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Attorneys' Fee Awards to Prevailing Defendants in Consumer Class Action Litigation in California: A Dual Standard Restricting Awards to Prevailing Defendants is Necessary

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The general rule in American courts is that prevailing parties are not awarded attorney's fees. There are, however, statutory and equitable exceptions which may result in fee shifting, all of which are applicable in class action suits.\(^1\)

In the federal courts the exceptions are applied according to a dual standard for prevailing plaintiffs and prevailing defendants. The standard is dual in that it is a liberal one for awards to plaintiffs and a restrictive one for awards to defendants.\(^2\) California has not yet articulated a dual standard that distinguishes between plaintiffs and defendants, but historically the legislature and the courts have favored consumers as plaintiffs. Without a dual standard awards may be made in many instances in which the defendant is simply the prevailing party, with no showing of bad faith on the part of the plaintiff. When this occurs, there is a considerable deterrent effect on consumer class action litigation.\(^3\)

In 1975, an award of attorney's fees was made to the prevailing defendants in *Seibert v. Sears*.\(^4\) The award was granted solely on the basis of the statutory provision for an award to a prevailing party; there was no showing of bad faith on the part of the plaintiffs. This set an extraordinary precedent for class actions in California.\(^5\)
The threat of liability for attorney's fees is a tremendous weapon against the potential consumer class action plaintiff. Moreover, an award made under the Seibert circumstances is not in keeping with California's history of consumer rights legislation and class action litigation. This comment will show that standardless awards should not be granted to prevailing defendants; instead, the federal dual standard should be adopted. A proposal will be developed for legislative enactment of a statutory dual standard.

I. ATTORNEY FEE SHIFTING—THE AMERICAN RULE AND ITS EXCEPTIONS

To begin to understand the importance of an attorney's fee award to a prevailing defendant, it is necessary to first understand the "American Rule" regarding attorney's fees. In England and most other Western countries, attorney's fees are awarded as a matter of course to the prevailing party. By contrast, the rule in the United States requires that each party be responsible for the financial burdens of his own legal expenses absent either a statutory exception, an agreement between the parties, or certain equitable circumstances. It is primarily in the class action arena that qualifying equitable situations arise.

In both the federal and California courts, the developments of the statutory and non-statutory exceptions to the no-fee rule have...
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paralleled each other. The federal court developments are important in California because of the state's judicial adoption of Rule 23 of the Federal Rules of Civil Procedure for class action litigation. There are currently many examples of statutory exceptions which allow attorney's fees either to the prevailing plaintiff or to the prevailing party whether plaintiff or defendant. Additionally, there are a few general exceptions to the no-fee rule that have arisen out of the courts' equitable power to respond to certain types of actions. The exceptions developed in the federal and California courts are the common fund, substantial benefit, private attorney general, and bad faith theories.

A. Common Fund Theory

The common fund theory allows recovery of fees when a plaintiff has created or preserved a common fund for the benefit of others not parties to the suit. Such a fund may consist of damages the court has ordered to be paid by the losing defendant to the successful class. The fund may also consist of monies preserved by the plaintiff when they have successfully enjoined the defendant from spending money for a particular purpose or in a particular manner.

The rationale behind this exception is that the party plaintiff has taken on the burden of a suit minimally beneficial to him, but the outcome significantly benefits a large class of individuals or the

11. See infra notes 16-36 and accompanying text.
12. Implicit in the adoption of the federal model is that California Courts will use federal judicial interpretations and precedents, as well as the federal rule itself, in assessing attorney's fees awards.
15. See infra text accompanying notes 16-36.
general public.\textsuperscript{19} Because the unnamed beneficiaries of such a suit would otherwise profit with no cost to themselves, fees are awarded from that common fund.\textsuperscript{20} The federal and California courts freely utilize this exception, especially in class actions.\textsuperscript{21}

B. Substantial Benefit Theory

Under the substantial benefit theory, the same kind of equitable circumstances exist as under the common fund theory, but there may be no common fund from which to award the fees.\textsuperscript{22} To justify fee shifting under this theory, the court focuses on the benefit the plaintiff confers on all the class members in successfully litigating their rights without their participation as parties. In the past, in order to reimburse the prevailing class representatives, the courts have assessed fees against the absent members of the class who were benefited. But, this was held to violate due process rights of those absent class members because the court does not have in personam jurisdiction over them.\textsuperscript{23} The court may, however, assess fees against the losing defendants.\textsuperscript{24}

Because the award may be made when there is no identifiable fund from which to pay the fees, the substantial benefit rationale is used less often than the common fund rationale. This theory is employed, however, in both the federal and California courts.\textsuperscript{25}

C. Private Attorney General Theory

Closely akin to the substantial benefit theory is the private attorney general theory. This exception is applied when the underlying action is one to enforce an important public right or public policy. The plaintiff is seen as acting in lieu of the attorney general for

