cir. 1971); cf. *Clark v. Board of Educ.*, 369 F.2d 661, 671 (8th Cir. 1966); *Schechtman v. Wolfson*, 244 F.2d 537, 539 (2d Cir. 1957).

⁷³ 495 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. October 15, 1974) (No. 73-1977). Indeed, the Court appears to have invited resubmission of the private attorney general issue. See *F.D. Rich*, 417 U.S. at 130.

⁷⁴ *Wilderness Soc'y v. Hickel*, 325 F. Supp. 422 (D.D.C. 1970). The court of appeals remanded the case to the district court for determination of a reasonable fee, 495 F.2d at 1036, but the propriety of the fee award awaits resolution in the Supreme Court. See note 73 *supra*.

⁷⁵ *Wilderness Soc'y v. Morton*, 479 F.2d 842, 892-93 (D.C. Cir. 1973), cert. denied, 411 U.S. 917 (1973). 30 U.S.C. § 185 (1970).

⁷⁶ 42 U.S.C. §§ 4321 et seq. (1970).

⁷⁷ 479 F.2d at 848.

lees, Rogers C. B. Morton and Earl L. Butz, in their respective official capacities as Secretary of the Interior and Secretary of Agriculture for the United States, the Alyeska Pipeline Service Company, and the State of Alaska. The propriety of the appellants' request for expenses and costs exclusive of attorney's fees was acknowledged by the Government, and accordingly these were ordered to be divided equally among the appellees.⁷⁸ The District of Columbia Circuit further held that the requested award of attorney's fees was, under the circumstances, highly appropriate.⁷⁹

The violations established by the appellants involved the grant of a developer's right-of-way to Alyeska by the Department of the Interior in excess of the maximum width allowable under the Mineral Leasing Act of 1920.⁸⁰ The court rejected the appellees' primary argument "that, whatever the width restriction in the Act originally meant, a settled administrative practice to evade those restrictions took precedence."⁸¹

However, enforcement of the strict letter of the law was far from the sole result of this litigation.⁸² In the court's view the suit served as a catalyst for deep and vital changes in federal environmental posture and policy. In response to this litigation, Congress passed amendments to the outdated Mineral Leasing Act of 1920, imposing for the first time substantial charges and responsibilities upon developers of government lands.⁸³ At the same time, however, it removed the offensive restriction of the 1920 Act, thus clearing the way for construction of the pipeline as originally planned. In so doing, Congress also expressly ratified the environmental impact statement of the Department of the Interior, which it deemed

⁷⁸ 495 F.2d at 1028.

⁷⁹ Id. at 1036.

⁸⁰ Section 28(l) of the Mineral Leasing Act originally provided a right-of-way width of twenty-five feet on either side. 30 U.S.C. § 185 (1970).

⁸¹ 495 F.2d at 1033.

⁸² Enforcement of the laws is a worthy achievement and the court in fact characterized this aspect of the successful litigation as involving no less than "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." Id. The resolution of this separation of powers issue had great therapeutic value. Id., citing *Mills*, 396 U.S. at 396. Circuit Judge MacKinnon, in his dissenting opinion in *Wilderness*, regarded the separation of powers issue as grossly exaggerated, and especially inappropriate in view of the fact that only Alyeska, the private appellee, would be paying any of appellants' attorney's fees. 495 F.2d at 1041-42 (dissenting opinion). Judge MacKinnon apparently believed there should be a punitive aspect to any award of fees, ignoring the rationale of the private attorney general exception.

⁸³ Pub. L. No. 93-153 (Nov. 16, 1973), reprinted in 1973 U.S. Code Cong. & Ad. News 639. Section 101, amending § 28(l) of the 1920 Act, requires the recipient of a right-of-way to pay the fair market value therefor, and all reasonable costs of processing an application (query—attorney's fees from suits such as this one, not otherwise taxable against the federal government includable as reasonable costs?) and monitoring the right-of-way. Section 204 makes the operator of the pipeline strictly liable for damages resulting from use of the right-of-way, and requires him to maintain a \$100,000,000 liability fund to satisfy claims thereunder.

sufficient under the requirements of NEPA.⁸⁴ The drafting of that statement was also a direct result of appellants' persistence in court, benefiting "the public's statutory right to have information about the environmental consequences of the pipeline."⁸⁵ In turn, the impact statement led to refinement of the protective stipulations embodied in the amendments.⁸⁶

The suit was therefore instrumental in focusing Congress' attention on the environmental issues of the pipeline project at a crucial stage in its development (the choice of a trans-Alaskan versus trans-Canadian route) and on the nation's need for fuel resources during the crisis winter of 1973-1974. Acknowledging the present "commitment to improving and protecting our natural environment as one of the most vital of current national policies"⁸⁷ the court found the intervention of Congress in the matter a clear indication that congressional policy of pre-eminent importance was at stake.⁸⁸

Wilderness therefore falls clearly into the mold of prior cases awarding attorney's fees to the prevailing plaintiff as a private attorney general. Its more unique and controversial aspects, however, illustrate the flexibility of this equitable exception.

A. *Prevailing on an Important Legal Issue of Societal Significance*

The clearest case in which application of the private attorney general exception would be appropriate is one in which plaintiff establishes numerous and gross violations of explicit statutory language where the duty violated and the danger from the violation is settled and certain.⁸⁹ Many of the cases under the Civil Rights Acts

⁸⁴ See Pub. L. No. 93-153, § 203(d) (Nov. 16, 1973), reprinted in 1973 U.S. Code Cong. & Ad. News 639, 649.

⁸⁵ 495 F.2d at 1034.

⁸⁶ Section 203(c) of Pub. L. No. 93-153 (Nov. 16, 1973), reprinted in 1973 U.S. Code Cong. & Ad. News 639, 648, expressly makes the Alaska pipeline subject to these stipulations.

⁸⁷ 495 F.2d at 1034.

⁸⁸ Id. at 1035. This dissenting opinion is less enthusiastic, viewing Congress' actions as undercutting the court in disfavor of the delay from the suit, the losses it has cost Alyeska, and the immeasurable losses it has and will in the future cost the Nation. Id. at 1039 (dissenting opinion).

