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After Alyeska: Will Public Interest Litigation Survive

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COMMENTS

AFTER ALYESKA: WILL PUBLIC INTEREST LITIGATION SURVIVE?

INTRODUCTION

On what principle of justice can a plaintiff wrongfully run down on a public highway recover his doctor's bill but not his lawyer's bill? And on what principle of justice is a defendant who has been wrongfully haled into court made to pay out of his own pocket the expense of showing that he was wrongfully sued?

The traditional American rule governing attorneys' fees requires that each litigant bear his own legal expenses. This practice varies from that of almost every other country in the world, a fact which has not escaped the attention of legal writers. Since 1929, when the first major critical analysis appeared, legal scholars have periodically subjected the rule to intense and generally unfavorable scrutiny. The recent growth of public interest litigation, with the concomitant development of the private attorney general rationale, has generated a wide-


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spread interest in the subject and increased the stream of critical commentary. In general, the writers urge that it is time for at least a partial abandonment of our present system, and call for further development of the practice of fee-shifting, either by legislative direction or by the exercise of the court’s equitable powers. However, the recent Supreme Court decision in *Alyeska Pipeline Service Co. v. Wilderness Society* is certain to inhibit further development of the judiciary’s equitable power to award attorneys’ fees. The need for legislative guidance in the area has become critical.

An exhaustive treatment of all the problems involved in the area of attorneys’ fees is obviously not possible in one comment, if indeed it is possible at all. Therefore, this comment will be confined to the issue of attorneys’ fees in connection with public interest litigation. It will briefly explore some of the established means of obtaining attorneys’ fees, examine the scope and assess the impact of *Alyeska* on past and future equitable awards of attorneys’ fees, and consider the need for and the likelihood of federal legislation in the area. Finally, an attempt will be made to discover if the California courts can be expected to adopt a more liberal stance than can now be anticipated from the federal courts.

**THE AMERICAN RULE**

*Past, Problems and Proposals*

By the middle of the 18th century in England, the prevailing litigant could recover attorneys’ fees both at law and in equity. The rule, however, was not followed in the United States. It has been suggested that the American public basically distrusted lawyers; that the law could be understood by anyone, so lawyers were unnecessary; and even that the development of the American rule was influenced by the sporting

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4. See articles cited note 2 supra.
6. Hearings were conducted by a subcommittee of the Senate Judiciary Committee on various aspects of attorney’s fees in October, 1973. The report contains 1778 pages without reaching a consensus of where we are, let alone where we should be. *Hearings Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary on the Effect of Legal Fees on the Adequacy of Representation, 93d Cong., 1st Sess. (1973)* [hereinafter cited as *Senate Hearings*].
7. McCormick, supra note 2, at 619.
8. Goodhart, supra note 2, at 873.
theory of early American justice—a theory of early American justice—since the law is a gamble at best, it would be unfair to penalize the losing party even further by requiring him to pay two legal fees. As a corollary, taxing the loser with his opponent’s legal fees might tend to discourage poor litigants from bringing good faith claims to court, thereby undercutting the principle that the courts are forums open to all for the resolution of disputes.

Ironically, the last argument provides ammunition for both the advocates and the opponents of the present system. Those who oppose fee-recovery have suggested that if the rule were changed, already-crowded courts would be inundated with plaintiffs filing suit, firm in their rectitude and convinced that they would recover both damages and fees. On the other hand, there is a real danger that the possibility of having to pay two legal fees will deter litigants with legitimate claims from pursuing a remedy in court. Some have suggested that a change in the rule would help unclog the courts by providing incentive for settlement; others fear that such a change would actually lead to coerced settlements, since a corporate or wealthy defendant who could afford the risk would be in a position to pressure a less affluent claimant into a premature or unjust settlement on a debatable claim.

The gambling theory was perhaps best refuted by Professor Goodhart, who argued that since the costs have to be paid by someone, it is at least more probable that the losing party was in the wrong and he or she ought to pay the fees.

10. Goodhart, supra note 2, at 876-77.
11. Id. at 874.
14. Dawson, supra note 12, at 1598; McCormick, supra note 2, at 642.
15. See Mause, supra note 2; Comment, Equal Access, supra note 2, at 651-52.
16. Professor Goodhart, however, believed that the American system lent itself to greater coercion than the English system:

[The English system of costs is of advantage to the poor litigant... As long as the cost of fighting a case is merely nominal, as it is under the American practice, the wealthy defendant, especially if the defendant is a corporation, will frequently refuse to pay a just claim on the chance of winning on a technicality or of tiring out the plaintiff. It is the poor man who cannot afford to wait for his money and can, therefore, be forced to accept an unfair settlement by fear of long delay.

Goodhart, supra note 2, at 876.
17. Id. at 877.
In response to one particular critic, he retorted, "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."\(^{18}\)

Professor Ehrenzweig has pointed out that even though courts occasionally will make erroneous decisions, so that requiring the losing party to pay the other's legal expenses would compound the injustice, the fact remains that under the present system, the prevailing party is almost always unjustly burdened with legal expenses necessitated by the loser's wrongful action.\(^{19}\)

Further objections are that legal fees are too remote from the defendant's wrongful conduct to justify recovery; that it would be difficult to establish proper fees; and that lawyers would charge excessive fees if they expected to be reimbursed by the other party.\(^{20}\)

As a practical matter, however, the cost of obtaining legal assistance—normal, foreseeable conduct on the part of the victim of a wrongful act—could hardly be considered more remote than court costs which are regularly allowed to the prevailing party.\(^{21}\) It is true that awarding attorneys' fees might create a problem in determining the amount properly recoverable. The traditional English system was widely criticized because it involved a statutory fee schedule prescribing the amount allowable for each service performed, thus requiring that every step in the legal process be accounted for by the attorney seeking compensation.\(^{22}\) This was an extremely cumbersome procedure. Although the system was revised in 1953,\(^{23}\) "[t]here is no section of the community that is satisfied with the present

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18. Id.
19. Ehrenzweig, supra note 2, at 797.
20. McLaughlin, supra note 2, at 780-81.
21. Id. at 781.
22. A thorough discussion of the traditional English system is found in Goodhart, supra note 2, at 854-72.
23. For non-contentious work (i.e., non-court proceedings), a solicitor now gives a general description of the work done and charges the client based on the amount of work, its complexity and other relevant matters. This amount may be appealed to a taxing master. In 1960, a similar system was instituted for contentious work. For substantially routine processes, the charges are fixed, but "where something is a matter of professional skill and experience the charge is either left to be settled between a prescribed maximum and a prescribed minimum, or it is 'discretionary.'" This sum may also be appealed to a taxing master. R. Jackson, The Machinery of Justice in England 327-28 (5th ed. 1967).
cost of litigation." Yet systems which leave the award up to the judge's discretion have also received much criticism. This is the situation in Alaska, the only state which by statute provides for attorneys' fees as costs to the prevailing party in all cases "[u]nless the court, in its discretion, otherwise directs . . . ." Although the Alaska statute sets up a schedule for allowable fees, based on percentages of the total recovery, the court clearly is permitted to deviate from the schedule, which it frequently does. Furthermore, where there is no monetary recovery, or the judgment is not an accurate measure for determining the fee, the court may award whatever amount it deems appropriate. There has been so much discontent with the resulting uneven fee awards that the statute may very well be repealed soon.

Nor does the fear that fee-shifting would generate higher legal charges appear to have proved justified in those areas where the court already does make fee awards.

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24. Id. at 334. The current system is fully discussed in id., ch. 5, at 324-50.
25. ALAS. R. Civ. P. 82(a) [hereinafter cited as Alaska Rule 82] states:
   (a) Allowance to Prevailing Party as Costs.
   (1) Unless the court, in its discretion, otherwise directs, the following schedule of attorney's fees will be adhered to in fixing such fees for the party recovering any money judgment therein, as part of the costs of the action allowed by law:

   ATTORNEY'S FEES IN AVERAGE CASES

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<thead>
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<th></th>
<th>Contested</th>
<th>Without Trial</th>
<th>Non-Contested</th>
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<td>FIRST</td>
<td>$2,000.</td>
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<td>NEXT</td>
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<tr>
<td>NEXT</td>
<td>$5,000</td>
<td>15%</td>
<td>12.5%</td>
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<td>OVER</td>
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   Should no recovery be had, attorney's fees for the prevailing party may be fixed by the court as a part of the costs of the action, in its discretion, in a reasonable amount.
   (2) In actions where the money judgment is not an accurate criteria for determining the fee to be allowed to the prevailing side, the court shall award a fee commensurate with the amount and value of legal services rendered.
   (3) The allowance of attorney's fees by the court in conformance with the foregoing schedule is not to be construed as fixing the fees between attorney and client.

27. McLaughlin, supra note 2, at 781.
The Exceptions

The effects of fee-shifting are not entirely a matter of speculation, since there are several situations in which fee awards have traditionally been permitted: for instance, one may contract to reimburse the prevailing party for his attorneys' fees if litigation is necessary; the court may order the wife's legal fees to be paid by the husband in a divorce action; and where the defendant's wrongful conduct has caused the plaintiff to prosecute or defend a prior suit, the plaintiff may recover all reasonable expenses, including attorneys' fees, of the prior suit. Further, there are many statutes which expressly provide for awards of "reasonable" attorneys' fees; and the judicially created doctrines of bad faith and "common fund," the progenitor of the private attorney general rationale, are exceptions of long standing. The problems inherent in the concept of fee-shifting do not appear to have proved insurmountable in these areas, though difficulties do unquestionably exist.

Antitrust, divorce. Fee awards have long been established in the antitrust area under the Clayton Act. While one court pointed out that "reasonableness" depended on the facts of the particular case, and that a reasonable fee in one set of circumstances might be totally unreasonable in another, the factors

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28. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717-18 (1967); McCormick, supra note 2, at 636-37. Some states have codified this common law exception with the added qualification that such contracts be enforced reciprocally. E.g., CAL. CIV. CODE § 1717 (West 1973).