\textsuperscript{19} See Note, supra note 6, at 85-86.
\textsuperscript{20} See supra note 16.
\textsuperscript{22} Witkin, supra note 16, at § 134; see also Note, supra note 6, at 85-86.
\textsuperscript{23} Lamb v. United Sec. Life Co., 59 F.R.D. 44 (S.D. Iowa 1973); National Ass'n of Farmworker Orgs. v. Marshall, 628 F.2d 23 (D.C. Cir. 1979); C. Wright & A. Miller, supra note 16.
\textsuperscript{24} Fletcher v. A. J. Industries, Inc., 266 Cal. App. 2d 313, 72 Cal. Rptr. 146 (1968); C. Wright & A. Miller, supra note 16; Witkin, supra note 16, at § 134; see also Note, supra note 6, at 85-86.
\textsuperscript{25} See, e.g., Woodland Hills Residents Ass'n v. City Council, 23 Cal. 3d 916, 593 P.2d 200 (1979), 154 Cal. Rptr. 503; Inyo v. Los Angeles, 78 Cal. App. 3d 82, 144 Cal. Rptr. 71 (1978); Foley v. Devaney, 528 F. 2d 888 (3d. Cir. 1976); Witkin, supra note 16, at § 134; Note, supra note 6, at 85-86.
the public at large and is reimbursed for expenses incurred. Until the United States Supreme Court decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, this exception was widely used in federal courts. *Alyeska* severely limited this exception and called for explicit statutory authorization for such an award. This exception was virtually dead after the *Alyeska* decision, but was soon followed by legislative response. In a variety of areas, Congress authorized fee awards by revising existing laws and enacting new ones.

Generally, the California court decisions, in the wake of *Alyeska*, also denied awards to the prevailing plaintiff on the basis of the private attorney general theory. Soon thereafter, the California Supreme Court in *Serrano v. Priest* affirmed a trial court decision that such an award could be made when a constitutional issue is litigated. Additionally, before the *Serrano* opinion was filed, the California legislature codified the private attorney general theory permitting the award of fees when there is a vindication of either a constitutional or a statutory right.

**D. Bad Faith Litigation Theory**

At the federal court level, there is an exception for bad faith litigation. In this instance, either party may be awarded fees when the suit has been brought or maintained in a vexatious or oppressive manner. The California courts have not yet applied this exception. One California court recognized the bad faith exception, but chose not to apply the exception under the circumstances of the case. Another California court held that while it recognized the need for such an exception, it would not adopt this exception in the absence of

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28. *Id.* at 262.
29. Note, *supra* note 6, at 89. For an exhaustive list of federal statutes authorizing fee shifting, see *Newberg*, supra note 14, at § 7040.
33. *Id.* at § 134C.
suitable legislation.\textsuperscript{86}

Except for the bad faith rule, all of these equitable exceptions focus on the prevailing plaintiffs. The common fund, substantial benefit, and private attorney general theories also presuppose a private plaintiff enforcing a private or public right or correcting a wrongdoing by the defendant. The bad faith exception focuses on the misconduct of either party in bringing or pursuing litigation.

Thus, the equitable exceptions to the American no-fee rule are primarily favorable to the plaintiff. In contrast, the defendant generally must look to one of the statutory exceptions which permit fee shifting to a prevailing party.\textsuperscript{87}

II. CLASS ACTIONS—PROCEDURES IN FEDERAL AND CALIFORNIA COURTS

Both federal and California legislation directly related to class action litigation contain no provisions authorizing the award of attorney's fees. At the federal level, class actions are authorized by Rule 23 of the Federal Rules of Civil Procedure.\textsuperscript{88} Included in the federal rule are detailed instructions for many aspects of the class actions, such as the prerequisites to a class action, the conditions for maintenance of a class action, notice to the class members, and various orders that may be made in reference to the class action. In spite of this seemingly thorough treatment of class actions, there is no reference to attorney's fees. This issue must be determined by the application of statutory and equitable exceptions to the no-fee rule in accordance with standards determined by the United States Supreme Court.

In California, there are two statutes dealing with class actions. California Code of Civil Procedure section 382 is a permissive statute only, allowing the use of the class action device "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court."\textsuperscript{89} This section is applicable to any type of suit and leaves the question of the award of attorney's fees to the relevant


\textsuperscript{87} See, \textit{e.g.}, \textit{Witkin, supra} note 16, at § 128. \textit{See also} Aaron, \textit{Attorney Fee Awards for Pro Bono Lawyers, 7 LITIGATION} 28 (1981); Note, \textit{Attorney's Fees, supra} note 8, at 28-30.

\textsuperscript{88} \textit{FED. R. CIV. P.} 23.

\textsuperscript{89} \textit{CAL. CIV. PROC. CODE} § 382 (West 1973).
statutory or equitable exceptions to the no-fee rule.\textsuperscript{40}

Class actions are also authorized by California Civil Code section 1781\textsuperscript{41} for suits alleging violations of the California Consumer Legal Remedies Act.\textsuperscript{42} The only procedural instructions in this section are those setting the prerequisites for maintenance of a class action. Again, no mention is made of attorney's fees within section 1781 and there are no other provisions in the Consumer Legal Remedies Act which permit fee shifting.

Therefore, in all state or federal class actions, the party seeking an award of attorney's fees must find an applicable statutory or equitable exception.\textsuperscript{48}

### III. Attorney's Fees Awards Within the Class Action Context

The lack of specific statutory direction concerning attorney's fees in class actions necessitates looking to the federal and state statutory and equitable exceptions which do provide for the award of attorney's fees.