⁸⁹ Perhaps it is best at this point to note the inherent lack of reciprocity of both the private attorney general and common fund exceptions. Where a fee award is statutorily limited to prevailing plaintiffs, the result is clear. E.g., Clayton Act, 15 U.S.C. § 15 (1970). But where the award is available to either party, at the court's discretion, the plaintiff is still favored. *Wilderness*, 495 F.2d at 1035 n.2. In the regulatory area especially, the rationale for taxing only losing defendants is that the fear of multiple damages and attorney's fees liability not only aids compliance, but promotes settlement of controversies outside the courts, thereby lessening the strain on judicial machinery. *Hutchinson v. William C. Barry, Inc.*, 50 F. Supp. 292, 298 (D. Mass. 1943). Where fee awards are discretionary, the court can withhold the award should a plaintiff not meet the criteria due to bad faith or the less weighty, "strike suit" nature of his claim. *Schechtman v. Wolfson*, 244 F.2d 537, 540 (2d Cir. 1957). The *Wilderness* court noted that, had appellees prevailed, an award of fees would be unjustified under the argument that the American Rule poses a significant deterrent effect upon potential plaintiffs such as appellants. 495 F.2d at 1032 n.2. Such is likely to be the case in this area of the law where plaintiffs rarely have the resources to personally support extended litigation.

are of this nature, especially those where there are landmark decisions on point to draw upon as precedent.⁹⁰ Yet resolution to final judgment is not a prerequisite for operation of the equitable exceptions. A settlement out of court, ascribable to the pressures of litigation, may be sufficient success, and in fact may represent more of a success for the parties involved than would have resulted from a protracted court battle.⁹¹

In *Wilderness*, the NEPA issues never became ripe for adjudication due to the plaintiff's success on the Mineral Leasing Act of 1920 violation, although the appellants were forced to fully brief and argue the other issues.⁹² The majority was satisfied that the NEPA issues were sufficiently interrelated with the Mineral Leasing Act violation, and the unsuccessful prosecution of the former so instrumental in developing congressional concern over the latter, that an award was justified for *all* of the legal work performed through this appeal.⁹³

Id. at 1032; *La Raza Unida v. Volpe*, 57 F.R.D. 94, 101 (N.D. Cal. 1972). In the more financially substantial area of commercial litigation, a defendant who prevails with much effort and has perhaps effected significant changes in statutory or case law, could conceivably qualify as a type of private attorney general, and recover an attorney's fee, without seriously deterring future resort to the legal system by his opponent and others like him. (If a prevailing defendant were to vindicate congressional policy by his success, his remedy would be the bad faith exception, applied to the plaintiff.) But *F.D. Rich* has removed commercial litigation from the non-contractual, non-statutory fee shifting universe, and, without further guidance from the Court, this could include even the derivative action of *Mills*. Therefore, in view of the likely chilling effect upon resort to the courts, it is doubtful that a case falling within the Supreme Court's idea of "non-routine" litigation will come up, wherein a prevailing defendant will receive an award of attorney's fees. As long as the award is discretionary, the policies expounded in *Wilderness* are likely to prevail.

⁹⁰ E.g., *Newman v. Piggie Park Enterps., Inc.*, 390 U.S. 400 (1968); *Cooper v. Allen*, 467 F.2d 836 (5th Cir. 1972) (fee award on remand), *aff'd*, 493 F.2d 765, 769 (5th Cir. 1974); *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971); *Lea v. Cone Mills Corp.*, 438 F.2d 86 (4th Cir. 1971); *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala.) *aff'd mem.*, 409 U.S. 942 (1972). It may also be the seemingly ever present element of bad faith which ensures an award in these cases. See, e.g., *Sims v. Amos*, 340 F. Supp. at 693-94.

⁹¹ See text at note 49 *supra*. This may be true in the sense that both sides have incurred less expense and have arrived at a presumably amicable resolution of their differences. See, e.g., *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 164-65 (3d Cir. 1973); *Yablonski v. UMW*, 466 F.2d 424, 431 (D.C. Cir. 1972); *Powell v. Pennsylvania R.R.*, 267 F.2d 241, 242, 243 (3d Cir. 1959); *Lafferty v. Humphrey*, 248 F.2d 82, 84 (D.C. Cir. 1957). In *Yablonski*, *supra*, a motion for allowance of attorney's fees as costs in actions against a union by its members involved four separate suits. Despite the fact that three of the suits never proceeded beyond the issuance of preliminary injunctions, and the fourth failed to reach that stage, the court granted the motion. It noted that the suits had the practical effect of making the union more democratic and dignified, as Congress had envisioned in passing the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401 (1970), 466 F.2d at 431. The court also cited *Mills* for the proposition that the relevant inquiry is not the technical posture of the litigation, but whether it has conferred a substantial benefit on members of an ascertainable class, there being no need for a final judgment. *Id.* Clearly, however, there must be some "final" action taken by a district court on some phase of the litigation in order to reach the appellate stage, as appellants did in *Yablonski*. See 28 U.S.C. §§ 1291, 1292 (1970).

⁹² 495 F.2d at 1035.

⁹³ *Id.* at 1034-35.

The dissenting members of the court were not satisfied. They regarded appellants as having ultimately, though extra-judicially, failed on the legal theory of their case. They pointed out that instead of limiting the pipeline to the statutory fifty foot wide right-of-way, appellants wound up with an amended Mineral Leasing Act providing for an even wider right-of-way and a congressional circumvention of the NEPA through outright ratification of the impact statement to which appellants objected.⁹⁴

It should be emphasized that the private attorney general exception is a flexible equitable tool. Furthermore, it is not of a nature to require a scorecard of favorable judgments where more than one issue is involved. The inherent power of the chancellor to "do equity" allowed him to take into consideration all factors surrounding a dispute and to fashion relief accordingly.⁹⁵

Equity may reward the sacrifice involved in litigation intended to open the avenues for social change as certainly as it may penalize the litigant who opposes such change in bad faith through sheer vexatiousness and obdurate obstinacy. It is undisputed that environmental concerns must form a significant part of our national policy for the decades ahead.⁹⁶ The appellants in *Wilderness* must be said to have "prevailed on the issues" in the only sense in which that criterion can matter in an equitable award of attorney's fees under the private attorney general rationale: that a net benefit has accrued to the public interest from the litigation in question.⁹⁷

⁹⁴ Id. at 1042-43 (Wilkey, J., dissenting). See Pub. L. No. 93-153, § 203(d) (Nov. 16, 1973), reprinted in 1973 U.S. Code Cong. & Ad. News 639, 649.

⁹⁵ *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 166 (1939). Accord, *Hall v. Cole*, 412 U.S. 1, 5 (1973). In *Sprague*, the Supreme Court noted that the award of attorney's fees is not routine in nature and is better made at the end of the case than at an earlier stage, where the conduct and practical results of the case are in the best perspective. 307 U.S. at 168. The Court recently acknowledged, however, that the entire litigation need not be at an end for attorney's fees to be awarded, since to so require would work "substantial hardship on plaintiffs and their counsel" in long, complicated suits. *Bradley v. School Bd.*, 416 U.S. 696, 723 (1974).