29. McCormick, supra note 2, at 626.

30. Id. at 630-31.


usually considered in arriving at a fee are the amount of damages recovered, hourly rates of compensation, private fee arrangements, quality of counsel, difficulty of the case, time spent by counsel, and public benefit from the antitrust action.\textsuperscript{34} It is generally recognized that the trial court has great discretion in determining the award, since it is in a good position to evaluate the attorney's performance and to conclude whether the requested fee is excessive.\textsuperscript{35}

It is also customary to award attorneys' fees to the wife in a divorce action.\textsuperscript{36} While the same basic factors are generally considered in arriving at a figure, it is recognized that divorce matters often require a greater expenditure of counsel's time. Therefore, courts have noted that full remuneration for the time expended cannot always be expected.\textsuperscript{37} Also, it is quite common for a court to consider both the husband's ability to pay and the amount needed by the wife in order to make an effective presentation of her side of the controversy,\textsuperscript{38} although this does not seem to mean that large fees will be allowed on the basis of the husband's wealth alone.\textsuperscript{39} In the domestic area, the courts seem to be somewhat more willing to consider the matter of fees on appeal. The fact remains, however, that in these and other areas where fees are regularly awarded, the judiciary has not been overwhelmed and unable to cope with the appeals that do result.

**Bad faith.** The federal courts have not hesitated to use their equitable powers to award attorneys' fees when a party has acted in bad faith, vexatiously, wantonly or for oppressive reasons—the judicially created "obdurate behavior" exception.\textsuperscript{40} In such cases fees are awarded to protect the honest litigant and the courts by penalizing the bad faith litigant for unreasonable litigation tactics.\textsuperscript{41} This exception has often been


\textsuperscript{35} McLaughlin, supra note 2, at 781, 786.


\textsuperscript{37} See, e.g., In re Marriage of Jayne, 200 N.W.2d 532 (Iowa 1972); De Witt v. De Witt, 86 S.D. 59, 191 N.W.2d 177 (1971).


\textsuperscript{39} See, e.g., Chaachou v. Chaachou, 135 So. 2d 206 (Fla. 1961); Young v. Young, 354 Mich. 254, 92 N.W.2d 328 (1958).

\textsuperscript{40} E.g., Fairley v. Patterson, 493 F.2d 598, 606 (5th Cir. 1974); Guardian Trust Co. v. Kansas City S. Ry., 28 F.2d 233, 241 (8th Cir. 1928), rev'd on other grounds, 281 U.S. 1 (1930); see 6 J. Moore, FEDERAL PRACTICE § 54.77(2) (1976), at 1709.

\textsuperscript{41} King & Plater, supra note 2, at 41.
applied in civil rights litigation, an area in which the exception has been expanded to include cases where "the court shifted its focus away from the culpability of the party litigants qua litigants to consider also the relevance of defendants' extra-judicial conduct in the extended public interest context." 

Common fund and the development of the private attorney general rationale. A second major, judicially created exception to the American rule is the common fund doctrine. Originally, courts permitted a plaintiff to recover attorneys' fees when his action in bringing suit resulted in the recovery or establishment of a fund in which others had the right to share. In order to prevent the unjust enrichment of the others who stood to benefit at the expense of the successful plaintiff, each direct beneficiary was charged with a portion of the litigant's expenses, including attorneys' fees. The sum was ordinarily recovered directly from the fund, before any distribution.

The common fund doctrine has undergone considerable expansion over the years. In Mills v. Electric Auto-Lite Co., the United States Supreme Court held that there need be no creation of an "actual fund" in order for the plaintiff to recover his attorney's fees, as long as a "substantial benefit" of some kind had accrued to the enriched class and the court had "jurisdiction over an entity through which the contribution can be effected." Mills was a stockholder's action to set aside a corporate merger on the ground that the proxy solicitation for the merger was materially misleading. The Court stated:

The fact that this suit has not yet produced, and may never produce, a monetary recovery from which the fees could be paid does not preclude an award based on [the common fund] rationale . . . . [N]othing in these cases indicates that the suit must actually bring money into the court as a prerequisite to the court's power to order reimbursement of expenses.

43. King & Plater, supra note 2, at 42.
44. E.g., Trustees v. Greenough, 105 U.S. 527, 532 (1881).
46. Id. at 392-97.
The Court further found that

[t]he stress placed by Congress on the importance of fair and informed corporate suffrage leads to the conclusion that, in indicating the statutory policy, petitioners have rendered a substantial service to the corporation and its stockholders . . . . To award attorneys' fees in such a suit . . . is not to saddle the unsuccessful party with the expenses but to impose them on the class that has benefited from them and that would have had to pay them had it brought the suit.49

Although no fund was produced in Mills, the case involved the type of litigation which was associated with the common fund doctrine. Two years later, however, the Court appeared to be expanding the application of the doctrine still further when it found that Hall v. Cole50 was “clearly governed by this aspect of Mills.”51 The Hall case was brought under section 102 of the Labor-Management Reporting and Disclosure Act (LMRDA),52 the purpose of which was to guarantee all union members at least “‘minimum standards of democratic process.’”53 Title I was enacted specifically to protect union members' freedom of speech and assembly,54 but contained no provision for fee-shifting. However, the Court authorized an award, holding that when the plaintiff vindicated his own right of free speech, he “rendered a substantial service to his union as an institution and to all its members.”55

The violations in these cases, and others like them, could only be remedied by the private actions of affected parties; but the monetary harm suffered by any one individual is frequently so small that, even if there is a recovery, it will not cover his expenses. If an injunction is the only relief sought, there will be nothing to offset the expense of the litigation. The Court decided, therefore, that “to ensure that the right in question

49. Id. at 396-97.
51. Id. at 7.
52. 29 U.S.C. § 412 (1970) provides in pertinent part:
   Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate.
55. 412 U.S. at 8.
could be enforced," attorneys' fees should be awarded in Mills, Hall and, presumably, other appropriate cases.

In addition to the apparent expansion of the common fund doctrine in Mills and Hall, the Court had spoken favorably of the private attorney general idea in Newman v. Piggie Park Enterprises, Inc. Newman was brought under Title II of the Civil Rights Act of 1964, which entitled the prevailing party to an attorneys' fee at the discretion of the court. However, the Supreme Court held that Congress intended that the fee always be awarded, absent exceptional circumstances, and described the plaintiff as a "private attorney general" whose actions had conferred a significant benefit on the public. Since the Court in Hall was impressed by the "substantial service" to the union, and in Newman by the "significant benefit" to the public that the plaintiffs had rendered, many federal and state courts were encouraged to begin awarding fees to successful plaintiffs in public interest litigation even without statutory authorization. What had begun as a means of preventing unjust enrichment by recipients of a common fund became a way to reward a private attorney general for protecting the rights of many.

The specific factors which are generally used to determine the propriety of allowing counsel fees under the private attorney general theory were stated in La Raza Unida v. Volpe: "1) the effectuation of strong Congressional policies; 2) the number of people who have benefited from plaintiffs' efforts; and 3) the necessity for and financial burden of private enforcement."
The private attorney general theory seemed to meet a very specific and very important need; it was enthusiastically received as another exception to the traditional American fee rule. The Alyeska case, however, has effectively halted any extension of the doctrine in the federal courts, and has appreciably narrowed the range of circumstances in which its benefits are available.

**The Effects of Alyeska**

*The Case*

When oil was discovered in Alaska, plans were soon under way to facilitate its eventual delivery to the continental United States. In June, 1969, Alyeska, a consortium of the oil companies owning leases for exploration of the Prudhoe Bay area where the discovery was made, applied to the Department of the Interior for three rights-of-way. One was for the pipeline itself, which would run from the North Slope to the Port of Valdez, while the others were for various construction projects which would have to accompany it. In December, 1969, the application was amended to request only the one pipeline right-of-way. In addition, two special land use permits (SLUP's) were requested which would have allowed for construction space and for the construction of a road from Prudhoe...
Bay to Livengood. In March, 1970, the Wilderness Society filed suit requesting declaratory and injunctive relief against the Secretary of the Interior, on the ground that he intended to issue the right-of-way and SLUP's in violation of the Mineral Leasing Act of 1920, and without requiring Alyeska to comply with the National Environmental Policy Act of 1969 (NEPA). On April 28, 1970, the District Court in Washington, D.C., granted a preliminary injunction. During the ensuing 16 month period, Alyeska contracted with the State of Alaska to build a public highway from Livengood to Prudhoe Bay (which happened to follow a route almost identical to the one proposed in Alyeska's request for the SLUP); consequently, Alyeska was able to withdraw its SLUP application for a road.

The district court dissolved the preliminary injunction and dismissed plaintiffs' complaint on August 15, 1972, in an unreported opinion. Plaintiffs appealed, seeking to prevent the Secretary of the Interior from issuing the permits for the pipeline.

The United States Court of Appeals for the District of Columbia reversed. The court stated that a literal reading of the Mineral Leasing Act section 28, combined with the legislative history of the section and the settled construction of the administrative regulations, required the conclusion that the Secretary of the Interior lacked the authority to grant the SLUP requested by Alyeska. Though fully cognizant of the fact that the injunction was going to cause further hardships, not only for the oil companies involved but also for the people and State of Alaska, the court suggested that the appropriate

68. Plaintiffs were the Wilderness Society, Friends of the Earth, and the Environmental Defense Fund, Inc. and intervenor David Anderson, Chairman of the Canadian Wildlife Federation. Dominick & Brody, supra note 64, at 341 n.10.
69. 30 U.S.C. § 185 (1970). Section 28 provides for rights-of-way through public lands for pipelines carrying oil or natural gas. The right-of-way is to be limited to the ground occupied by the pipeline plus 25 feet on each side. Further, failure to comply with the provisions of the section is ground for forfeiture of the grant.
72. See Wilderness Soc'y v. Morton, 479 F.2d 842, 850-51 (D.C. Cir. 1973) and Dominick & Brody, supra note 64, at 387-89, for other amendments made by Alyeska to its application and a complete chronology of events.
74. Id. at 851.
75. Id. at 847. Since this finding was sufficient to uphold the injunction, the court did not deal with the NEPA issue. Id. at 848.
76. Id. at 847.
procedure was for Congress to change the applicable law in order to let the project continue.\textsuperscript{77} With the decision of the court of appeals and the subsequent denial of certiorari by the Supreme Court,\textsuperscript{78} the judiciary, in effect, remanded the question to the legislature and insisted that Congress make the necessary policy decisions. The court apparently believed that such an important question, dealing as it did with two seemingly competing public interests—protection of the environment and development of a domestic oil supply—would be more thoroughly and properly aired in Congress than in the courts.\textsuperscript{79}