Fee awards in class action suits are of much greater importance than in the ordinary civil suit. Class action plaintiffs are often unable to afford litigation, yet, they are frequently the most in need of the protections available to the consumer.\textsuperscript{44} Often in such instances the cost of maintaining a suit individually would be so prohibitive, especially in comparison to the possible financial gains, that a class action is the only viable method of pursuing a claim.\textsuperscript{45} The time-consuming procedures unique to class action suits, however, often result in fees that are staggering in comparison to the costs of individual actions.\textsuperscript{46}

When such enormous fees are at stake, the crucial issue is who

\textsuperscript{40} This section does not address any procedural issue. For a discussion of the statutory and equitable exceptions, see \textit{supra} text accompanying notes 8-37.

\textsuperscript{41} \textsc{Cal. Civ. Code} § 1781 (West 1973).

\textsuperscript{42} \textsc{Cal. Civ. Code} § 1750-1789 (West 1973).

\textsuperscript{43} See \textit{supra} text accompanying notes 15-20.

\textsuperscript{44} Note, \textit{Consumer Legislation and the Poor}, 76 \textit{Yale L.J.} 745 (1967).

\textsuperscript{45} See Vasquez \textit{v.} Superior Court of San Joaquin County, 4 \textit{Cal. 3d.} 808, 807-08, 484 P.2d 964, 968, 94 \textsc{Cal. Rptr.} 796, 800-01 (1971).

\textsuperscript{46} For a broad sample of the size of the fees resulting from various types of class actions see \textsc{Newberg}, \textit{supra} note 14, at § 7025, 7030, and 7035. An excellent example of the extremely time-consuming nature of class action litigation even in pre-trial stages can be seen from the group of law suits consolidated in San Francisco Superior Court by various named plaintiffs against major California banks. Under the file name of Rudolfi \textit{v.} Bank of America, there were over \textit{2000} volumes of pleadings and papers in the files as of summer, 1982. Rudolfi \textit{v.} Bank of America, \textsc{Civ. No.} 720-308 (San Francisco Super. Ct., Dept. 3, Sept. 16 1983).
is responsible for those fees. Without a strong possibility of repayment for the attorney's time and advancement of considerable costs, much class action litigation would simply fall by the wayside.\textsuperscript{47} No matter how strong the motivations of the individual attorney or small law firm or how deep the commitment to pro bono work of the large law firm, the drain on their finances through representation of class action clients would soon eliminate effective representations in all but the most unusual cases. Thus, the availability of various fee shifting arrangements presents a threshold question in the class action suit. The development of federal and California statutory and equitable exceptions to the American no-fee rule has kept the door open to class action litigation.\textsuperscript{48}

In the area of class action litigation, there are many examples of the various exceptions to the no-fee rule.\textsuperscript{49} When there is an exception by statutory allowance of fees to a prevailing party, the prevailing defendant has an almost equal chance of being awarded attorney's fees as does the prevailing plaintiff. The class action suit, however, is often given special consideration and is moreover the subject of special procedural rules.\textsuperscript{50}

A. Attorney's Fees Awards in Federal Class Actions

In the federal courts, when there is a statutory fee shifting provision, prevailing class action plaintiffs are treated differently than prevailing class action defendants.\textsuperscript{51} The Civil Rights Attorney's Fees Awards Act of 1976\textsuperscript{52} embodied the congressional attitude favoring the award of fees to class action plaintiffs.\textsuperscript{53} The Act provides for reasonable attorney's fees in several types of civil rights actions and in some tax litigation. It is typical of other statutes au-

\textsuperscript{47} McDermott & Rothschild, \textit{supra} note 30.

\textsuperscript{48} See \textit{id}.


\textsuperscript{51} See Note, \textit{supra} note 6, at 91-100.


\textsuperscript{53} Note, \textit{supra} note 6, at 90 n.77, 91-93.
As a response to the United States Supreme Court decision in *Alyeska*, the Act was intended to be liberally applied to a prevailing plaintiff vindicating an important public right. On the other hand, Congress intended the Act to be applied to a prevailing defendant only when necessary to deter meritless suits.

The standard for awards to prevailing plaintiffs was determined in *Newman v. Piggie Park Enterprises*. The *Newman* court held that a prevailing plaintiff “should ordinarily recover an attorney’s fee unless special circumstances would render such an award unjust.” This very liberal standard was preserved by Congress in its enactment of the Awards Act and has been subsequently followed in many court decisions.

Aware of the great potential for abuse of the class action mechanism as a means of harassing and intimidating a defendant, Congress provided for the award of attorney’s fees against a plaintiff guilty of vexatious, frivolous or harassing litigation. The standard for making such an award was enunciated in *Christiansburg Garment Co. v. EEOC*. In *Christiansburg*, the United States Supreme Court held that prevailing defendants should be awarded fees only when it is shown that the plaintiff’s action was “frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.” Although initially not accepted by all the courts, it has since become the recognized dual standard in civil rights cases. In general, the federal courts have followed *Christiansburg* in all class action suits.