⁹⁶ Restoring nature to its natural state is a cause beyond party and beyond factions. It has become a common cause of all the people of the country. It is the cause of particular concern to young Americans because they more than we will reap the grim consequences of our failure to act on the programs which are needed now if we are to prevent disaster later—clean air, clean water, open spaces. These should once again be the birthright of every American. If we act now, they can be.

President Nixon's State of the Union Message, Jan. 22, 1970, N.Y. Times, Jan. 23, 1970, at 22, col. 4. On the other hand, the environmental movement reportedly regards Congress' action concerning the pipeline, effectively overriding the NEPA, as a stunning blow. See Kindleberger, *Who's Watching the Environment?* The Boston Sunday Globe Magazine, Sept. 22, 1974, at 22, 27 col. 1. As with most things, only time will tell, but the philosophy of national dedication underscored by former President Nixon has far from flagged. See, e.g., *Wilderness*, 495 F.2d at 1033-34; Exec. Order No. 11,752, 3 C.F.R. 380 (1974) (federal facilities to demonstrate leadership in abatement of environmental pollution); Reis, *Environmental Activism: Thermal Pollution—AEC And State Jurisdictional Considerations*, 13 B.C. Ind. & Com. L. Rev. 633, 633-37 (1972).

⁹⁷ See 495 F.2d at 1033 n.3, quoting the Honorable Russell E. Train, then chairman of the President's Council on Environmental Quality and now Administrator of the Environmental Protection Agency.

Would this formulation allow an award of attorney's fees to any litigant whose suit eventually effected a change in either statutory or case law, regardless of magnitude? Not every statute involves congressional policies of preeminent importance. Furthermore, not every lawsuit turns on policy issues of preeminent importance.⁹⁸ These are undoubtedly questions for resolution as matters of law based upon available indicia of congressional intent and concern.⁹⁹ The equitable exceptions have always been subject to the court's discretion and only a clear abuse of that discretion will warrant reversal on appeal.¹⁰⁰

B. *Benefiting the Public Interest*

In addition, however, the court in *Wilderness* had to determine that the success of the litigants justified the time and resources expended in privately enforcing congressional and national policy.¹⁰¹ "[T]he environmentalists—through long delays they already have forced—achieved the inclusion of strong safeguards in plans for the Alaskan line."¹⁰² Once more, the dissenters were not so appreciative. Circuit Judge MacKinnon strongly objected to compensating appellants for any part of their work in support of their NEPA claims, the end result of which, he claimed, would have been to subject the United States to further foreign control of its energy resources.¹⁰³ Circuit Judge Wilkey was even more critical in characterizing appellants as "*frustrating the policy Congress considers highly desirable and of the utmost urgency*,"¹⁰⁴ conferring no public

⁹⁸ The Supreme Court made this abundantly clear in *F.D. Rich* with respect to the Miller Act, 40 U.S.C. §§ 270a et seq. (1970). 417 U.S. at 130. See notes 7, 32 supra.

⁹⁹ In this vein, see *Named Individual Members of San Antonio Conservation Soc'y v. Texas Highway Dep't*, 496 F.2d 1017 (5th Cir. 1974) and discussion in text at note 132 infra. Congressional action, taken while the case was in the courts, severed all federal ties to the highway project under attack, and was enough to negate plaintiffs' contention that the suit effectuated important congressional policy. 496 F.2d 1026.

¹⁰⁰ Cf. *Crites, Inc. v. Prudential Ins. Co.*, 322 U.S. 408, 418 (1944). This is not to imply that review of such decisions is wholly foreclosed. The particular issues of law as well as mixed fact and law involved are not usually subject to close calls, and that which involves a decision of law is freely reviewable for possible mistake or misapplication. A fee award, therefore, will not always be at the widest discretion of the district courts. For example, the bad faith exception presents essentially factual questions which are more appropriately evaluated by the court in the first instance, while congressional intent presents essentially a question of law and thus is a question open to review. Compare *Whitley v. Board of Educ.*, 457 F.2d 940, 942 (4th Cir. 1972) and *Kelly v. Guinn*, 456 F.2d 100, 111 (9th Cir. 1972), with *Newman v. Piggie Park Enterps., Inc.*, 390 U.S. at 402.

¹⁰¹ 495 F.2d at 1032. See *Schechtman v. Wolfson*, 244 F.2d 537 (2d Cir. 1957), where the court recognized the principle of equitable allowance of attorney's fees, but proceeded to find no benefit accruing from the suit and therefore no award warranted, *id.* at 540. See *Leisner v. New York Tel. Co.*, 8 FEP 565, 567 (S.D.N.Y. 1974); *Chastang v. Flynn & Emrich Co.*, 8 FEP 378, 380-81 (D. Md. 1974).

¹⁰² 495 F.2d at 1034-35 n.5, citing 119 Cong. Rec. 1374 (daily ed. July 16, 1973) (remarks of Senator Fannin).

¹⁰³ 495 F.2d at 1040-41 (dissenting opinion). "*When we subsidize lawyers to bring such suits against our national interests we promote our own destruction.*" *Id.* at 1041 (dissenting opinion).

¹⁰⁴ *Id.* at 1042 (dissenting opinion).

benefit on the United States, and guilty of poor judgment in "assaying just where the public interest lies."¹⁰⁵

None of the dissenters denied, however, the basic proposition that it is incumbent upon the judiciary to evaluate as best it can those factors which bear upon the very exercise of its jurisdiction. They did not deny that an award of attorney's fees is an available remedy, and they in fact affirmed that "[d]iffering perceptions of justice and public interest are understandable and to be expected"¹⁰⁶ The question really amounts to the following: should the courts determine firsthand whether a legal position adopted by a litigant comports with the best interests of society; or should they defer, in all but the most certain and established areas, to the actions and inclinations of an elected Congress charged with the responsibility under the Constitution of transforming notions as to the public interest into public policy through legislation? The fact that Congress has chosen to act in a certain area does not preclude the courts, when presented with a conflict requiring resolution, from considering the public interest implications and wisdom of their own actions in that same area.

In determining whether the appellants in the instant case had produced results contributing to the public benefit, the court took into consideration the sense of Congress as expressed in the pipeline resolution.¹⁰⁷ The courts do not inquire into the wisdom of congressional enactments in the socioeconomic area.¹⁰⁸ Had the pipeline resolution merely ratified the prior action of the Department of the Interior, without erecting new safeguards for the environment, the court would have been constrained to view the efforts of appellants as having changed little and certainly as not having effected a congressional policy of overriding concern, as required under the private attorney general rationale.¹⁰⁹

Here, however, there was more. The court appropriately sought out the intent of the legislation, and by majority vote of its members found it to be supportive of efforts to protect the environment.¹¹⁰ The court was clearly not incorrect in determining this to be an important national policy, and in concluding that appellants had contributed significantly.