Seven and a half months later, on November 16, 1973, Congress resolved the issue by amending the Mineral Leasing Act\textsuperscript{80} "to allow the granting of the permits sought by Alyeska, and declared that no further compliance with NEPA was necessary before construction of the pipeline could proceed."\textsuperscript{81}

\textit{The Attorneys' Fee Award}

The Alyeska plaintiffs returned to the court of appeals seeking an award of attorneys' fees. In spite of a vigorous dissent,\textsuperscript{82} the majority held that plaintiffs had prevailed against Alyeska on the Mineral Leasing Act in question, that the litigation "had served as a catalyst to ensure that the Department of the Interior drafted an impact statement [pursuant to NEPA requirements] and that the statement was thorough and complete";\textsuperscript{83} therefore, the court concluded, they should be awarded attorneys' fees under the private attorney general theory.\textsuperscript{84} However, the court decided that it was precluded by statute from taxing the fees to the federal government,\textsuperscript{85} and

\begin{itemize}
\item \textsuperscript{77} \textit{Id.} at 848.
\item \textsuperscript{79} Dominick & Brody, \textit{supra} note 64, at 349.
\item \textsuperscript{81} Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 244-45 (1975).
\item \textsuperscript{82} Wilderness Soc'y v. Morton, 495 F.2d 1026, 1039-46 (D.C. Cir. 1974).
\item \textsuperscript{83} \textit{Id.} at 1034.
\item \textsuperscript{84} \textit{Id.} at 1036.
\item \textsuperscript{85} 28 U.S.C. § 2412 (1970) provides:
\begin{quote}
Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court
\end{quote}
\end{itemize}
that it would be inappropriate to assess the State of Alaska since it had voluntarily participated in the suit. Consequently, Alyeska was ordered to pay half the amount determined by the district court to be a reasonable fee, and plaintiffs were left to assume the share that would otherwise be allocable to the government. Alyeska appealed and the Supreme Court reversed.

The Supreme Court Decision

Although the Court arguably had recognized the validity of the private attorney general theory in the past, the majority concluded that it was not proper for the courts to invade the legislature’s province by sanctioning further erosion of the traditional American rule. The Court pointed out that Congress was aware that as a rule, attorneys’ fees are not awarded to prevailing parties in American courts. Further, by specifically authorizing fee-shifting in various statutes, Congress apparently had exercised its right to alter the established procedure only selectively. Since no provision for awards was made in any statute applicable to the Alyeska litigation, the Court chose to interpret the legislative silence as a directive that the general rule should prevail. In addition, the Court held that it was prevented from establishing such a major exception to the fee rule by case law and by the 1853 Act, which specified “the
nature and amount of the taxable items of cost in the federal courts. The Court cited a 1796 decision, Arcambel v. Wiseman, for the position that the judiciary cannot, in contravention of American practice, create a general rule permitting recovery of attorneys' fees as damages without statutory sanction. Although Arcambel cited no authority for its position, subsequent decisions have usually accepted it as precedent on the point. Until 1800, federal courts were required by statute to adopt the rules of the forum state in awarding attorneys' fees; and the practice continued as a matter of custom until 1853. At that time, Congress enacted a statute which was intended to standardize the costs recoverable in federal litigation. The Act provided as follows:

That in lieu of the compensation now allowed by law to attorneys, solicitors, and proctors in the United States courts to United States district attorneys, clerks of the district and circuit courts, marshals, witnesses, jurors, commissioners, and printers, in several states, the following and no other compensation shall be taxed and allowed. But this Act shall not be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients, other than the Government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective states, or may be agreed upon between the parties.

Specific amounts were then listed for the services of attorneys, solicitors and proctors. In 1948, the words "and no other com-
pensation shall be taxed and allowed” were dropped.\(^\text{104}\)

Justice Marshall, dissenting in \textit{Alyeska}\(^\text{105}\) asserted that the majority had misinterpreted the earlier cases\(^\text{106}\) and the Act of 1853;\(^\text{107}\) Marshall also chided the Court for mistakenly relying on Congressional silence\(^\text{108}\) in concluding that awarding fees to attorneys under a private attorney general theory constitutes usurpation of a legislative function. Citing illustrative cases,\(^\text{109}\) he argued persuasively that the Court had often found its equitable powers broad enough to award fees without a statutory directive when “overriding considerations indicat[ed] the need for such a recovery.”\(^\text{110}\) Justice Marshall concluded that the federal courts have the inherent power to award attorneys’

\(^\text{104}\) Prior to this change, the wording had been slightly changed in the Revised Statutes of 1874 although the fee schedule remained the same. No changes were made by the Judicial Code of 1911. Different section numbers and minor wording changes resulted when the Judicial Code became part of Title 28 U.S.C. in 1926. \textit{Alyeska Pipeline Serv. Co. v. Wilderness Soc’y}, 241 U.S. 240, 253-57 & nn.26-29 (1975). However, even though the limiting language was no longer part of the statute, the majority read it as if it were. This interpretation was based on the fact that “the function of the Revisers of the 1948 Code was generally limited to that of consolidation and codification. Consequently, . . . no change is to be presumed unless clearly expressed.” \textit{Id.}, quoting \textit{Tidewater Oil Co. v. United States}, 409 U.S. 151, 162 (1972). Justice Marshall thought that the construction of the 1853 Act in prior cases “would suffice to dispose of the court’s argument” had the language still been present. Since it was not, it seemed “even less reasonable to read the fee statute as an uncompromising bar to equitable fee awards.” \textit{Id.} at 281 (Marshall, J., dissenting).

\(^\text{105}\) Justice Brennan dissented in a separate opinion, stating his belief that federal equity courts have the power to award fees on a private attorney general theory, and that \textit{Alyeska} was a “proper [case] for the exercise of that power.” \textit{Id.} at 271-72 (Brennan, J., dissenting).

\(^\text{106}\) \textit{Id.} at 274-78 (Marshall, J., dissenting).

\(^\text{107}\) \textit{Id.} at 278-81.

\(^\text{108}\) \textit{Id.} at 281-82.


fees and that "the equities in this case support an award of attorneys' fees against Alyeska."\textsuperscript{111}

Marshall conceded the difficulty of determining which actions are of sufficient public interest and import to justify fee-shifting as a matter of equity, and offered tentative guidelines which basically reiterate the factors listed in \textit{La Raza}. Fee-shifting, Marshall suggested, should occur when (1) the important right being protected is one actually or necessarily shared by the general public or some class thereof; (2) the plaintiff's pecuniary interest in the outcome, if any, would not normally justify incurring the cost of counsel; and (3) shifting that cost to the defendant would effectively place it on a class that benefits from the litigation.\textsuperscript{112}

The majority's concern was with issues which Justice Marshall acknowledged but did not adequately resolve. The first was the problem of "manageability."\textsuperscript{113} \textit{La Raza} and other cases indicated that implementation of a strong Congressional policy\textsuperscript{114} justifies awards of attorneys' fees even without explicit statutory authorization. Since any statute arguably represents strong Congressional policy, the \textit{Alyeska} Court reasoned that it was not a proper function of the judiciary to evaluate legislative policies by permitting fee awards in actions based on selected statutes, while denying them to litigants relying on others. Further, if the courts chose to treat every statute as embodying a policy important enough to justify encouraging its enforcement by awarding attorneys' fees to successful plaintiffs, surely plaintiffs who attempt to vindicate constitutional rights would also be entitled to fees.\textsuperscript{115} The exception would unquestionably swallow the rule.

Justice Marshall's method would force upon the Court precisely the task the majority sought to avoid: that of making judgments about the merits of the policy being enforced, or in the alternative, allowing fee-shifting in all statutory litigation.\textsuperscript{116} The difficulty of deciding whether Congressional policy is being implemented by any particular litigation is well illustrated in the \textit{Alyeska} case itself.

Although Justice Marshall believed that the public de-
rived significant benefits from the *Alyeska* litigation.\textsuperscript{117} Judges Wilkey, MacKinnon and Robb, the dissenters in the court of appeal, thought it was clear that the plaintiffs had been "frustrating the policy Congress considers highly desirable and of the utmost urgency."\textsuperscript{118} Nor could they believe that Americans caught up in a spiral of escalating fuel prices and dwindling supplies were consumed with a "warm glow of gratitude to those public-spirited plaintiffs in the Alaska Pipeline case."\textsuperscript{119}

An additional problem the Court would face if Marshall's system were adopted is that of determining to whom the fees should be shifted. The majority pointed out that in the typical public interest case, the government or one of its agencies is the primary defendant.\textsuperscript{120}

Section 2412, Title 28 of the United States Code,\textsuperscript{121} however, provides that costs may be awarded to a party prevailing against the United States in "any civil action brought by or against the United States or any agency or official . . . acting in his official capacity," but "not the fees and expenses of attorneys";\textsuperscript{122} this has been held to bar an award of fees when the government is an unsuccessful defendant unless there is specific statutory authority to the contrary.\textsuperscript{123}

Justice Marshall, who would shift the cost to the "class that benefits,"\textsuperscript{124} found that the Department of the Interior bore "the legal responsibility for adopting a position later determined to be unlawful\textsuperscript{125} and that consequently all United States citizens had benefited from the litigation instigated by the *Alyeska* plaintiffs. If the statute barred assessing the government,\textsuperscript{126} Marshall reasoned that the class could be reached by taxing costs to the *Alyeska* consortium, which would pass them along to its consumers, part of the benefited group. As the majority pointed out, however, by allowing fee-shifting only

\begin{footnotes}
\item 117. *Id.* at 285-88 (Marshall, J., dissenting).
\item 118. Wilderness Soc'y v. Morton, 495 F.2d 1026, 1042 (D.C. Cir. 1974) (Wilkey, Circuit Judge, dissenting).
\item 119. *Id.*
\item 121. *See note 85 supra.*
\item 122. *Id.*
\item 124. *Id.* at 285 (Marshall, J., dissenting).
\item 125. *Id.* at 285-86.
\item 126. Justice Marshall was not convinced that 28 U.S.C. § 2412 foreclosed attorneys' fee awards against the United States in all cases. *Id.* at 287 n.9.
\end{footnotes}
"when the award could be said to impose the burden on those who benefit from the enforcement of the law," Justice Marshall appeared to be advocating not a true private attorney general rationale, but "an expanded version of the common fund approach," which the Court found particularly inappropriate to "litigation in which the purported benefits accrue to the general public": In this Court's common fund and common benefit decisions, the class of beneficiaries was small in number and easily identifiable. The benefits could be traced with some accuracy, and there was reason for confidence that the costs could indeed be shifted with some exactitude to those benefitting. In this case, however, sophisticated economic analysis would be required to gauge the extent to which the general public, the supposed beneficiaries, as distinguished from selected elements of it, would bear the costs.