Thus, the fee award rule in class action suits in federal courts requires that fees be awarded to a prevailing plaintiff unless unusual circumstances suggest it would be unjust to do so. Fees will not be awarded however, to a prevailing defendant unless unusual circumstances suggest it would be unjust not to do so.

54. *See id.* at 89; *Aaron, supra* note 37, at 28.
55. Thus the private attorney general exception to the no-fee rule which *Alyeska* held could not be applied absent legislative authorization. *See supra* text accompanying notes 32-35.
56. *Note, supra* note 6, at 91-93.
57. 390 U.S. 400 (1968).
58. *Id.* at 402.
59. *Note, supra* note 6, at 87-88.
60. *Id.* at 95.
62. *Id.* at 421.
63. *Note, supra* note 6, at 95 n.102.
64. *Note, supra* note 6, at 95-100.
B. Attorney's Fees Awards in California Class Actions

As in the federal courts, California has statutory and equitable exceptions to the no-fee rule applicable to class actions. While there are many statutory exceptions, the equitable exceptions are limited to the common fund, substantial benefit, private attorney general and bad faith exceptions. Moreover, the California legislature has kept the door open for class action litigation by addressing the threshold issue of financial responsibility. But, unlike Congress, which enacted many revisions and additions to existing legislation, the California legislature's response to the Alyeska decision was to adopt the private attorney general theory by statute. As a result, California has very broad authorization for the allowance of attorney's fees to plaintiffs in an action affecting a consumer interest.

In contrast to the federal courts, California has not developed a dual standard for awards to prevailing defendants. There has been no California case comparable to Christiansburg limiting awards to prevailing defendants to those circumstances in which there is a showing of bad faith on the part of the plaintiff. Consequently, no such showing is required, and there has been at least one decision in which attorney's fees were awarded to a prevailing defendant without any showing of plaintiff's bad faith.

The 1975 court of appeals decision in Seibert v. Sears awarded attorney's fees to the defendant solely on the basis of California Civil Code section 1811.1 which authorizes fees to a prevailing party. Although presented with arguments that such an award is contrary to the spirit and intent of the Unruh Act on which the

65. See generally supra notes 14-37 and accompanying text.
66. Id.
67. See CAL. CIV. PROC. CODE § 1021.5 (West 1980). Section 1021.5 provides in pertinent part: Upon motion, a court may award attorney's fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.
68. Because CAL. CIV. PROC. CODE § 1021.5 permits the court to make discretionary awards whenever any statutory or constitutional right is litigated, class action plaintiffs are not dependent on specific statutory authorization in California as they are dependent on the individual statutory exceptions in federal suits.
69. See supra notes 60-64 and accompanying text.
70. 45 Cal. App. 3d 1, 120 Cal. Rptr. 233 (1975).
71. See supra note 5.
class action was based, the court ignored these equitable considerations. Instead, the court looked only to the plain meaning of the statutory language and awarded attorney’s fees to the defendants because they were the prevailing party.\textsuperscript{73}

IV. ATTORNEY’S FEES AWARDS TO PREVAILING DEFENDANTS IN CALIFORNIA CONSUMER CLASS ACTIONS

The history of consumer legislation and class actions in California shows a policy towards encouraging consumer activism and class actions. The award of attorney’s fees to prevailing defendants in consumer class actions is contrary to that policy and creates due process and cost allocation problems.

A. California’s Consumer Rights Policy

California’s courts and legislature are committed to consumer legislation. Beginning in the 1960’s with legislation such as the Rees-Levering Act of 1966\textsuperscript{74} and the Moscone Auto Leasing Act of 1969,\textsuperscript{76} dozens of statutes have been enacted which deal directly with consumer problems.\textsuperscript{76} All of these statutes were designed to aid the consumer. In many of the pertinent code sections there is language authorizing attorney’s fees. Generally, fees are not authorized to a prevailing party; the language limits the award to a prevailing consumer.\textsuperscript{77}

The provision for fees to a prevailing party in the Unruh Act, California Civil Code section 1811.1, is an exception, but is not an indication of legislative intent to simply shift fees to the winner in a

\textsuperscript{73} 45 Cal. App. 3d at 22, 120 Cal. Rptr. at 249.

This result is possible under any statute permitting fee shifting to a prevailing party, even under \textit{Cal. Civ. Proc. Code} § 1021.5, which specifies only that “a court may award attorney’s fees to a successful party against one or more opposing parties. . . .” However, the likelihood of this eventuality will remain small if the other requirements of § 1021.5 are carefully adhered to by the courts: there must be a significant benefit conferred on the general public; there must be a financial burden that makes the award appropriate; and the fees should not, in the interests of justice, be paid out of the recovery. See McDermott & Rothschild, \textit{supra} note 30, at 157.


contract action. This Act governs actions based on consumer retail installment sales contracts. Use of the term "prevailing party," coupled with the provision that it shall apply whether the action is brought by the seller, holder or buyer, is simply a recognition of the fact that actions on contracts are often initiated by the party seeking to enforce the terms of a contract. The consumer who prevails in such a suit may well be a prevailing defendant. Thus, the use of the words "prevailing party" was designed to allow only a prevailing consumer to recoup his attorney's fees whether he is the plaintiff or the defendant.