In terms of the original inquiry, therefore, where Congress has given a clear, unambiguous indication of its policy and position on a matter, the courts are generally constrained to follow it unless it

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 1042 (dissenting opinion).

¹⁰⁷ *Id.* at 1035.

¹⁰⁸ *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963).

¹⁰⁹ See, e.g., *Named Individual Members of San Antonio Conservation Soc'y v. Texas Highway Dep't*, 496 F.2d 1017, 1025 (5th Cir. 1974). See text at notes 135-37 *infra*.

¹¹⁰ 495 F.2d at 1032, 1036. Indeed, had it been found not to be protective of the environment, Congress would then appear to have ignored its own mandate in NEPA. See 42 U.S.C. § 4331 (1970).

exceeds constitutional limitations.¹¹¹ But where, as here, Congress' actions are open to interpretation, the courts must determine notions of public interest underlying them and take into consideration all the information available.¹¹²

Courts do not operate in a vacuum; nor must they, or should they remain oblivious to all that occurs outside the courtroom. The protection of important rights requires effective remedies,¹¹³ and it was therefore appropriate for the court of appeals to award reasonable attorney's fees to the appellants in *Wilderness Society v. Morton* as private attorneys general suing in the public interest to vindicate a policy of the highest national importance.

However, *Wilderness* is hardly a single-issue case. It presents additional problems which in terms of practical effect may loom larger than the propriety of allowing attorney's fees as costs. One of these is the question of the continuing viability of sovereign immunity as a potential bar to assessments of attorney's fees against state governmental defendants in the federal courts.¹¹⁴

C. Putting a Premium on the Private Defendant

Once having decided in favor of an award of attorney's fees, the *Wilderness* court was then faced with the problem of affixing liability upon some or all of the appellees. Under the private attorney general exception, of course, this should not amount to a task more difficult than per capita apportionment among the named defendants, since the object of the award under this rationale is not punitive but rather redistributive and ameliorative.¹¹⁵ However, the statutory immunity of the United States to awards of attorney's fees created a significant philosophical problem for the court in that it was the Department of the Interior, and not Alyeska, which vio-

¹¹¹ This was the reasoning of the Supreme Court in denying attorney's fees under the Lanham Act, 15 U.S.C. § 1117 (1970). *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. at 719-21.

¹¹² This was the reasoning of the Supreme Court in allowing attorney's fees under the private attorney general theory in *Newman*, 390 U.S. at 401-02.

¹¹³ See Note, Awarding Attorney and Expert Witness Fees in Environmental Litigation, 58 Cornell L. Rev. 1222, 1240-41 n.111 (1973).

¹¹⁴ The concept of sovereign immunity is embraced in the Eleventh Amendment to the U.S. Constitution: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. The doctrine expressed in *Ex parte Young*, 209 U.S. 123 (1908), allowing a state officer to be sued in his official capacity, proceeds under the fiction that the officer is sued in his individual capacity because, when he is acting in contravention of the U.S. Constitution, the supreme law of the land, he is automatically stripped of the cloak of state authority. *Id.* at 159-60. Five years later, in *Home Tel. & Tel. Co. v. Los Angeles*, 227 U.S. 278 (1913), the Court found that his "individual conduct" still constituted state action, and therefore the state was bound by a decision against the officer. *Id.* at 288.

¹¹⁵ *Hall v. Cole*, 412 U.S. 1, 14-15 (1973). Overriding considerations of equity could result in a different apportionment, as might also considerations of relative economic size among defendants, although the latter at best would enter sub silentio.

lated the Mineral Leasing Act of 1920.¹¹⁶ To tax Alyeska for attorney's fees would appear to be a circumvention of the immunity by taxing Alyeska "for a dereliction not its own."¹¹⁷

The court avoided such an improper result by reasoning that Alyeska was still the real party in interest of the government action. It further reasoned that Alyeska had also actively defended the suit, and consequently that Alyeska should properly bear one-half of the award, thereby accommodating the congressional policy of sovereign immunity as to fee shifting with the judicial policy of promoting public interest litigation through fee awards.¹¹⁸

The other reason that Alyeska was required to bear one-half the fee award was that the State of Alaska was spared even partial liability for attorney's fees. The state had voluntarily joined the litigation as a defendant in order to present a version of the public interest implications of the pipeline project that would be attuned to the necessities of a developing region.¹¹⁹ In reasoning remarkably similar in form to that supporting the private attorney general exception itself, the court determined that to tax Alaska would undermine "the goal of ensuring adequate spokesmen for public interests."¹²⁰ Under that reasoning, a fee award to a prevailing defendant might be necessitated under a "defendant's version" of the private attorney general exception.¹²¹

Indeed, one wonders whether the court was not in fact demonstrating concern that such an award against the State of Alaska might be barred by the Eleventh Amendment to the Constitution.¹²²

¹¹⁶ See note 56 *supra*. But see, *NRDC v. EPA*, 484 F.2d 1331, 1334 (1st Cir. 1973), which notes that the Clean Air Amendments of 1970 apparently do authorize an award of fees against the United States. 42 U.S.C. § 1857h-2(d) (1970) expressly authorizes such an award in any suit brought pursuant to 42 U.S.C. § 1857h-2(a) (1970), which, the court decided, covered this action. *NRDC v. EPA*, 484 F.2d at 1338.

¹¹⁷ 495 F.2d at 1036.

¹¹⁸ *Id.* Appellants will therefore "bear" one half of the attorney's fees which they were under no obligation to pay to their pro bono publico lawyers. The court ordered that the "reasonable" attorney's fees be paid directly to the law firm, and that the law firm should return to appellants any payments they had made in order to avoid setting a precedent for potential windfalls to non-obligated clients. *Id.* at 1037.

¹¹⁹ *Id.* at 1036 n.8.

¹²⁰ *Id.*

¹²¹ In terms of burden of proof on the merits, there is a significant distinction between a plaintiff who initiates a lawsuit and a defendant who responds to one. A defendant may prevail by virtue of the plaintiff's failure to sustain his burden; his avenue to a fee award would then more appropriately be the bad faith rather than the private attorney general exception. There is a further difference in posture between an original defendant and one who voluntarily joins to protect an interest in the outcome of the action which might not coincide with the interest of the original defendant. Query, however, whether the distinction is meaningful for these purposes, where considerable expense has been realized and argument delivered by both sides on an issue of substantial public importance.