Alyeska: In Defense of the Taxpayer?

It seems clear that neither the cases cited in the majority opinion, the 1853 Act, nor Congressional silence, mandated the Court's conclusion in *Alyeska*. Justice Marshall was clearly correct that when "overriding considerations [had] indicated the need" for awards of attorneys' fees in the past, the Court had granted them. However, considering the present composition of the Court and the controversy surrounding the Alaskan pipeline, the decision was perhaps to be expected. No doubt attempts will be made in the future to distinguish *Alyeska* on the grounds that the plaintiff did not really prevail, that the public interest was not clear-cut, and that the proper defendant could not be taxed with the fees if they were awarded.

Also, since the opinion seemed to focus on the fact that statutes were involved, with the implication that Congress had had a clear opportunity to provide for fee-shifting but had elected not to do so, it could be argued that in a case dealing with a constitutional right, the Court is still free to exercise its equitable powers and allow fee-shifting. However, a footnote in

127. *Id.* at 264-67 n.39.
128. *Id.*
129. *Id.*
130. *Id.* at 274-80.
the *Alyeska* opinion suggests that this Court does not want to deal with the issue at all, and it does not seem likely that such arguments will prevail in the near future.

The majority opinion made it clear that the Court did not believe it proper to make the value judgments which would be necessary if the private attorney general rationale were allowed to develop further. There is little doubt that the average American citizen finds it hard to grasp that holding up construction of various projects through environmental lawsuits necessarily confers a benefit on the public. What he does understand, however, is that an oil supply remains untapped, or that congestion on a highway cannot be relieved, or that new homes are not built because some self-appointed guardian of his welfare is determined to protect him from dangers of which he is not even aware. With the present state of the economy, any delay in such projects is certain to raise the final cost of construction markedly when, after all the legal wrangling has ceased, the project goes through—as it usually does. Even when such suits are successful—the disputed environmental impact report is submitted, the project is modified, the environmental damage minimized—in most cases, it is not an achievement with which the majority of the public can identify. The impact the citizen recognizes is the necessity for paying increased construction costs through higher prices or taxes; the fact that part of the increase is in effect an assessment to pay the fees of the public-spirited attorneys who, indirectly at least, are responsible for the higher prices or taxes is an irony he is not likely to appreciate. Nor is it reasonable to assume that the public will quietly acquiesce in a practice it sees as an arrogant and badly camouflaged raid on its pocketbook.

It is submitted that this is the real reason that the Supreme Court denied attorneys' fees to the plaintiffs in *Alyeska*: not because the private attorney general theory presents problems of manageability, although it does; not because the Act of 1853 forbids such an award, although the argument can be made; not even because it is the legislature's right and duty to deal with the problem of attorneys' fees, although it is at least entitled to do so.

Instead, it seems that the Court has either disclaimed or has chosen not to exercise the power to increase the cost to the public for these controversial suits. Perhaps underlying the

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131. *Id.* at 270-71 n.46.
Court's decision in Alyeska was the feeling that if the representatives of the people think the expense involved in public interest lawsuits must be tolerated by citizens for the sake of the benefits that ensue, then it is Congress that is going to have to assume the burden of educating the public to accept that, and to establish reasonable guidelines to prevent abuse of the system.

Of course, judicial decisions that result in an increased burden on the taxpayer are not unusual. Decisions requiring desegregation and busing, \textsuperscript{132} reapportionment, \textsuperscript{133} labor \textsuperscript{134} and welfare benefits, \textsuperscript{135} are obvious examples. One difference, however; is that such matters present constitutional issues and are clearly within the traditional purview of the courts. It is not at all clear that most environmental and consumer protection problems can be so characterized; thus it might be argued that cost factors are a legitimate consideration and may indeed outweigh other interests, especially when the interest asserted is merely the equitable right to be compensated for the expense of conferring a possible benefit on the public.

In any event, the immediate impact of Alyeska seems clear: where the "purported benefit" accrues to the general public rather than to a limited, identifiable class, the federal courts will permit awards of attorneys' fees on a private attorney general rationale only where such awards are specifically authorized by statute.

\textbf{THE NEED FOR FEE-SHIFTING IN PUBLIC INTEREST LITIGATION}

\textit{The Problems}

Although Alyeska was an environmental case, the Supreme Court left no doubt that the principle enunciated is


\textsuperscript{135} See, e.g., Taylor v. City of Millington, 476 F.2d 599 (6th Cir. 1973); Ojeda v. Hackney, 452 F.2d 947 (5th Cir. 1972); Gaddis v. Wyman, 336 F. Supp. 1225 (S.D.N.Y. 1972).
applicable to public interest litigation generally.

Despite the difficulties inherent in any attempt to sketch the parameters of the class, a noted commentator has gamely attempted a working definition of "public interest litigation." It is, he says, the type of suit that is

not aimed at resolving private differences between the named plaintiff and the named defendant . . . [but] is brought by private plaintiffs in the hope of achieving broader results by litigating issues of extreme current importance which when resolved will affect substantial numbers of people.\(^{138}\)

Such litigation is by its very nature complex, time-consuming, and consequently expensive. It is neither rational nor proper under such circumstances to expect an individual who cannot hope to recover his expenses to press a suit, even though he and others are faced with a loss of a right if no suit is brought.\(^{137}\) Therefore, if public interest litigation is to survive, except perhaps as an avocation of the wealthy, it must be subsidized.

Thus far, this type of litigation has been funded almost exclusively by foundations or the government (through legal aid organizations), a method that has proved inadequate. During the fiscal years 1971, 1972 and 1973, the budget of the Office of Legal Services remained the same, while inflation alone increased costs 13.4 percent;\(^{138}\) the total cost increase was such that in 1973, the Office of Legal Services needed an additional $15 million to maintain its 1971 level of operation.\(^{139}\) Further, the private foundations which have supplied substantial funds for public interest litigation never intended to support pro bono firms indefinitely. Initial support was predicated on the as-

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137. Such litigation normally seeks only injunctive and declaratory relief, not damages. Therefore, rarely will an individual—even a wealthy individual—be likely to seek out and pay counsel to commence costly litigation to vindicate, not his own private rights, but widely shared public rights. In other words, any single individual’s interest in the enforcement of broad public rights is normally diffused in the public interest. In these circumstances it is not rational for any person to attempt to capture his or her minute portion of the aggregate good by using personal funds to pay the full cost of enforcing the mutual right.

*Senate Hearings, supra* note 6, at 801 (Statement of J. Anthony Kline, Esq., Public Advocates, Inc.).

138. *Senate Hearings, supra* note 6, at 847 (statement of Dean E. Clinton Bamberger, Catholic University Law School).

139. *Id.*
sumption that such firms would eventually generate sufficient funds to continue alone. Consequently, it is expected that much of the foundation support will be withdrawn within the next few years. There are very few private practitioners who handle large scale pro bono cases because of the necessary commitment of time and money.

Ironically, the defendant in a public interest case is usually a branch of the state or federal government, or a large corporation. Taxpayers are already paying for all of the government's legal expenses, even when it loses. What much of the public doesn't realize, however, is that it is also paying for nearly 50 percent of a corporation's legal expenses—reasonable or not—because that proportion of legal fees can be deducted by the corporation as a necessary business expense. Even a pro bono firm funded by a foundation usually cannot match the funds which its opponents can spend, and adequate presentation of the issues often hinges upon relatively equal financial resources. It seems fundamental that

the vindication of important legal rights should not depend upon the beneficence of private philanthropy or be subject to the whim of government. Nor should it be made to depend upon the noblesse oblige of the occasional attorney who may be willing to provide representation without fee.

It is particularly unreasonable to deny fees to a plaintiff who is, in effect, enforcing government policy by bringing a law suit to require compliance with a statute or the Constitution. Without some provision for fee-shifting in such cases, the law frequently confers a paper right only.

140. Id. at 853 (statement of Joseph N. Onek, Esq., Director, Center for Law and Social Policy).

141. Int. Rev. Code of 1954, § 162 establishes the right to deduct all ordinary and necessary expenses incurred in carrying on any trade or business. Legal expenses are included within this category. These not only include the fees paid to lawyers, but also fees and expenses of accountants, witnesses, or other persons involved in the preparation of the taxpayer's position, court costs, stenographic and printing charges. 1 CCH 1976 Stand. Fed. Tax Rep. ¶ 1348.

142. Senate Hearings, supra note 6, at 800 (statement of J. Anthony Kline, Esq.). For an illustration of the different resources of the parties in La Raza, see id. at 799. In discussing the discrepancy in resources, a civil rights lawyer stated, "the school boards pay their lawyers, win, lose, or draw, day in and day out and yet we are on our own and we are to do the work of the Nation." Id. at 857 (statement of Joseph Onek).

143. Id. at 860-61 (statement of Armand Derfner, Esq., Lawyers' Comm. for Civil Rights Under Law).

When Congress calls upon a private citizen to enforce its mandates,
Some Solutions

While attempts may be made to minimize the adverse impact of *Alyeska* by expanding the established "bad faith" and "common fund" exceptions to the no-fees rule, experience indicates that such a course is not likely to prove a satisfactory solution. Even where fee-shifting historically has been available, whether by statute providing for "reasonable" (but unspecified) fees or by virtue of one of the judicially created exceptions, appellate courts, aware of the problems involved in evaluating the factors pertinent to a determination of a reasonable fee, have traditionally given the trial courts wide discretion in setting the appropriate amount. An allowance usually will not be disturbed on appeal unless an abuse of discretion can be shown.4 The result has been wide variation in the actual—as opposed to theoretical—availability of fee awards, and in the amount of the award itself.