The California Supreme Court gave judicial support to this interpretation in Morgan v. Reason Corp. In that decision, the court looked to the finding of the Assembly Subcommittee on Lending and Fiscal Agencies which proposed the Unruh Act. Section 1811.1 was intended "[to] encourage [an] attorney to accept cases when the buyer has a good defense against an action instituted by the seller or holder or when the buyer wishes to institute an action for such rights as he may have." Clearly, the purpose of this section was to aid the consumer, not simply to provide for a fee-shifting arrangement regardless of who ultimately prevails.

In the same manner, California Civil Code section 1717 expresses this concern for the consumer. Many contracts contain provisions that provide for attorney's fees for a party seeking to enforce the contract. Because usually only the non-consumer brings suit on a contract, a literal reading of the contract would award attorney's fees only to the successful non-consumer. In an attempt to stop this one-way shifting of attorney's fees, section 1717 provides that in any action on a contract containing such a provision, the prevailing party will be awarded attorney's fees regardless of which party was seeking to enforce the contract. The scant information available as to

80. See infra notes 86-88 and accompanying text.
82. See Subcommittee Report, supra note 78, at 23.
83. Id.
84. 69 Cal. 2d at 896-97, 447 P.2d at 648-49, 73 Cal. Rptr. at 408-09.
85. Comment, supra note 79, at 236-37. CAL. CIV. CODE § 1717 provides in pertinent part: [I]n any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the
the legislative intent behind section 1717 indicates that "[t]he bill is intended to protect persons of limited means who sign contracts with those in a superior bargaining position."\(^{86}\)

Sections 1811.1 and 1717 and other statutes that provide attorney's fees to prevailing parties are in accordance with the general rule that attorney's fees will be provided only to a prevailing consumer. Additionally, even if a statute does not specifically provide for attorney's fees, they may still be awarded. California Code of Civil Procedure section 1021.5 permits the award of attorney's fees whenever a class action is used to vindicate an important public right.\(^{87}\)

Any action to enforce a consumer rights statute usually concerns an important public right. Therefore, the general rule in California is that in a consumer class action an award of attorney's fees will usually be available, but only to the prevailing consumer.

B. California's Class Action Policy

Because of their commitment to consumer rights, the California legislature and courts are equally committed to the class action device to protect these rights. Since the 1960's, the courts have shown a trend toward liberalizing rigid procedural requirements.\(^{88}\) The standards for procedural devices have been relaxed so that it is now easier to comply with class action prerequisites.\(^{89}\)

In 1967, in *Daar v. Yellow Cab Company*,\(^{90}\) the California Supreme Court issued a ground breaking decision for consumer class actions in California. Prior to that decision, the courts had strictly adhered to precedents which required a clearly ascertainable class in order to maintain a class action.\(^{91}\) The court in *Daar* distinguished

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\(^{86}\) Comment, *supra* note 79, at n.29 (citing Enrolled Bill Memorandum to then-governor Reagan, Assembly Bill No. 563, June 5, 1968 (chaptered bill file 68-AB563, California State Archives)).

\(^{87}\) See *supra* note 67.

\(^{88}\) *Newberg, supra* note 14, at § 1220b.


\(^{90}\) 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967). In *Daar* the plaintiffs alleged that Yellow Cab Co. had been over-charging its customers during a four year period. Although all class members and the extent of their claims could not be identified at the outset of the suit, the court held that they still constituted a sufficiently ascertainable class to be certified. *Id.* at 706, 433 P.2d at 746, 63 Cal. Rptr. at 738.

between an ascertainable class and an identifiable class and permitted the class action to proceed on behalf of thousands of unidentified consumers.\textsuperscript{92} Daar was also the initial step towards judicial adoption of Rule 23 of the Federal Rules of Civil Procedure as a model for class action procedures in California.\textsuperscript{93}

\textit{Vasquez v. Superior Court of San Joaquin County},\textsuperscript{94} like \textit{Daar}, continued to break away from the precedents. In \textit{Vasquez}, the California Supreme Court urged use of the Federal model whenever there was a "hiatus" in the California legislation as to the procedural standards necessary to maintain a class action.\textsuperscript{95} \textit{Vasquez} has since been the standard by which class action litigation is measured and is cited routinely in cases and commentary.\textsuperscript{96}

Subsequent decisions continued the lead of \textit{Daar} and \textit{Vasquez} by upholding more liberal procedural requirements than had the decisions prior to \textit{Daar}. \textit{Cartt v. Superior Court}\textsuperscript{97} and \textit{Cooper v. American Savings & Loan Association},\textsuperscript{98} for example, addressed the issue of notice to the large consumer class. Together, these cases established that in the proper circumstances notice by publication is an acceptable alternative to individual notice.\textsuperscript{99}

\textsuperscript{92} 67 Cal. 2d at 706, 433 P.2d at 740, 63 Cal. Rptr. at 732. The court held that the extent of the injuries could be determined from the cab company's records. The identities of the class members could be determined at a later date when they would be expected to come forward with proof of their claims.