¹²² See note 113 *supra*. Of course, the third rational explanation could be that "the equities" were not with an award against Alaska, but *were* with an award against Alyeska. Dissenter MacKinnon formulates the majority opinion as follows: "[O]il companies are prosperous, appellants are poor, and therefore oil companies should finance both sides of this

If such a bar were to exist, then each plaintiff acting as a private attorney general and taking on a state or its subdivision or agency would be wise also to find an available private defendant to whom sovereign immunity does not extend in order to seek reimbursement of his attorney's fees. Where the suit involves a governmental function, such as operation of a school system or construction of a public highway, such a bar would go far to extirpate the gains made in recent years by development of equitable exceptions to the American Rule.¹²³

The existence of such a bar has been argued often in the past. Under the doctrine of *Ex parte Young*,¹²⁴ a private citizen may sue a state officer in federal court in order to obtain injunctive relief against alleged unconstitutional official acts. He may not, however, obtain damages.¹²⁵

Nevertheless, numerous federal court decisions since *Young* have imposed financial liabilities upon state officers acting in their official capacities on the grounds that such expenses are integral to an effective equitable remedy.¹²⁶ On March 25, 1974, however, the Supreme Court attempted to clarify the permissible scope of relief under *Ex parte Young* in the case of *Edelman v. Jordan*.¹²⁷ In a 5-4

litigation." 495 F.2d at 1042. This may simply be the actuality in most civil rights/public interest cases, where victims are "small" and offenders are overwhelmingly large.

¹²³ The Supreme Court is not likely to reach the Eleventh Amendment issue in *Wilderness*: (1) because it was apparently not raised below; and (2) because Alaska's freedom from liability is not among the questions presented on the petition for certiorari. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y.*, 43 U.S.L.W. 3096 (U.S. Aug. 20, 1974). However, *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972), now on appeal to the Ninth Circuit, 4 E.L.R. 10133 (1974), and likely to reach the Supreme Court whatever the outcome in the circuit court, presents the issue squarely. In *La Raza*, the plaintiffs were awarded counsel fees against the California State Highway Department and its Chief Engineer. Their successful suit was found to effectuate the congressional mandate of § 4(f), Department of Transportation Act of 1966, 49 U.S.C. § 1653(f) (1970) regarding the preservation of park lands. 57 F.R.D. at 99. The federal district court found no constitutional bar to the award against the state officers. *Id.* at 101-02 n.11. Because the circuits are in disagreement on this question, a detailed treatment is appropriate here. Compare *Taylor v. Perini*, 503 F.2d 899, 901 (6th Cir. 1974) (bar), with *Class v. Norton*, 505 F.2d 123, 127 (2d Cir. 1974) (no bar).

¹²⁴ 209 U.S. 123 (1908). See note 112 *supra*.

¹²⁵ See, e.g., *Rothstein v. Wyman*, 467 F.2d 226, 236, 238 (2d Cir.), cert. denied. 411 U.S. 921, rehearing denied, 411 U.S. 988 (1972). The possible individual liability of the state official for unconstitutional acts is not at issue here, except as it may be assumed by the state. See note 148 *infra*.

¹²⁶ E.g., *Harkless v. Sweeny Indep. School Dis.*, 427 F.2d 319 (5th Cir. 1970), which awarded back pay to a reinstated teacher in a suit under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970). The court characterized the remedy as an "inextricable part of the restoration to prior status . . ." *Id.* at 324. In *Gates v. Collier*, 489 F.2d 298 (5th Cir. 1973), the court extended the *Harkless* rationale of equitable restitution by allowing an award of attorney's fees to successful prison inmates in a class action against state and prison officials. *Id.* at 302. Other cases speak simply of the inability of a state to shield its officers from a lawful federal injunction and therefore of the inability to shield them from the legitimate costs attendant thereto. E.g., *Sims v. Amos*, 340 F. Supp. 691, 694 n.8 (M.D. Ala. 1972); *Ojeda v. Hackney*, 452 F.2d 947, 948 (5th Cir. 1972). But see *Ex parte New York*, 256 U.S. 490, 500-02 (1921); *Williams v. Eaton*, 443 F.2d 422, 428-29 (10th Cir. 1971); note 148 *infra*.

¹²⁷ 415 U.S. 651 (1974).

decision Justice Rehnquist, writing for the majority, declared that retrospective liabilities against a state are barred by the Eleventh Amendment.¹²⁸

Edelman involved a claim for declaratory and injunctive relief against Illinois state officials administering the joint federal-state program of Aid to Aged, Blind, and Disabled (AABD). The defendants were found to have failed to process applications for benefits under the program within the time periods allowed under federal guidelines. They were ordered to conform in the future and pay all past-due benefits for which there were outstanding applications. The court of appeals affirmed.¹²⁹ On certiorari to the Supreme Court, Justice Rehnquist initially noted that *Ex parte Young* did not authorize any and every type of relief, regardless of how closely it may resemble a money judgment payable out of the state treasury, so long as the relief could be labeled "equitable" in nature.¹³⁰

While most injunctive relief has an effect on the state treasury, and much equitable relief has been granted where the remedy fashioned by the Supreme Court required money to be spent by the state,¹³¹ the Court cautioned that such prospective expenditures are an inevitable necessity and consequence of *Ex parte Young*. An award of past-due benefits, on the other hand, is not a necessary consequence of future compliance with the determination of a substantive federal question. Rather, it is indistinguishable in many respects from an award of damages against the state.¹³² It stems from "a time when petitioners were under no court-imposed obligation to conform to a different standard [of operation]."¹³³ "It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials."¹³⁴

¹²⁸ *Id.* at 678.

¹²⁹ *Jordan v. Weaver*, 472 F.2d 985, 999 (7th Cir. 1973).

¹³⁰ 415 U.S. at 666.

¹³¹ E.g., *Griffin v. County School Bd.*, 377 U.S. 218 (1964), where the Court remanded a long and arduous school desegregation suit to the district court for prompt relief including, if necessary, an order that defendant state and county officials "levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination" a free public school system. *Id.* at 233. On remand, the district court declined to require that action, but instead enjoined state tuition grants for use in segregated schools. *Griffin v. State Bd. of Educ.*, 239 F. Supp. 560, 566 (E.D. Va. 1965). The grant laws were ultimately declared unconstitutional. 296 F. Supp. 1178, 1181 (E.D. Va. 1969). The Court in *Edelman* attempted to distinguish *Griffin* as a suit against a county, rather than a state, and as such permitted under *Lincoln County v. Luning*, 133 U.S. 529, 531 (1890). Although the rule is that county action is state action for purposes of the Fourteenth Amendment and a county defendant is not a state defendant for purposes of the Eleventh Amendment, *Edelman*, 415 U.S. at 667 n.12, it is hard to ignore the likelihood of state-level effects from county-level financial liabilities, which the Court itself proposed in remanding *Griffin*, 377 U.S. at 233. See notes 147, 148 *infra* and accompanying text. See also *Brown v. Board of Educ.*, 349 U.S. 294, 301 (1955) (implementation decision). Furthermore, the counties in both *Griffin* and *Edelman* were exercising state policy, *Edelman*, 415 U.S. at 684 (dissenting opinion).