Factors which are often considered in determining the fee are the nature, extent and difficulty of the legal services rendered; time devoted to the matter; loss of opportunity for other employment; the ability and professional standing of the attorney; the amount involved and the responsibility assumed; the contingency of compensation and the hazards of litigation; the results and benefits obtained; the losing litigant’s ability to pay; and the customary charges for similar services in the same

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Congress simply cannot expect that citizen to become an unpaid law enforcement official, especially when those who are most often responsible for violations, government officials and corporations, have their legal defenses subsidized.

The government—local, state or federal—which violates the law has resources which the private citizen could never hope to accrue—resources which, unfortunately, it often spends hindering rather than furthering the public interest. Why should the public subsidize violations of the law of the land while the private citizen must pay to vindicate public policy? Government, by virtue of almost unlimited funds, is already in an advantageous position; if attorneys’ fees are denied the private citizen who brings suit to force his local, state or federal government to obey the law, government violators of the law are beyond reach.


144. See text accompanying notes 40-55 *supra*, for a discussion of these exceptions. It should be noted, however, that the *Alyeska* court apparently attempted to short-circuit any such attempt with its comments on the application of the common-fund theory. *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 264-67 n.39 (1975).

locality. This elaborate list of factors that have been considered in various cases indicates that some firm guidelines are necessary if any uniformity is to be achieved in attorney fee awards.

The need for uniform standards is particularly pressing in the public interest area of litigation. All too often, the recompense theoretically available to a victorious pro bono plaintiff is not forthcoming; even where they are permitted by statute, frequently only minimal fees are awarded. It would appear that many judges feel that plaintiffs' attorneys handling pro bono publico cases should be happy to donate their time to a worthy cause. As justification for its inadequate award of fees, one court declared that since the attorney's services were "imposed" on clients who hadn't contracted for them, "their fees may properly be less than those they could have received by entering the marketplace and selling their services to the private client who would make the highest bid for them." Also, when counsel is from a legal aid society or a firm supported by a foundation or private funds, as most attorneys who do a significant amount of public interest litigation are, many courts seem to believe that an award of fees is unnecessary or inappropriate. It has been suggested that such non-profit organizations may not accept fees even if they are awarded, and such reasoning has been used to deny altogether an award of fees theoretically available. What these practices do, of course, is further reduce the number of attorneys willing to handle public interest cases, since the loss in time, money, and

146. See Annot., 56 A.L.R.2d 13, 20-46 (1957) for lists of cases going to these points; e.g., Los Angeles v. Los Angeles-Inyo Farms Co., 134 Cal. App. 268, 25 P.2d 224 (1933).

147. See, e.g., Trout v. Carleson, 37 Cal. App. 3d 337, 340-41, 112 Cal. Rptr. 282, 284 (1974), where plaintiff was represented by an attorney from California Rural Legal Assistance (CRLA) in an action against the Director of the California State Dept' of Public Welfare. Attorneys' fees were provided under CAL. WELF. & INST'NS CODE § 10962 (West 1972). Based on the Imperial County Bar Association minimum fee schedule, the CRLA attorney requested $700.00. The trial judge stated:

I am not going to be probably as generous as I frankly might if it were some private group. I don't know, but I feel that under the circumstances, that $20.00 an hour is sufficient, and so I will award $400.00.

Trout v. Carleson, supra.


even future business becomes prohibitive.\textsuperscript{150}

The most appropriate method of assuring equity and conformity in the area of public interest litigation fee-shifting is for the legislature to provide authorization and guidelines by statute.

\textbf{LEGISLATIVE PROPOSALS}

Drafting a statute which will equitably resolve the many problems connected with attorneys' fees in public interest litigation will not be an easy task; but in light of \textit{Alyeska}, it is obvious that any real change in the traditional American rule in the federal courts will have to come from Congress. The repercussions already apparent in both federal\textsuperscript{151} and state\textsuperscript{152} courts demonstrate that some type of legislation is a necessity if public interest litigation is to have any real meaning in our society,\textsuperscript{153} and if access to legal solutions for vexing problems is to be freely available to good faith litigants.\textsuperscript{154}

A number of proposals have been made, among them the adoption of a statutory scheme resembling the British system, previously described,\textsuperscript{155} which routinely provides for fee-recovery by successful litigants. There appears to be almost no support for such a move, since the English fee-shifting procedure is impractical and unwieldy; nor has its American cousin, the Alaskan system, been well received,\textsuperscript{156} as the broad discretion vested in the trial judge has triggered an avalanche of appeals. Indeed, the attorneys' fee award has become the most frequently appealed issue in the state.\textsuperscript{157}

\begin{itemize}
\item \textsuperscript{150} Senate Hearings, supra note 6, at 855, 859 (testimony of Armand and Mary Frances Derfner).
\item \textsuperscript{151} \textit{E.g.}, Muhammad Temple of Islam v. City of Shreveport, 517 F.2d 922 (5th Cir. 1975); Sabala v. Western Gillette, Inc., 516 F.2d 1251, 1267-69 (5th Cir. 1975); Wallace v. House, 515 F.2d 619, 636-38 (5th Cir. 1975); Turner v. F.C.C., 514 F.2d 1354, 1356 (D.C. Cir. 1975).
\item \textsuperscript{152} See \textit{Menge v. Farmers Ins. Group}, 50 Cal. App. 3d 143, 123 Cal. Rptr. 265 (1975) & discussion accompanying notes 208-16 infra.
\item \textsuperscript{153} Senate Hearings, supra note 6, at 855-56.
\item \textsuperscript{154} Free access does not have to mean more litigation, clogged court calendars and long delays. "Access is important as a bargaining chip in settlement negotiations, and equal ability to threaten trial tends to equalize the bargaining relationship." Comment, \textit{Equal Access}, supra note 2, at 670 n.210.
\item \textsuperscript{155} See text accompanying notes 22-24 supra.
\item \textsuperscript{156} See text accompanying notes 25-26 supra.
\item \textsuperscript{157} Comment, \textit{Attorney's Fees in Alaska}, supra note 26, at 130 n.7, 145.
\end{itemize}
Proposed Federal Statute

The first significant attempt to find a partial legislative solution to the attorneys' fee problem has been made in the civil rights area, where attorneys' fees have frequently been awarded in the past. \(^{158}\) When such fees have not been provided for by statute, the courts have been quite willing to rely on their inherent equitable powers to grant them in order to encourage those injured by various forms of discrimination to seek judicial relief. \(^{159}\) Recently, a bill was introduced in the Senate which would authorize attorneys' fees, at the court's discretion, in all actions brought under sections 1977, 1978, 1979, 1980 and 1981 of the United States Code, \(^{160}\) or Title VI of the Civil Rights Act of 1964. \(^{161}\) In the remarks which preceded the introduction of the bill, Senator John V. Tunney stated that fees had not specifically been authorized in all the civil rights laws because "it was widely believed and held that the courts already had the power to award counsel fees . . . as part of their inherent equity power." \(^{162}\) The Alyeska decision, however, made it necessary to provide statutory authorization to "maintain the traditionally effective remedy of fee-shifting in these cases." \(^{163}\)

This bill may be seriously inadequate even for its limited purposes, however, because it does not specify that fees may be awarded against the United States. Those statutes which do presently provide for award of attorneys' fees as costs in the civil rights area state that "the United States shall be liable for costs the same as a private person." \(^{164}\) The Alyeska Court's insistence on clear guidance from the legislature suggests that, faced with the omission of similar words in this bill, the Court would not assess fees against the United States.


\(^{161}\) S. 2278, 94th Cong., 1st Sess. (1975) proposes to amend Revised Statutes § 722, 42 U.S.C. § 1988 as follows:

In any action or proceeding to enforce a provision of Section 1977, 1978, 1979, 1980 and 1981 of the Revised Statutes, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.


\(^{163}\) Id. at S 14976.

In addition, the bill's broad grant of discretionary power to the trial court, coupled with the lack of any guidelines and the volume of civil rights and Title VI litigation, threatens a repetition in the civil rights area of the Alaska experience.

Private Attorney General Statute

A prominent public interest attorney has suggested to the Senate subcommittee studying attorneys' fees that it would be "appropriate for the Congress to provide guidelines for the exercise" of reasonable judicial discretion in awarding fees "to successful private attorneys general who, in effectuating legislative policies and constitutional rights, have conferred substantial benefits on the public." He emphasized that such guidelines ought to ensure that public interest attorneys are allowed fees which are "commensurate with the fees obtained by private lawyers in the vicinity in comparable litigation." While a private attorney general statute broadly authorizing fee-shifting in "public benefit" situations might well be an acceptable solution, the Alyeska Court clearly expressed its disinclination to make the kind of value judgments implicit in defining terms like "substantial benefit." The Supreme Court has pointedly passed that particular ball back to Congress.

A "Procedural" Statute

A system not hampered by these difficulties was recently proposed by a legal commentator. Recognizing that most schemes for authorizing attorneys' fees in public interest litigation require the court to make a subjective evaluation of arguably competing policies, the author recommends that any plaintiff found to be representing a "relevant policy position . . . not normally represented before the court," be awarded fees "regardless of whether the party [is] successful on the merits, [and] regardless of any benefit that might result apart from full and fair representation." The subjective element would be essentially eliminated; "relevance" should not be a difficult determination, and "public interest litigation" in this context would be defined simply as "representation of an otherwise inadequately represented policy position . . . formulated to promote an interest which will be affected by the decision to

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165. Senate Hearings, supra note 6, at 794, 805 (statement of Anthony J. Kline, Esq.).
166. Comment, Equal Access, supra note 2, at 675.
be made.”

Thus fee awards would become entirely a procedural matter.