\textsuperscript{93} \textit{Newberg}, supra note 14, at § 1220b.

\textsuperscript{94} 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971). In \textit{Vasquez}, suit was brought on behalf of various consumers in San Joaquin and Stanislaus counties. The consumers alleged fraudulent business practices by the retailers of freezers and frozen foods. In permitting the class representatives to proceed, the \textit{Vasquez} court reaffirmed the \textit{Daar} court's liberalized policy toward class actions and also allowed the first class action in a suit for consumer fraud.

\textsuperscript{95} Id. at 821, 484 P.2d at 977, 94 Cal. Rptr. at 809.


\textsuperscript{97} 50 Cal. App. 3d 960, 124 Cal. Rptr. 376 (1975). This suit alleged that the class members relied on false advertising by Standard Oil Company in purchasing gas at an inflated price.

\textsuperscript{98} 55 Cal. App. 3d 274, 127 Cal. Rptr. 579 (1976). Plaintiffs complained that the California savings and loan associations were improperly charging late fees to borrowers on notes secured with deeds of trust and that clauses in the notes were an invalid restraint on alienation.

\textsuperscript{99} 50 Cal. App. 3d at 973, 124 Cal. Rptr. at 389; \textit{see also Cooper}, 55 Cal. App. 3d at 285, 127 Cal. Rptr. at 590. Additionally, the Los Angeles Superior Court has published the only manual available in any state for pre-trial procedures in class actions. \textit{Superior Court of Los Angeles City, Manual for the Conduct of Pre-Trial Hearing on Class Actions Issues} (1983). In adopting a written manual of procedures, the Los Angeles court
These developments do not resolve all the issues present in class action litigation, but they have stimulated liberal use of the class action device.\textsuperscript{100} The pre-trial procedural issues are the keys to class actions because once the parties reach trial, the issues are the same as in ordinary litigation. California's flexibility at the pre-trial stage favors class action litigation and demonstrates a policy in favor of the class action device.\textsuperscript{101}

C. The Effect of Attorney's Fees Awards on California's Consumer Class Action Policy

The Seibert decision is antithetical to California's policy favoring consumer class actions.\textsuperscript{102} Seibert stands for the proposition that a prevailing defendant in a class action may be awarded attorney's fees even in the absence of vexatious, harassing or frivolous conduct by the plaintiff.\textsuperscript{103} The possibility that a class action plaintiff may be liable for the defendant's legal fees has a stifling effect on consumer class action litigation and raises several issues regarding implementation of such an award.

1. Effect on Consumer Litigation

Public interest litigation and public interest law firms have depended on the numerous equitable and statutory exceptions to the American no-fee rule for their existence and growth.\textsuperscript{104} Great gains were made by taking the financial burden of initiating and maintaining a class action suit off the shoulders of the individual plaintiff. There is no real relief for the plaintiff, however, if the defendant prevails and the plaintiff is forced to shoulder the tremendous financial burden of the opposition's legal fees.

The commentators are in agreement that awards of attorney's fees to prevailing defendants, absent a showing of bad faith on the part of the plaintiff, is chilling to consumer litigation.\textsuperscript{105} Awards to

\textsuperscript{100} Newberg, supra note 14, at § 1220b.
\textsuperscript{101} Coutlett, supra note 89.
\textsuperscript{102} See supra notes 74-76 and 90-100 and accompanying text.
\textsuperscript{103} See supra text accompanying notes 70-73.
\textsuperscript{104} McDermott & Rothschild, supra note 30, at 138-39.
\textsuperscript{105} See, e.g., Staff Studies Prepared for the National Institute for Consumer Justice on Consumer Class Action (1977); Newberg, Federal Consumer Class Action Legislation: Mak-
prevailing defendants have generally not been allowed because it is against public policy in that it would "diminish whatever deterrent value the possibility of large exposure to liability might have [on the non-consumer] . . . it turns the deterrent in the consumer, making him reluctant to bring suit against a corporation with high-powered legal counsel if he may be required to pay the defendant's costs."

Moreover, equitable considerations advantageous to consumers are present in consumer class action litigation. When a suit is brought alleging a violation of a consumer rights statute, the defendant who does not prevail is a violator of California law. In addition, whether or not the suit is based on a statutory violation, the prevailing consumer is vindicating important public policy. Legislation designed to protect the consumer and to encourage him to defend his rights is of greatly diminished value when the consumer knows he may be assessed attorney's fees if he attempts to protect his rights and fails.

2. Problems of Due Process and Notice to the Class

The plaintiffs in Seibert raised issues which made it clear that some direction must be given to the courts concerning how attorney's fees are to be awarded and what effect the fees have on class notice. The plaintiffs urged that the defendant be required to collect the fees proportionately from each class member and notify each class member of the assessed liability. If the court issued such an order several problems would arise.