¹³² 415 U.S. at 668.

¹³³ *Id.*

¹³⁴ *Id.* (emphasis added). The Court noted that this was the first time it was squarely

It took barely three months for a federal court to apply the *Edelman* prohibition on retrospective liabilities to a request for an award of attorney's fees. *Named Individual Members of San Antonio Conservation Society v. Texas Highway Department*,¹³⁵ an environmental case, was brought against the Texas Highway Department and the Federal Department of Transportation to enjoin construction of an expressway through parklands. Immunity of the federal defendant to a fee award was conceded.¹³⁶ The court rebuffed appellant's claim to private attorney general status by noting that Congress had, *pendente lite*, withdrawn all federal support for the project, and therefore appellants could not claim to be effectuating any congressional policies since the project was no longer in the sphere of federal legislation.¹³⁷

No bad faith on the part of appellees was found.¹³⁸ Furthermore, since any award for attorney's fees must inevitably be paid from the general revenues of the state, even the limited claim of appellants to services rendered through the first appeal was barred by the Eleventh Amendment.¹³⁹

The deficiency of the *Edelman* rationale is that it breathes life into what is essentially a distinction without a difference. Whether an equitable remedy carries with it a prospective or retrospective element requiring a disbursement of funds is of no real import except as it may affect the state accountant who must record it and the state legislator who must find the funds necessary to comply with a lawful court order. In either case, there is a justifiable increase in the state's responsibilities to those directly affected by the litigation.¹⁴⁰

It is furthermore hard to understand just where an award of attorney's fees fits into the *Edelman* scheme. It is not truly a prospective expense incident to compliance with a decision of law, except in the sense that failure to pay is failure to comply fully. Nor is it a retrospective liability as that is defined by the *Edelman* facts. There, plaintiffs were seeking funds wrongfully withheld although they were entitled to those funds under existing legislation. Thus,

presented with the issue well-briefed and argued. While *Shapiro v. Thompson*, 394 U.S. 618 (1969) affirmed a three judge district court decision allowing a retroactive award of welfare benefits, the Eleventh Amendment issue, though orally argued, was not treated by the Court. 415 U.S. at 670-71.

¹³⁵ 496 F.2d 1017 (5th Cir. 1974).

¹³⁶ *Id.* at 1025.

¹³⁷ *Id.*

¹³⁸ *Id.* at 1026.

¹³⁹ *Id.*, citing *Edelman*, 415 U.S. at 663.

¹⁴⁰ See *Edelman*, 415 U.S. at 682, 686-87 (Douglas, J., dissenting). Legally, a state official must obey the decisions and orders of a federal court properly exercising jurisdiction with regard to federal rights. Moreover, a state official should have the interests of the state citizens at heart, which are best served by rooting out the vestiges of the wrong he has committed, by paying out benefits lawfully due. *Id.* But see *Rothstein v. Wyman*, 467 F.2d 226, 234-36 (2d Cir. 1972).

they were seeking direct compensation from the state for an actual pre-existing loss.¹⁴¹ An award of legal fees, on the other hand, like an award of court costs against the state generally,¹⁴² is not such an award of damages, especially where there is no punitive aspect to it,¹⁴³ nor does the amount ultimately to be awarded "exist" even as a potentiality prior to commencement of legal action. It becomes certain only after the case is *res judicata*.¹⁴⁴ An equitable fee award is an unique tool which the courts will wield to even out what they perceive to be an imbalance in the final result of even the most successful public interest suits.¹⁴⁵

The *Edelman* Court's concern with retrospective liabilities of the state treasury probably stems from the notion that an award of damages against a state would deplete its general revenues. In this regard, a distinction has been made in the lower courts between charges against current general revenues and charges against future revenues which the state may receive. If funds have not yet been collected or, if collected, have not been earmarked, they may be applied to a fee award against the state.¹⁴⁶ Obviously, the factor present in such a distinction is the opportunity for fiscal planning with regard to a fee liability. Yet, one test of whether an action is one against the sovereign is whether it can, in any way, affect the state treasury.¹⁴⁷ Whether a suit is against the state is to be determined by the essential nature and effect of the proceeding, not the identity of the nominal defendant.¹⁴⁸ When the action in essence is

¹⁴¹ 415 U.S. at 668.

¹⁴² See *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70, 76-77 (1927); *Utah v. United States*, 304 F.2d 23, 27 (10th Cir.), cert. denied, 371 U.S. 826 (1962).

¹⁴³ The punitive aspect of the bad faith exception has never restrained the Court. See note 169 *infra*.

¹⁴⁴ Partial awards may be made at certain stages of the litigation, usually at the point where liability is certain and only matters relating to the shape and implementation of relief remain. See note 93 *supra*.

¹⁴⁵ See, e.g., *Hall v. Cole*, 412 U.S. 1, 5, 11-13 (1973); *Ross v. Goshi*, 351 F. Supp. 949, 955-56 (D. Hawaii 1972); *Wyatt v. Stickney*, 344 F. Supp. 387, 408-09 (M.D. Ala. 1972). See also *DeThomas v. Delta S.S. Lines, Inc.*, 58 F.R.D. 335, 346 (D.P.R. 1973).

¹⁴⁶ E.g., *Gates v. Collier*, 489 F.2d 298, 303 (5th Cir. 1973).

¹⁴⁷ *Dugan v. Rank*, 372 U.S. 609, 620 (1963); *Harrison Constr. Co. v. Ohio Turnpike Comm'n*, 272 F.2d 337, 340 (6th Cir. 1959).