Since access to the courts is an important element of political power, the implementation of this system would benefit the public at large by insuring that all significant points of view on an issue were well-represented, thus making it more likely that the court would be provided with a range of information conducive to sound decision making. In order to prevent duplication of effort, the author suggested one restriction: that fees be allowed only where public enforcement is inadequate. Some statutes clearly are intended to be enforced by private actions; thus it seems only equitable to provide attorneys’ fees to one who is, by necessity, assuming the law enforcement responsibilities of the government. Even when the implementation of a statute is nominally left to the government, it is obvious that such a task is frequently too great to be handled effectively by the designated public agency. Therefore, a private plaintiff would be entitled to attorneys’ fees when, in actual practice, government enforcement is inadequate. Furthermore, in such cases the fees should properly come from a public fund, rather than a private defendant, since the private plaintiff is in effect assisting the government, which has primary responsibility to enforce the laws.

Since the goal of the procedural theory is adequate representation of all relevant points of view on an issue, whether or not the plaintiff “prevails” should not be the crucial factor, as long as the “suit has served to further public policy goals or [to] educate the court.” However, the court should have

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168. Id. at 678.
169. Id. at 671, 677-78.
170. Id. at 677. In dealing with a similar problem on the issue of standing, then
Judge Burger of the D.C. Circuit stated:

The theory that the Commission can always effectively represent the listener interests in a renewal proceeding without the aid and participation of legitimate listener representatives fulfilling the role of private attorneys general is one of those assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the Commission can continue to rely upon it.
171. Senate Hearings, supra note 6, at 856.
172. Comment, Equal Access, supra note 2, at 671-72.
173. Id. at 675 (footnote omitted).
power to decline to award fees when the suit is frivolous, or when the public interest issue is a "purely incidental element in the context of the case and merely serves as a tangential boot-strap to recovery of costs." Of course, the court already has and should retain the inherent power to deny fees if a party acts in bad faith.

An additional advantage of the procedural system is that the fee-shifting factors could feasibly be examined and evaluated at a pre-trial hearing. The court could make an initial ruling on the "relevance" and "representation" questions, thus indicating whether fees would be awarded at the conclusion of the trial and consequently lessening the plaintiff's financial risk. The actual amount of the fee award, based on the difficulty of the case and the time and skill involved in the litigation, would be determined after trial.

The Charitable Deduction Proposal

A much different proposal calls for a statute which would allow professionals to take a charitable deduction for the pro bono work they do. At the present time, the Internal Revenue Service interprets section 170(c) of the Internal Revenue Code of 1954 as restricting charitable deductions to donations of money, not services. It has been suggested that if section 170(c) were amended, and certain limitations established, private law firms would find it very advantageous to represent pro bono clients.

The main drawback is the fact that not all clients with a public interest suit could qualify as charitable organizations under section 174(a). Therefore a plaintiff who qualified

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174. Id.
175. King & Plater, supra note 2, at 66.
179. It could be required that eligibility of the organization be determined by whether or not it worked in "a congressionally selected national problem area, such as poverty or pollution." Baird, supra note 176, at 444-45. Services by lawyers and other professionals which could be deducted would have to be restricted to those for which one needs a license, or for which the donor regularly is paid. Id. at 445 & n.26.
180. Id. at 443.
181. At the present time, charitable deductions must be limited to a charitable
under the liberalized standing requirements to bring the suit might in actual practice be unable to do so unless he could find a qualified organization to pursue the suit, and thus induce a firm looking for a charitable deduction to undertake the litigation.

The charitable deduction plan is an attempt to avoid federal funding and the strings which tend to accompany federal funds. One of the major problems faced by the legal aid organizations funded by the OEO—other than the constant problem of inadequate funding—\textsuperscript{182} is the pressure frequently exerted by members of Congress and the administration when the cases brought by the public interest groups receiving funds involve causes unpopular with middle-class constituents and politicians.\textsuperscript{183} To prevent the same type of pressure from being applied under the charitable deduction system, it would be necessary to expand the definition of charitable organization to encompass environmental and consumer groups, without requiring them to abandon their lobbying efforts to advance consumer and environmental causes through legislation.\textsuperscript{184} It would be difficult to formulate an amendment to section 170(c) broad enough to effect this purpose, but limited enough to avoid creating the kind of loophole the current restriction is designed to avoid. Without a broader definition of “charitable organization,” however, it is hard to see how the charitable deduction theory could generate the representation needed in the public interest area.

\textit{A Combination of Theories}

Although the fee-shifting concept has numerous proponents, there is no consensus as to the best way to implement it. Perhaps the first and most elementary requirement is that Congress establish guidelines for determining when a lawsuit brought by a private party is in the “public interest.” The

\begin{itemize}
  \item [\textsuperscript{182}] Baird, \textit{supra} note 176, at 442 n.6.
  \item [\textsuperscript{183}] Id. at 442 & nn.7-8.
  \item [\textsuperscript{184}] Inr. Rev. Code of 1954, § 170(c)(2)(B) states:
    \begin{itemize}
      \item no substantial part of the activities of which is carrying on propaganda,
      \item or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.
    \end{itemize}
\end{itemize}
“procedural” proposal offers the most liberal standard and is also the one which reduces to a minimum the kind of subjective value judgments which the Alyeska court found inappropriate and unmanageable. Furthermore, it seems to promise that equal access to the courts would become a reality and not merely a pleasant platitude. A plaintiff who can be assured of recovering his expenses as long as he is asserting a “relevant policy position... not normally represented before the court” will almost certainly have adequate encouragement to pursue a legitimate claim in which his personal financial stake is small.

Next, the reasonableness of the traditional rule that only a victorious plaintiff may recover should be re-examined. The plaintiff should not have to prevail in order to be reimbursed, as long as the litigation produces positive results which derive from plaintiff’s participation. The procedural system would replace the “prevailing plaintiff” standard, which looks only to a narrow end result, with a “meritoriousness” standard focusing “upon the therapeutic result of the various facets of the litigation both in terms of the instant case and beyond.” If this standard were adopted, attorneys’ fees could be awarded even if the case became moot, or was settled, or the plaintiff lost on the merits, as long as the intervention by the plaintiff served to halt conduct not in the public interest—conduct forbidden by a statute, for example.

This flexible notion of meritoriousness recognizes that the Congressional purpose is equally well served where an acceptable public project moves forward after forced compliance with the minimum statutory safeguards, as where an unsound project is stopped. Where either result is a product of an exercise of the legal process, the requisite degree of success on the merits has been demonstrated.

A third key decision is selection of an appropriate method of funding awards of attorneys’ fees. In light of the large percentage of public interest cases in which the government is the defendant, it is crucial that section 2412 be changed to permit fee-assessment against the government. If a public fund is

185. King & Plater, supra note 2, at 81.
186. Id. at 78-79.
187. Id. at 79.
188. Id. at 81.
189. Senate Hearings, supra note 6, at 791 (testimony of J. Anthony Kline, Esq.).
established to cover public interest attorneys' fees, it would seem that section 2412 would no longer be viable in any event. The public fund approach might also have the advantage of making fees available to attorneys during the research and preparation of the case. Since the expenses of such litigation are very high, pro bono attorneys often find themselves having to eliminate issues and forego expensive but vital research during the preparation of the case because, even if fees are awarded at termination, they have insufficient funds with which to do the initial work. It has been suggested that a fund be established which would provide loans to pro bono lawyers to finance the proper preparation of their cases, which could be repaid out of the fee award. A pre-trial determination that a plaintiff would be awarded fees at the conclusion of the trial would tend to make such plaintiffs good credit risks for this type of loan.

The fees that are awarded must adequately compensate attorneys who represent public interest clients. A schedule based on the damages awarded would probably be unacceptable since there frequently is no monetary recovery, or only a nominal one. However, leaving the decision completely to the court's discretion is also unacceptable, as the Alaskan experience has demonstrated. Though any schedule of factors would necessarily have an element of arbitrariness, the number of hours involved in the litigation and comparable fees charged by attorneys in the private sector would have to weigh heavily in the computation of an award. If adequate compensation is not forthcoming, it is not likely that public interest actions will be pursued with much vigor in the future. The courts have shown

190. Id. at 834, 838-40 (testimony of Dennis Flannery, Esq.).
191. Id. at 842.
192. See text following note 179 supra.
193. The ABA Code of Professional Responsibility, Canon 2, DR 2-106 (1975) lists 8 factors which are to be considered in determining a reasonable fee:
   1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
   2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
   3) The fee customarily charged in the locality for similar legal services.
   4) The amount involved and the results obtained.
   5) The time limitations imposed by the client or by the circumstances.
   6) The nature and length of the professional relationship with the client.
   7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
   8) Whether the fee is fixed or contingent.
their willingness to award substantial fees in antitrust and securities litigation; an equally sympathetic judicial attitude toward public interest litigation, and an effective statute which authorized fee awards, would probably provide much-needed encouragement in this vital area.

Finally, it would be helpful to require an official declaration by the judge indicating how he determined the fee award. This would, hopefully, tend to eliminate arbitrary treatment, to promote consistency in awards, and to reduce the number of appeals over the size of the award.

CALIFORNIA: STATUS AND POTENTIAL

Section 1021 of the California Code of Civil Procedure states that unless attorneys' fees are provided for by statute, it is left to the attorney and client to agree on a fee and method of payment. This comports with the traditional American rule. The nonstatutory common fund and substantial benefit exceptions are also firmly established in California; the bad faith and private attorney general doctrines, however, have never been approved by the California Supreme Court.

In a 1968 case, Fletcher v. A. J. Industries, the California Court of Appeal, relying on the substantial benefit theory enunciated by the United States Supreme Court in Sprague v. Ticonic National Bank, awarded attorneys' fees to a plaintiff who had successfully settled a pending stockholders derivative action. The Fletcher court concluded—as the United States Supreme Court had in Mills v. Electric Auto-Lite Co.—that even though no fund had been created, the court's equitable powers allowed it to do justice between the plaintiff and those benefiting from his litigation, by awarding plaintiff attorneys' fees. The fact that the benefits were achieved by settlement

194. Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to costs and disbursements, as hereinafter provided. Cal. Civ. Proc. Code § 1021 (West 1955).


196. 307 U.S. 161 (1939). Sprague was an extension of the common fund idea. Although petitioner represented only herself, her actions served to establish the claims of 14 other persons as well. Consequently it was proper to award attorneys' fees. Id. at 166-67.

197. 266 Cal. App. 2d at 322, 72 Cal. Rptr. at 150-51.


