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# LABOR RELATIONS AND ATTORNEYS' FEES

CHARLES A. EDWARDS†

Perhaps no facet of litigation is of more interest to attorneys than the availability of court-awarded fees. The discussion in this article limits itself to one aspect of that topic: the availability of court-awarded fees in what may broadly be classed as labor relations cases. Various federal statutory provisions may be invoked in the context of alleged infringement of employee rights. These include civil rights legislation spanning more than a century,<sup>1</sup> labor legislation originating with the New Deal,<sup>2</sup> and special statutory provisions covering fair labor standards, age discrimination, equal pay for equal work, duties to employees arising out of contractual relations and arbitration, and job safety requirements.<sup>3</sup>

With respect to attorneys' fees, these statutes fall into two general categories: those that expressly provide an award of fees to the "prevailing party" if the court in its discretion sees fit to award fees, and those that are silent on the subject.<sup>4</sup> Such a classification may well be a distinction without a difference in the employment area.

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1. Civil Rights Act of 1866, 42 U.S.C. § 1982 (1970); Civil Rights Act of 1870, 42 U.S.C. § 1981 (1970); Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970); Title VII, Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e-15 (1970), *as amended*, 42 U.S.C. §§ 2000e to e-6, e-8, e-9, e-13 to e-17 (Supp. IV, 1974).

2. National Labor Relations Act, 29 U.S.C. §§ 151-68 (1970), *as amended*, 29 U.S.C. §§ 152, 153, 158, 161, 169 (Supp. IV, 1974); Railway Labor Act, 45 U.S.C. §§ 151-63 (1970).

3. Fair Labor Standards Act, 29 U.S.C. §§ 201-19 (1970), *as amended*, 29 U.S.C. §§ 202-08, 210, 212-14, 216 (Supp. IV, 1974); Equal Pay Act, 29 U.S.C. § 206 (1970), *as amended*, (Supp. IV, 1974); Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1970), *as amended*, 29 U.S.C. §§ 630, 633a, 634 (Supp. IV, 1974); Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-531 (1970), *as amended*, 29 U.S.C. § 441 (Supp. IV, 1974).

4. It can also be said that there are three classifications: (1) statutes that make attorneys' fees mandatory, such as section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b) (1970), *as amended*, (Supp. IV, 1974), and the provisions of the Railway Labor Act relating to enforcement of National Railroad Adjustment Board orders, *e.g.*, 45 U.S.C. § 153 (¶ 'First') (p) (1970); (2) statutes that make the award of counsel fees discretionary, as in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (1970), and the inspection of records and fiduciary duties provisions of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 431(c) & 501(b) (1970); and (3) statutes that make no reference to compensation for prevailing counsel, such as the National Labor Relations Act, the Age Discrimination in Employment Act, and the Equal Pay Act, cited in notes 2 & 3 *supra*.

## I. THE AMERICAN RULE AND ITS EXCEPTIONS

The courts have continually reiterated, "The general rule, apart from statute, is that the prevailing party in litigation is not entitled to recover any sum for his attorneys' fees."<sup>5</sup> This "American rule," unlike that prevailing in British jurisprudence, has been justified on the ground that a burden on the courts would result by compelling judicial determination of the reasonableness of fees.<sup>6</sup> As one court simply put it,

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Note also the provision for "attorney's docket fees" in 28 U.S.C. § 1923(a) (1970), which was mandatory from 1853, 10 Stat. 161, until made discretionary in 1948, 62 Stat. 956. One writer has recently set out at least twenty federal statutes permitting the allowance of attorneys' fees. Comment, *Court Awarded Attorneys' Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636 (1974) [hereinafter cited as *Equal Access*]. Another writer, Senator Tunney, states that there are twenty-nine. Tunney, *Foreword, Financing the Cost of Enforcing Legal Rights*, 122 U. PA. L. REV. 632, 633 (1974). Several such statutes have issued from the 93d Congress. See note 210 *infra*.

5. D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 3.8, at 194 (1973); see, e.g., *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967). The so-called general rule was commonplace in the United States as early as 1796. See, e.g., *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796). See also Goodhart, *Costs*, 38 *YALE L.J.* 849 (1929).

But as one historian notes, lawyers were not always paid at all. In 1773 Thomas Jefferson, Patrick Henry, and five of their colleagues announced in the press that they "would give no opinion on any case without the payment of the whole Fee." The reason was that during Jefferson's first six years of practice, he collected less than one-third of his billed fees. F.M. BRODIE, *THOMAS JEFFERSON, AN INTIMATE HISTORY* (1974), quoting *Virginia Gazette*, May 20, 1773.