First, the due process rights of absent class members may be violated by assessing fees against absent class members over whom the court does not have in personam jurisdiction. Absent class members are bound by the res judicata effect of the suit only though use of adequate notice to the class. This notice must contain information sufficient to insure that a potential class member is fully

\[\text{Footnotes:}\]

106. Making the System Work, supra note 105, at 258.
107. Although a losing defendant is not found guilty as he would be in a criminal proceeding, the defendant is nonetheless guilty of a violation of a California statute.
109. Id. at 2, 5-6, D 5.
111. C. Wright & A. Miller, supra note 16 at § 1786.
aware of his rights and understands what steps must be taken to best protect his interests.112 In spite of this, absent class members are not considered to be "parties" to the suit and cannot be asked to share the costs and expenses of the class representative.113

Thus, if absent class members can be held liable for the legal costs of the class opponent, then some mention of this potential liability will have to be made a part of the initial class notice. As yet, however, it is not clear what will constitute adequate notice under these circumstances or even if any notice will be sufficient to overcome due process objections.114 In any case, the fears expressed by the commentators that awarding fees to prevailing defendants will stifle participation in consumer rights litigation may be realized when the potential class members get such a notice.

Recent suits brought by various plaintiffs against the major banks in California116 indicate that this has already become an issue and a weapon for use by the non-consumer defendant. Among the various arguments put forth by plaintiffs and defendants as to the proper content of the notice to consumers were discussions about the propriety of alerting consumers of their possible liability for legal costs should the plaintiffs lose in court.117 This creates a new issue as to the allocation of the cost of the notice. Such a notice may be viewed as just another of the many costs integral to class action litigation to be borne by the plaintiff or shared between both parties.118

113. Id.
114. This issue has not been discussed in the commentaries. If a dual standard is adopted in California the issue will become moot. See infra note 120.
115. These suits were brought claiming that the banks had overcharged customers for overdrafts in violation of the account agreement. The suits have been consolidated in Rudolfi v. Bank of America, Civ. No. 720-308 (San Francisco Super. Ct., Dept. 3, Sept. 16, 1983).
116. Bank of America's response to Gary Checci's Purported Motion Challenging the Insufficiency of the Class Notice: "Intention of Counsel to Seek an Award of Costs Against Absent Class Members in the Event the Class is Unsuccessful in the Litigation Need Not be Disclosed in the Notice." Id. at p.5 of Defendant's Motion Challenging Insufficiency of Class Notice.
117. See supra notes 108-09.
118. The problems and arguments over the cost of notice in a class action have in themselves been the subject of considerable commentary. For a discussion of how California's approach to the problem of cost of notice differs from that of the federal courts see Comment, supra note 13; Comment, The California State Courts and Consumer Class Actions for Antitrust Violations, 33 HASTINGS L.J. 689 (1982).
On the other hand, since the prevailing defendant alone stands to benefit from the notice to class members that they are liable to the defendant, and because the consumers who fail to prove their claims are not guilty of any wrongdoing, it may be more equitable to allocate costs of notice solely to the defendant.

3. Assessing Fees to Individual Class Members

If each class member is to pay an equal share of the total fee award, this would not take into account the unequal burden on class members with smaller potential claims relative to other class members. Moreover, because a class action may involve an unidentified class, it may not be possible to accurately determine the number of shares into which the award should be divided. By contrast, if the award is to be divided in proportion to the relative potential benefit to each class member, there will be proof problems. Ordinarily, plaintiffs voluntarily submit their individual claims upon completion of the suit.119 If the class loses, absent class members will not voluntarily submit any claim once they know they will be assessed liabilities based on the claim.

These are the types of issues raised by the possibility of awarding attorney’s fees to a prevailing defendant in a class action. The court of appeals in Seibert did not address any of these issues, although the plaintiffs brought them to the court’s attention. As long as California does not have a dual standard restricting awards to prevailing defendants who show bad faith by the plaintiff, questions of due process, notice, and cost allocation will remain unanswered. If the California legislature acts to establish a dual standard comparable to that found in the federal courts, these questions will no longer be necessary.120

V. Proposal

The legislature must enact a new statute setting forth a standard for awarding attorney’s fees to prevailing parties in consumer class actions. The primary purpose of the legislation should be to


120. Some of these same problems will occur when awards are made on the basis of bad faith litigation on the part of the plaintiff. This is an equitable exception to the no-fee rule, however, and is intended to punish the errant litigant. WITKIN, supra note 16, at § 116. It must be presumed that the courts in making such an award will restrict the liability to those parties who engaged in the punishable conduct and not allow them to spread the burden to absent class members who are not responsible for the acts which induced the award.
remove the deterrent effect which now exists because of the possibility that a losing consumer may be assessed the legal expenses of the opposing party. 121 In addition, by removing the deterrent, an incentive will once again be present for the potential claimant with little or no money. The consumer and his attorney will be encouraged to vindicate consumer rights when they can proceed with some expectancy that they may recoup their own legal fees. 122

To effectuate the goal of promoting consumer rights litigation through the class actions, a dual standard is needed. A liberal standard should be applied to prevailing consumers and a more restrictive standard applied to prevailing non-consumers. As a model, the legislature can look to the United States Supreme Court decisions in Newman 123 and Christiansburg. 124 Together, these cases set forth the federal standard for attorney's fees awards in class actions in federal courts. The Supreme Court determined that a prevailing consumer should routinely be awarded attorney's fees absent special circumstances. 125 On the other hand, a prevailing non-consumer should be awarded attorney's fees only when there has been a showing of bad faith by the consumer. 126