199. 266 Cal. App. 2d at 323, 72 Cal. Rptr. at 152.
rather than full litigation, the court held, was immaterial.\textsuperscript{200}

However, attempts to persuade the California Supreme Court to adopt the bad faith and private attorney general theories have not been successful. In \textit{D'Amico v. Board of Medical Examiners},\textsuperscript{201} the court restricted itself to ruling that the common fund and substantial benefit doctrines were inapplicable to the facts.\textsuperscript{202} It refused to decide if it had the power to award fees to one party as a sanction for vexatious and oppressive conduct on the part of another party or opposing counsel;\textsuperscript{203} nor would it consider the private attorney general theory, which at that time was being reviewed by the United States Supreme Court in \textit{Bradley v. Richmond School Board}.\textsuperscript{204} The court stated that "pending an announcement by the high court concerning [the] limits and contours [of the private attorney general theory] on the federal level, we decline to consider its possible application in this state."

However, in \textit{Bozung v. Local Agency Formation Commission},\textsuperscript{206} a recent environmental protection case, the California court indicated that it would be willing to consider the private attorney general theory under appropriate circumstances. In \textit{Bozung}, the successful plaintiffs made a motion to the California Supreme Court to recover attorneys' fees incurred on appeal, based on the private attorney general theory.\textsuperscript{207} Although the court refused to grant the fees, it remanded the issue to the trial court for full briefing and oral argument, instructing the trial judge, if he decided plaintiffs were entitled to reasonable attorneys' fees, to fix the amount. The trial court's ruling would, of course, then be subject to review on appeal.\textsuperscript{208}

The \textit{Bozung} case was decided in February, 1975, and \textit{Alyeska} in May of 1975. In July, the California Court of Appeal for the Second District, Division 4, considered both cases in reaching its decision in \textit{Menge v. Farmers Insurance Group}.\textsuperscript{209}

\begin{thebibliography}{9}
\bibitem{200} Id. at 325, 72 Cal. Rptr. at 153.
\bibitem{201} 11 Cal. 3d 1, 520 P.2d 10, 112 Cal. Rptr. 786 (1974).
\bibitem{202} Id. at 25-26, 520 P.2d at 28, 112 Cal. Rptr. at 804.
\bibitem{203} Id. at 26-27, 520 P.2d at 28-29, 112 Cal. Rptr. at 804-05.
\bibitem{204} 416 U.S. 696 (1974).
\bibitem{205} 11 Cal. 3d 1, 27, 520 P.2d 10, 29, 112 Cal. Rptr. 786, 805 (1974).
\bibitem{206} 13 Cal. 3d 483, 531 P.2d 783, 119 Cal. Rptr. 215 (1975).
\bibitem{207} Id. at 484, 531 P.2d at 784, 119 Cal. Rptr. at 216.
\bibitem{208} Id. at 485, 531 P.2d at 784, 119 Cal. Rptr. at 216. On the same day, a similar instruction was given in \textit{No Oil, Inc. v. City of Los Angeles}, 13 Cal. 3d 486, 531 P.2d 784, 119 Cal. Rptr. 216 (1975).
\bibitem{209} 50 Cal. App. 3d 143, 123 Cal. Rptr. 265 (1975).
\end{thebibliography}
a class action seeking to enjoin the distribution of insurance solicitation materials alleged to be inaccurate and misleading. After 11 months of proceedings, plaintiffs obtained the relief sought through a stipulated judgment. They requested attorneys' fees under the private attorney general and substantial benefit doctrines. The issue with which the appeals court was presented was whether an equity court could award fees to plaintiffs' attorney in a class action where no fund had been created, and, although the litigation was responsible for some benefit to the defendant, "the special status of a corporate shareholder plaintiff [did] not exist."

When presented with a similar issue in April, 1975, in People ex rel. Department of Public Works v. Bosio, the Court of Appeal for the Second District, Division 3, had followed the example set by the California Supreme Court in Bozung and remanded the question to the trial court for decision. The Menge court, however, considered only the fact that the California Supreme Court in Bozung and the court of appeal in Bosio had not awarded attorneys' fees, declining to acknowledge that in each case the question of awarding fees had been remanded to the trial court. It denied attorneys' fees on two bases: the Alyeska decision (which post-dated Bosio), and the "reluctance" of the California Supreme Court to establish the private attorney general theory in this state.

A Pending Decision: Serrano v. Priest

It is possible that the supreme court will resolve the issue in the near future. The complex case of Serrano v. Priest, dealing with the constitutionality of the California system of school financing, is once more before the court, this time with an appeal on the issue of attorneys' fees consolidated with the

210. Id. at 144, 123 Cal. Rptr. at 265.
211. Id. at 148, 123 Cal. Rptr. at 267.
212. The trial court found that the benefit was the possible prevention of numerous lawsuits against the insurance company when people realized that they had not received the insurance coverage that the solicitation material had offered. Since it determined that no award of fees was appropriate, the court of appeal did not decide whether this benefit was analogous to the benefit recognized in Fletcher. Id.
213. Id. at 148, 123 Cal. Rptr. at 268.
215. Id. at 531-32, 121 Cal. Rptr. at 396-97.
appeal on the merits. The fee appeal raises issues concerning the availability in California of judicially awarded attorneys' fees under the private attorney general doctrine, or the common fund and substantial benefit theories.

The court might find that the common fund or substantial benefit theories are sufficiently broad or can be expanded to allow attorneys' fees in Serrano; or it may deny fees entirely, or in some other way avoid resolving the private attorney general question at this time. However, the court's prior decisions in many areas of the law suggest that fees will be granted, and since the facts of Serrano do meet the frequently stated standards for the private attorney general theory, it seems likely that the court will face the issue squarely now.

Indications of the Court's Receptiveness to Change

There is no appellate court decision explicitly approving the private attorney general theory in California. However, a number of factors strongly suggest that when the supreme court does deal with the issue, it will adopt the doctrine.

First, both the legislature and the courts of California have a good record for protecting the interests of its citizens in precisely those areas which generate the most public interest litigation. The courts have, for instance, vigorously enforced the state's consumer protection laws, repeatedly stressing that protection of "unwary consumers . . . is an exigency of the utmost priority." In Morgan v. Reasor Corp., construing a section of the Unruh Act that deals with attorneys' fees, the supreme court emphasized that the legislative intent had been to "encourage attorneys 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

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219. See text accompanying notes 220-45 infra.
220. Vasquez v. Superior Court, 4 Cal. 3d 800, 808, 484 P.2d 964, 968, 94 Cal. Rptr. 796, 800 (1971). In Vasquez, the court held that a consumer class action could be brought for rescission of installment contracts for fraudulent misrepresentation against both the seller and the finance company to which the contracts were assigned. Id. at 805, 484 P.2d at 966, 94 Cal. Rptr. at 798. See also Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1971).
221. 69 Cal. 2d 881, 447 P.2d 638, 73 Cal. Rptr. 398 (1968).
he may have.”223 Defendants argued that the section was applicable only in an action “on a contract,” and since the plaintiff was requesting declaratory relief, the award of fees was improper.224 The court concluded, however, that such an interpretation would unduly restrict the application of the Act and was not consistent with legislative history.225 The award of attorneys’ fees was affirmed.226

In the environmental area, California has declared it state policy to “take all action necessary to protect, rehabilitate, and enhance environmental quality of the state.”227 Accordingly, the supreme court has held that the key piece of environmental legislation, the Environmental Quality Act of 1970,228 must be construed to provide the broadest possible protection of the environment.229

The courts have acted to provide the fullest possible protection within the reasonable scope of statutory language in other “public interest” areas as well. Welfare and Institutions Code section 10962230 gives a welfare applicant the right to obtain a court hearing to review a decision made by the Director of the State Department of Social Welfare.231 If the applicant prevails, section 10962 allows reasonable attorneys’ fees and costs. In Silberman v. Swoap,232 the applicant filed a writ of mandate to compel the Director to issue his decision on the applicant’s claim. The Director argued that a mandamus proceeding was not within the scope of the governing statute and

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223. 69 Cal. 2d at 896-97, 447 P.2d at 648-49, 73 Cal. Rptr. at 408-09.
224. Id. at 896, 447 P.2d at 648, 73 Cal. Rptr. at 408.
225. Id. at 897, 447 P.2d at 649, 73 Cal. Rptr. at 409.
226. Id.
228. Id. et seq.
229. Friends of Mammoth v. Board of Supervisors, 8 Cal. 3d 247, 259, 502 P.2d 1049, 1054, 104 Cal. Rptr. 761, 768 (1972). Mammoth dealt with the question of whether the Environmental Quality Act applied to private activities for which a permit is required. One of the main features of the statute is the requirement of an Environmental Impact Report (EIR) for any project where a permit from the government is required, if the project may have a significant effect on the environment. CAL. PUB. RES. CODE § 21151 (West Supp. 1975). Since there was no definition of “project” in the statute, and a single meaning was not apparent on its face, the court held that it was “required to give it [the statute] an interpretation with which it was passed.” The court found that the legislative intent necessitated that it interpret “project” to apply to private as well as public activities. Friends of Mammoth v. Board of Supervisors, supra at 256, 259, 502 P.2d at 1054, 1056, 104 Cal. Rptr. at 766, 768.
thus fees should not be awarded. However, the court concluded that the reason for providing attorneys' fees under section 10962 was to enable a needy person to "establish through judicial proceedings his or her right to a statutory benefit." Since the remedy pursued by the petitioner was made necessary by the Director's inaction, and since a "statute should not be construed as creating a right without a remedy," the court found that the award comported with the spirit and purpose of the statutory provision.