¹⁴⁸ *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945). Courts distinguish between the immunity of the state itself and that immunity as extended to state officers in the performance of their official duties. The latter may be pierced through *Ex parte Young*; the former, absent waiver or appearance in federal court as a proper party, is impenetrable. See *Rank v. Krug*, 142 F. Supp. 1, 67 (S.D. Cal. 1956), *aff'd* in part, *rev'd* in part, sub nom. *California v. Rank*, 293 F.2d 340 (9th Cir. 1961), modified, 307 F.2d 96 (9th Cir. 1962), *rev'd* on other grounds sub nom. *Dugan v. Rank*, 372 U.S. 609 (1963). But see *Rothstein*, 467 F.2d at 236. However, the state will in effect assume the financial liability of its officers stemming from a federal court decision, *Gates v. Collier*, 489 F.2d at 302 n.2, provided it is not individual liability. *Scheuer v. Rhodes*, 416 U.S. 232, 248-49 (1974); *Barr v. Matteo*, 360 U.S. 564, 569-74 (1959). But see *Stanford Daily v. Zurcher*, 366 F. Supp. 18, 25-26 (N.D. Cal. 1973). The distinction is irrelevant insofar as the general applicability of sovereign immunity as a bar to the award of attorney's fees is concerned.

for recovery of money from the state, the immunity is available even though individual state officials are the nominal defendants.¹⁴⁹

But by the Court's own acknowledgement in *Edelman*, "prospective" expenditures are a necessary part of equitable relief under *Ex parte Young*.¹⁵⁰ Justice Frankfurter noted in his dissenting opinion in *Larson v. Domestic & Foreign Commerce Corp.*:¹⁵¹

The course of decisions concerning sovereign immunity is a good illustration of the conflicting considerations that often struggle for mastery in the judicial process, at least implicitly. In varying degrees, at different times, the momentum of the historic doctrine is arrested or deflected by an unexpressed feeling that governmental immunity runs counter to prevailing notions of reason and justice. . . . [O]ne of its results is the multitude of decisions in which this Court has refused to permit an agent of the government to claim . . . its immunity.¹⁵²

It must be recognized that the typical pro bono lawsuit, whether based on constitutional or federal legislative guarantees, comes to the courts fully charged with public policy ramifications. Substantive rights asserted often go to the very core of our national existence. Accordingly, as in the First Amendment area, such suits may be said to occupy a "preferred position."¹⁵³ Where substantive rights are not involved, but the interests are nonetheless socially important, courts very often react in the same manner, in terms of the extent and nature of relief available.¹⁵⁴ *Edelman* therefore becomes more of an enigma when viewed against the background of fairly liberal advances in the area of civil rights in the federal system. It represents a step backward in its sweeping prohibition of retrospective equitable relief, though restitutionary in nature. As noted, recent decisions have adopted the *Edelman* description and have denied an award of attorney's fees on the basis of the Eleventh Amendment immunity. It is submitted that this is incorrect.

The better view would seem to be that attorney's fees are sufficiently similar to normal taxable costs so as to come under the long settled practice in federal courts of allowing the latter against an unsuccessful state or state official where properly under federal

¹⁴⁹ *Williams v. Eaton*, 443 F.2d 422, 429 (10th Cir. 1971).

¹⁵⁰ *Edelman*, 415 U.S. at 667-68.

¹⁵¹ 337 U.S. 682 (1949).

¹⁵² *Id.* at 709 (dissenting opinion) (federal immunity).

¹⁵³ See *Kovacs v. Cooper*, 336 U.S. 77, 89-97 (1949) (Frankfurter, J., concurring). The Supreme Court clearly regards civil rights litigation as more worthy of fee shifting than commercial litigation. See note 171 *infra*.

¹⁵⁴ See *NRDC v. EPA*, 484 F.2d 1331, 1334 (1st Cir. 1973); *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 470 F.2d 289, 297-300 (8th Cir. 1972) ("substantive rights" as found by the court are actually very limited). But see *Pinkney v. Ohio EPA*, 375 F. Supp. 305, 311 (N.D. Ohio 1974).

jurisdiction.¹⁵⁵ A state loses a portion of its sovereign character when it appears in federal court, whether under its own consent or initiative, or under a federal law as a defendant, for the purpose of taxing it with a successful opponent's witness fees, transcript expenses, etc.¹⁵⁶ It cannot be said to regain its sovereign immunity when costs are extended to include reasonable attorney's fees.¹⁵⁷

Surprisingly, having created this dilemma in March with *Edelman*, the Supreme Court appears to have resolved it in May with *Bradley v. School Board*,¹⁵⁸ a unanimous decision allowing an award of attorney's fees for the successful prosecution of school desegregation litigation against a publicly funded governmental entity.

The history of this case is worthy of brief note. The district court in *Bradley* had awarded attorney's fees under both the bad faith and private attorney general exceptions.¹⁵⁹ The court of appeals reversed, noting Congress' failure to include an explicit authorization for attorney's fees in the Civil Rights Act of 1871,¹⁶⁰ under which this suit was brought, and reasoning that "in a statutory scheme designed to further a public purpose, it may be fairly accepted that it did so purposefully . . ."¹⁶¹ While the case was pending in the court of appeals, the Emergency School Aid Act became law.¹⁶² Section 718 thereof grants discretionary power to a federal judge to grant fee awards in appropriate school desegregation cases.¹⁶³ The court of appeals refused retroactive application of the Act to this suit.¹⁶⁴

The Supreme Court reversed. Not only did the Court hold section 718 applicable, but it also held that an award thereunder was justified on the private attorney general rationale, petitioners having vindicated a "national policy of high priority," the achievement of desegregation.¹⁶⁵

The second concern of the Court in *Bradley* was the possible injustice of a retrospective application of the Emergency School Aid

¹⁵⁵ See note 138 *supra*. But see *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939). In that case, the Court was concerned with procedural foreclosure of the request for a fee award as opposed to "normal" taxable costs. The question here is whether, given a seasonable request, fees may be awarded against a defendant who is otherwise liable for costs. Analytically, attorney's fees and other taxable costs are the same type of expense—a necessary cost of litigation. See *Class v. Norton*, 505 F.2d 123, 126 (2d Cir. 1974).

¹⁵⁶ 28 U.S.C. § 1920 (1970). See note 138 *supra*.

¹⁵⁷ *Taylor v. Perini*, 503 F.2d 899, 907, 909 (6th Cir. 1974) (Edwards, C.J., dissenting).

¹⁵⁸ 416 U.S. 696 (1974). Justices Marshall and Powell took no part in the consideration or decision of the case.

¹⁵⁹ *Bradley v. School Bd.*, 53 F.R.D. 28, 34-36 (E.D. Va. 1971).

¹⁶⁰ 42 U.S.C. § 1983 (1970). See note 32 *supra*.

¹⁶¹ *Bradley v. School Bd.*, 472 F.2d 318, 330 (4th Cir. 1972).

¹⁶² 20 U.S.C. §§ 1601 et seq. (Supp. II, 1972).

¹⁶³ 20 U.S.C. § 1617 (Supp. II, 1972).