Bad faith, as an exception to the American no-fee rule, has not yet been judicially accepted in California as it has been in the federal courts. 127 The proposed statute should codify the bad faith exception in class actions. Bad faith litigation should be defined as bringing or maintaining a frivolous action or an action intended to harass the opponent, or as conducting litigation in a vexatious manner. 128

By authorizing fee shifting on a showing of bad faith, the courts will be relieved of many meritless claims 129; consumers will be deterred from harassing non-consumers with unwarranted suits and

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121. See supra notes 104-106 and accompanying text.
122. Id.
123. 390 U.S. 400 (1968).
125. 390 U.S. at 402.
126. 434 U.S. at 415-22.
127. In the federal courts, attorney's fees are awarded to prevailing parties if there has been a showing of bad faith on the part of the losing party. California courts have been unwilling to adopt the bad faith exception under the circumstances that have been presented to the courts without specific legislative authorization. See supra text accompanying notes 34-36.
128. Bad faith includes conduct of either party both in initiating and maintaining litigation that is considered meritless, harassing or vexatious. See Note, supra note 6, at 83-84.
129. There is general agreement among commentators that fee shifting discourages litigation. See, e.g., McDermott & Rothschild, supra note 30, at 154-55; Note, supra note 6, at 76-78. By providing for fee shifting when there is a finding that a suit was meritless, unwarranted class actions are deterred. Id.
non-consumers will be inhibited from pursuing unreasonable defenses. Such bad faith conduct is costly and time consuming to all the parties and the courts, and statutory recognition of the exception will prevent it.

To ensure that the consumer is benefited most by this fee shifting provision, use of the terms "consumer" and "non-consumer" is preferable. Use of the terms "plaintiff" and "defendant" or "prevailing party" would require an additional definitional section. A "plaintiff" or "prevailing party" should be defined to be a consumer or other person vindicating a consumer right.

Under some circumstances the person advocating the consumer position may be the defendant. In such instances attorney's fees to a prevailing defendant should be made according to the more liberal standard. If the "prevailing plaintiff" or "prevailing party" is the non-consumer, then the more restrictive standard should be applied. Again, use of the terms "consumer" and "non-consumer" would be simpler and more direct.

Finally, this statute must be made applicable to any consumer class action. The language must clearly state that when a class action is brought, this attorney fee provision will take precedence over any other statutory attorney fee provisions, regardless of the statutory or non-statutory basis for the suit. Thus, when a class action is brought under a statute authorizing attorney's fees to a "prevailing party," the consumer will be the party intended to be benefited. If the non-consumer is the prevailing party, this new provision will be given priority and the prevailing non-consumer will be granted attorney's fees only on a showing of bad faith by the consumer.

Enactment of this proposal would correct the deterrent effects lingering after the decision in Seibert. A dual standard adopted by the legislature would eliminate the need for years of litigation on the issue of attorney's fee awards. Such a legislative step would be in keeping with the history of consumer rights and class actions in California and would benefit the policy of encouraging consumer class actions.

130. These are typical of the kinds of behavior which are defined as bad faith litigation. Note, supra note 6, at 76-78. Such conduct is believed to be deterred by the award of fees on a finding of bad faith. Id. at 83-85.
131. Id. at 97 n.107.
132. Fee shifting in class actions is an important means of financing class actions and encouraging private enforcement of consumer rights. See supra text accompanying notes 104-106.
133. 45 Cal. App. 3d at 22, 120 Cal. Rptr. at 254.
134. See, e.g., Cotchett, supra note 89.
VI. CONCLUSION

The legislature needs to fill the gap in determining under what standard attorney's fees awards will be made. Although the standard for awards to prevailing defendants was determined by the United States Supreme Court at the federal level in Christiansburg, establishing such a standard judicially may not be possible or practical in California. A long time may pass before the issue of attorney's fees awards to prevailing defendants is brought to the attention of the California Supreme Court. Indeed, it has already been eight years since this issue was heard on appeal in Seibert.135 In the interim, the stifling effect of the Seibert decision continues in potential class actions which may never be filed.136

California has had an active legislature in the area of consumer rights, but this legislative activism may be shrinking due to its failure to effectuate a determinative and restrictive standard for awards to prevailing class action defendants. Without the active use of the class action device, consumer rights legislation loses its effectiveness. While the individual consumer cannot afford the expense of pursuing his claims, a class action permits individual claimants to join forces to redress violations of consumer statutes. Yet, the risk of liability for the enormous legal costs of a high-powered opponent has its greatest effect before a class action suit actually commences. Class action plaintiffs and their attorneys must decide at the outset of the suit if they are willing to take the risk that they may be assessed a defendant's legal fees even if there is no bad faith on their part. When the risk is too great, therefore, the suits will not even be filed.

Enactment of the proposed legislation will take this enormous risk out of consumer rights litigation. Consumer plaintiffs and their attorneys can safely enforce consumer legislation, and California's policy encouraging consumer class actions will be furthered.

Marie Celeste Luce

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136. See supra text accompanying notes 70-73 and 104-106.