The court has been equally receptive when presented with public interest cases not brought on statutory grounds. For instance, in Knoff v. City and County of San Francisco, a class action to force changes in the property assessment system, the California Supreme Court found that "the award of attorneys' fees and the details thereof were proper exercises of the trial court's broad equitable powers, of which the existence of an actual fund of money is not a condition precedent." More recently, in Mandel v. Hodges, the court of appeal affirmed an award of attorneys' fees under the substantial benefit theory. Plaintiff, a state employee, brought suit to challenge the state practice of giving state employees time off with pay on Good Friday. In holding the practice unconstitutional, the court of appeal also declared that plaintiff was entitled to recover attorneys' fees because "1) the suit [was] one in which the court's equitable powers [came] into play; 2) it [was] commenced and maintained as a representative action; and 3) it resulted in a disposition that confer[ed] substantial benefits, pecuniary or otherwise, upon the persons represented." The court found that the benefit to the public—in this case the funds which would no longer be expended for work not performed by state employees—was not "materially distinguishable from the benefits received by the corporation in Fletcher ... and by the taxpayers in Knoff ... ." Although the court of appeal mentioned Alyeska's repudiation of the private attorney general concept on the federal

233. *Id.* at 570, 123 Cal. Rptr. at 457.
234. *Id.* at 571, 123 Cal. Rptr. at 458.
235. *Id.*
236. *Id.*
238. *Id.* at 203, 81 Cal. Rptr. at 696.
239. 54 Cal. App. 3d 586, 127 Cal. Rptr. 244 (1976).
240. *Id.* at 622, 127 Cal. Rptr. at 261.
241. *Id.* at 623, 127 Cal. Rptr. at 261-62.
level, it clearly did not consider the decision binding on a state court. Nevertheless, the court found that it was precluded from applying the private attorney general theory in *Mandel* because the California Supreme Court had thus far declined to approve the concept.\(^{242}\)

Perhaps the broadest language used by the California Supreme Court on a public interest issue was in *People v. Superior Court (Jayhill).*\(^{243}\) Construing a statute that empowered the attorney general to enjoin false and misleading advertising, the court held that in addition to issuing the injunction, it had the *inherent power* to order the defendant to make or offer to make restitution to defrauded customers, as ancillary relief. In the absence of a restriction stated “in so many words or by a necessary or inescapable inference”\(^{244}\) in the statute itself, “a court of equity is entitled to exercise the full range of its inherent powers in order to accomplish complete justice”\(^{245}\) between the parties.

*Jayhill*, like many of the cases cited in this section, was not concerned with attorneys' fees. But the principle for which it stands, together with the courts' commitment to giving as broad a reading as is reasonable to statutes meant to protect citizens' rights and enhance the quality of their lives, gives the California Supreme Court a solid basis for utilizing the private attorney general theory to allow attorneys' fees in public interest litigation in California.

**Possible Legislation**

Legislation to authorize attorneys' fees in California was considered during the 1975 Regular Session of the legislature. Senator Alfred H. Song introduced Senate Bill 664, which would have added section 1021.5 to the Code of Civil Procedure. The proposed bill provided:

Section 1. The purpose of this Act is to hold both public and private parties or entities accountable to the public for their acts or omissions. It is the intent of the Legislature that this purpose be carried out by the award of attorney's fees, expenses, and costs to the prevailing plaintiffs who bring actions which confer a substantial

\(^{242}\) *Id.* at 620, 127 Cal. Rptr. at 259-60.


\(^{244}\) *Id.* at 286, 507 P.2d at 1402, 107 Cal. Rptr. at 194.

\(^{245}\) *Id.*
benefit upon the public.

Section 2. Section 1021.5 is added to the Code of Civil Procedure, to read:

1021.5 Upon motion, a court shall award attorney's fees, costs and expenses to a prevailing plaintiff against a defendant in any action which has resulted in the enforcement of an important right if a significant benefit has been conferred on a large class of persons and the necessity and financial burden of private enforcement are such as to make the award essential.

As used in this section, “significant benefit” includes a nonpecuniary, as well as a pecuniary benefit.246

Although Senate Bill 664 failed to be reported out of committee, an attempt that is being made to introduce a similar measure in the 1976 legislative session has the approval of the Board of Governors of the State Bar Association.247 The basic difference between the bills is elimination of the requirement of a prevailing plaintiff in the new bill. Instead, one need only be a “successful” party, thus providing the possibility of recovering fees even though a settlement is achieved, or some other resolution of the problem occurs without producing a “winning” plaintiff.248

The tentative bill also provides that fees are only to be granted if they cannot reasonably be paid out of the recovery, and that fees may be awarded against, but not in favor of, public entities.249

It seems probable that the same concerns voiced about the Song bill will be raised when its successor is introduced. Many of these were aired when attorneys connected with public interest litigation attended hearings on Senate Bill 664 in September, 1975.250

At that time, concern seemed to focus on how public interest should be defined, and by whom; who should be permitted to recover fees; and whether a plaintiff should be required to show that, absent the availability of fees, he would have been financially unable to bring the action.

An argument was made that the legislature should clearly

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248. Id.
249. Id.
250. California Hearings, supra note 218.
define the types of litigation sought to be encouraged by the provision for fee-shifting. This could be done by adding or intentionally omitting to add an attorneys' fee provision to each bill as it was passed, or alternatively, by defining the area of "public interest" and letting the courts decide whether a particular case fell within those parameters. On the other hand, several attorneys felt that it was important not to be too specific. Not all rights are protected by statutes, nor is it necessarily clear at one point in time what rights will exist and need protection at another.

Several attorneys thought it important to award fees even to a plaintiff who did not prevail, as long as the litigation enhanced, preserved or protected important public rights or public policy. Proponents of this system, of course, opposed awarding fees to a prevailing defendant. Although it was argued that it might be a denial of equal protection to deny fees to prevailing defendants, it was noted that many statutes which provide fees to only the prevailing plaintiff have been upheld against just such a challenge. To insist on awarding fees to the prevailing defendant would in many cases, if not all, cancel out the public policy reason for providing fee awards: to "affirmatively encourage certain types of lawsuits to enforce statutory rights where the incentives would not otherwise exist."

There was no consensus as to whether awards should be granted to a prevailing plaintiff public agency. Attorney Gen-

251. Id. at 41-42 (testimony of Evelle J. Younger, Attorney General).
252. Id. at 46.
253. Id. at 113-14 (testimony of Ephraim Margolin, Esq.); id. at 72-73 (testimony of Jerome Falk, Esq.); id. at 91 (testimony of Malcolm A. Misuraca, Esq.).
254. Id. at 84-85 (testimony of Armando Menocal, Esq.); id. at 116 (testimony of Ephraim Margolin, Esq.). Mr. Margolin suggested that the bill include a provision stating that the court "may" award fees to a non-prevailing plaintiff "where a significant benefit [was] conferred on a large class of persons in the course of or due to litigation initiated by the plaintiff." Id.
255. Id. at 15 (testimony of Carlyle Hall, Esq.); id. at 55-56 (testimony of J. Anthony Kline, Esq.); id. at 90 (testimony of Malcolm A. Misuraca, Esq.).
256. Id. at 22-23 (testimony of Thomas Hookano, Esq.); id. at 37 (testimony of William L. Berry, Jr., Esq.).
257. Id. at 90 (testimony of Malcolm A. Misuraca, Esq.). See, e.g., Vinnicombe v. State, 172 Cal. App. 2d 54, 341 P.2d 705 (1959): "[I]f there is a reasonable basis for the [legislative] classification attorneys' fees may be granted as part of the costs to a particular class of litigants." Id. at 60, 341 P.2d at 708; accord, Beyerbach v. Juno Oil Co., 42 Cal. 2d 11, 265 P.2d 1 (1954); Builders' Supply Depot v. O'Connor, 150 Cal. 265, 86 P. 982 (1907).
258. California Hearings, supra note 218, at 55.
eral Younger suggested that public agencies be allowed to recover fees when they were prevailing plaintiffs.\textsuperscript{259} It was argued, however, that the Attorney General's office and state agencies are publicly funded for the purpose of enforcing specified rights, and thus should not be awarded fees.\textsuperscript{260}

Finally, the Committee was urged to drop the language that would limit an award of fees to cases where a recovery was a "necessity," on the ground that the proviso would appear to bar fee-shifting where the plaintiffs' attorney had agreed at the outset not to charge his client. That is, if a foundation, or otherwise funded firm agreed that the plaintiff would not be responsible for fees, no debt would exist between plaintiff and attorney for the conduct of the case, and the court could logically hold that being compensated for the representation was obviously not a necessity and deny an award. As has been indicated however, many public interest firms are in danger of going out of business if they do not develop new ways to support themselves.\textsuperscript{261} If they have to turn to accepting only money-making cases, the whole idea of public interest representation is defeated. Therefore, such a provision in the bill would seem to disable the intent and purpose of fee awards.\textsuperscript{262}

It is clear that there will be many hurdles to clear before a bill establishing the private attorney general doctrine in California is passed by the legislature.\textsuperscript{263} At least one prominent California public interest attorney thinks that although such legislation is necessary, it would also be desirable to leave the matter up to the courts, since they have the needed expertise and understanding of the facts in each particular case to determine when an award would be proper.\textsuperscript{264} If the California Supreme Court approves the private attorney general doctrine in Serrano, legislation would probably not be needed. Whatever the immediate outcome of these attempts to authorize fee-shifting in public interest litigation, however, it seems certain that the pressure will continue for regular awards of attorneys'
fees in public interest litigation until they become, of necessity, the accepted practice in California.

CONCLUSION

American society has undergone vast changes in the past few decades. Some of the rights for which enforcement is sought today did not exist even 20 years ago. All too often, however, the legislation which has conferred a right contains no adequate mechanism for its enforcement. It becomes necessary, then, to resort to complex, time-consuming and expensive litigation. Yet unless one who feels his rights have been violated can find a public interest attorney or firm to represent him, the expense of such litigation will frequently prevent him from vindicating a right vital to his own welfare, and that of the general public.

The federal courts were attempting to alleviate this problem by the development of the private attorney general rationale, which allowed the award of attorneys' fees to a plaintiff successfully litigating a "public interest" issue. However, the Supreme Court decision in *Alyeska Pipeline Service Co. v. Wilderness Society*265 has effectively halted that practice. While it is still possible for the state courts to continue to apply the private attorney general theory, *Alyeska* is likely to spread its chill in the state as well as the federal courts.

Consequently, it is clear that legislation is called for, on both state and federal levels, that will ensure attorneys who bring suits in the public interest adequate compensation, either out of a public fund or from the opposing party. Further, the government should no longer be immune from fee assessments. Only then will the average citizen have some assurance that his paper rights to such things as a decent environment and equitable treatment in the marketplace exist and can be enforced.

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