¹⁶⁴ 472 F.2d at 331-32.

¹⁶⁵ 416 U.S. at 716-21.

Act,¹⁶⁶ and of necessity, therefore, the possible injustice of an award of attorney's fees against a state entity. Clearly, if such an award were an impermissible retrospective liability under *Edelman*, then it could not be allowed here.¹⁶⁷

The respondent, Richmond School Board, claimed that its funds and existing appropriations thereof were in the nature of matured rights, with which a court, through an award of attorney's fees, could not interfere. In response, the Court flatly stated:

It cannot be claimed that the publicly elected School Board had such a right in the funds allocated to it by the *taxpayers*. These funds were essentially held in trust for the *public*, and at all times the Board was subject to such conditions or instructions on the use of the funds as the *public wished to make* through its duly elected representatives.¹⁶⁸

Undoubtedly, this would be true of any government entity's funds not already disbursed, and, for that matter, applicable as well to the state's general revenues. If *Bradley* is to be reconciled with *Edelman*, then an award of attorney's fees must be something other than a retrospective liability against the state treasury. Clearly, the Supreme Court regards it as such, and does not find it to be barred by the Eleventh Amendment. Here, as it has often done in the past,¹⁶⁹ the Court has upheld the validity and necessity of such an award, and has done so in terms of the private attorney general rationale.

Finally, the *Bradley* decision lays to rest any notions that a fee award to a successful public interest litigant in some way intrudes upon the legitimate expectations of the defendant. Neither section 718 of the Emergency School Aid Act nor the common law availability of a fee award altered the Board's pre-existing legal responsibilities to petitioners. Even assuming a degree of uncertainty in the law at the time of the original complaint regarding the Board's constitutional obligations, the Board was sufficiently aware of the possibility of an award of attorney's fees through discussions in the courts below. It might not have been able to predict the passage of section 718, but it certainly should have known of the availability of equity.¹⁷⁰

¹⁶⁶ Id. at 720.

¹⁶⁷ Statutory authorization or not, the award is still made under the court's general equity powers. See note 32 supra.

¹⁶⁸ 416 U.S. at 721 (emphasis added).

¹⁶⁹ E.g., *Northcross v. Board of Educ.*, 412 U.S. 427, 428 (1973); *Newman v. Piggie Park Enterps., Inc.*, 390 U.S. 400, 402 (1968). Certiorari was denied in the following cases involving bad faith on the part of state officials: *Brewer v. School Bd.*, 456 F.2d 943, 951-52 (4th Cir.), cert. denied, 406 U.S. 933 (1972); *Griffin v. County School Bd.*, 363 F.2d 206, 212 (4th Cir.), cert. denied, 385 U.S. 960 (1966).

¹⁷⁰ 416 U.S. at 721.

In the general context of public interest litigation involving governmental defendants, this can be read as the Court's announcement that the equitable exceptions have come into their own, and henceforth defendants in these special, "non-routine" pro bono publico lawsuits¹⁷¹ should be aware of their availability and plan accordingly.

It is submitted, therefore, that *Edelman* does not proscribe the equitable award of attorney's fees against state governmental authorities. Whatever significance *Edelman* may hold does not lie in the realm of fee shifting, and insofar as *Named Individual Members of San Antonio Conservation Society v. Texas Highway Department*¹⁷² relied upon the *Edelman* rationale in barring the award of attorney's fees against the state, it is submitted that it was wrongly decided and should not be followed.

CONCLUSION

The American Rule as to attorney's fee liability exerts an inherent chilling effect upon resort to the legal system wherever the pecuniary benefit to be derived from legal vindication of one's rights is less than the cost of an attorney. The contingent fee, one way of overcoming this institutional barrier to justice, is adequate where there is the potential for a large monetary recovery. It does not ordinarily lend itself to use, however, in the civil rights and environmental areas, where equitable remedies prevail. Injunctions do not generate fees. Equity itself, however, developed three exceptions to the American Rule to allow a fair apportionment of the real costs of litigation, the most progressive of which allows one who sues in the public interest in order to vindicate a national policy of high importance to recover reasonable attorney's fees from the unsuccessful defendants.

As evidenced by *Wilderness Society v. Morton*, this private attorney general exception stands ready and able to turn the tide in the vast sea of public interest litigation. *Wilderness* placed the environmental movement and the pro bono publico lawyer a giant step ahead. Reaffirming equity's inherent power to evaluate even the extra-judicial components of litigation in arriving at relief designed to meet overriding considerations of justice, the case clearly

¹⁷¹ "[S]chool desegregation litigation is of a kind different from 'mere private cases between individuals.' . . . [I]t is not appropriate to view the parties as engaged in a routine private lawsuit." 416 U.S. at 718. Compare this with the decision rendered thirteen days later in *F.D. Rich*: "In effect then, we are being asked to go the last mile in this case, to judicially obviate the American Rule in the context of everyday commercial litigation, where the policies which underlie the limited judicially created departures from the rule are inapplicable. This we are unprepared to do." 417 U.S. at 130-31. Whether the Court will further define "everyday commercial litigation" remains to be seen. *Bradley*, however, clearly reaffirms the ready availability of the equitable exceptions to pro bono plaintiffs. See 416 U.S. at 716-21.

¹⁷² 496 F.2d 1017 (5th Cir. 1974).

demonstrates the flexibility of a theory of fee shifting which devolves from considerations of social policy.

First, it allows the law to reflect important social change through the encouragement of suits vindicating basic, though newly emerging, human rights. Second, it allows the judiciary, traditionally the slow mover, to reflect change sooner due to increased exposure to societal problems. The law need not find itself out of step with the times. Third, it facilitates enforcement of regulatory legislation aimed at developing a safe, fair, economically viable nation, by encouraging private citizens to serve as "watchdogs" over those charged with the official responsibility for its growth and maintenance. Fourth, it raises the stakes for private defendants and potential violators who shirk their social responsibilities. Fifth, it redistributes the cost of pro bono litigation to a large portion of the benefited public through further shifting by way of taxation or, in the case of a private defendant, by the mechanisms of the marketplace. Sixth and last, its very existence works a therapeutic benefit upon a society become increasingly aware that its very complexity is causing it to lose touch with the controls.

State governmental and private defendants alike are open to liability for shifted fees and, should Congress ever discard the anachronism of federal sovereign immunity, so also would be the United States. The *Edelman* prohibition on retrospective liabilities against the states, it is submitted, is inapplicable to the unique tool of attorney's fee awards. Despite this decision, the Supreme Court gives every indication of intending to maintain and expand the concept of fee shifting in matters of great national importance, as a vital exception to its general commitment to the American Rule.

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