6. *Monolith Portland Midwest Co. v. Kaiser Alum. & Chem. Corp.*, 407 F.2d 288, 298 (9th Cir. 1969). At least one court has stated that the departure from the English model was intentional. *Conte v. Flota Mercante del Estado*, 277 F.2d 664, 672 (2d Cir. 1960). See generally Annot., 16 A.L.R. Fed. 643 (1973); Annot., 8 L. Ed. 2d 894 (1963). Be this as it may, the American rule has come under fire in no fewer than a dozen scholarly works: Avilla, *Should Counsel Fees Be Allowed?*, 13 *STATE B.J. OF CALIF.* 42 (1938); Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 *CALIF. L. REV.* 792 (1966); Goodhart, *Costs*, 38 *YALE L.J.* 849 (1929); Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 *IOWA L. REV.* 75 (1963); Mause, *Winner Takes All: A Re-examination of the Indemnity System*, 55 *IOWA L. REV.* 26 (1969); McCormick, *Counsel Fees and Other Expense of Litigation as an Element of Damages*, 15 *MINN. L. REV.* 619 (1931); Stirling, *Attorney's Fees: Who Should Bear the Burden?*, 41 *STATE B.J. OF CALIF.* 874 (1966); Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 *U. COLO. L. REV.* 202 (1966); Note, *Attorney's Fees*, 43 *MISS. L.J.* 238 (1972); Note, *Attorney's Fees as an Element of Damages*, 15 *U. CINN. L. REV.* 313 (1941); Note, *Attorney's Fees: Where Should the Ultimate Burden Lie?*, 20 *VAND. L. REV.* 1216 (1967); Note, *Distribution of Legal Expense Among Litigants*, 49 *YALE L.J.* 699 (1940).

An objective and heavily footnoted analysis is Professor Dawson's two-part study, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 *HARV. L. REV.* 1597 (1974), and *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 *HARV. L. REV.* 849 (1975). See generally *F.D. Rich Co. v. United States*, 417 U.S. 116 (1974). An excellent discussion is found in Judge Celebrezze's decision in *Incarcerated Men of Allen County Jail v. Fair*, 507 F.2d 281 (6th Cir. 1974).

"attorneys are paid by their clients."<sup>7</sup> Both statutory and judge-made exceptions to this general rule, however, have become increasingly apparent.

The court sitting in equity has the power to tax attorneys' fees as costs when equity would demand such a practice. This doctrine was enshrined in American jurisprudence by Justice Frankfurter's opinion in *Sprague v. Ticonic National Bank*,<sup>8</sup> and has expanded to the point that the general rule is much more accurately stated as follows: "[The award of attorneys' fees] necessarily requires a permitting statute, a contractual obligation, or equitable discretion in the trial court."<sup>9</sup>

The theoretical bases advanced for fee-shifting are beyond the scope of this article, although many will be touched upon peripherally. It is perhaps more significant that there is a lack of any consistent legislative or judicial application of these theories in practice. The prevailing theme underlying departures from the American rule is the protection of interests that, absent a reward in the form of fee-shifting, might not be protected adequately by the bar.<sup>10</sup> Implicit in such a theme is the idea that without fee-shifting plaintiff's attorney would not be paid; this idea is, in many instances, far from true.

Curiously, the only treatise devoted to the subject of attorneys' fees,<sup>11</sup> while containing excellent discussions of the various theories of fee recovery, devotes less than four of its 1300 pages to what it calls "civil rights" cases—yet it is in this specific area of the law that a great deal of judicial flesh has been added to the statutory bones of such phrases as "prevailing party," "reasonable attorney's fee," and "good faith," along with references to "private attorneys general," "therapeutic value," and other similar concepts that have spilled over into the deliberations of judges and Congressmen.

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7. *In re Joslyn*, 224 F.2d 223, 225 (7th Cir. 1955) (Swaim, J.).

8. 307 U.S. 161 (1939). This concept was early utilized in labor cases involving discrimination, *see, e.g., Rolax v. Atlantic Coast Line R.R.*, 186 F.2d 473, 481 (4th Cir. 1951).

9. *Williams v. Kimbrough*, 415 F.2d 874, 875 (5th Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970).

10. A brief analysis of this subject by an eminent trial judge is found in Richey, *Attorneys' Fees: A Two-Pronged Problem*, 11 TRIAL, Nov./Dec. 1975, at 59: "Those who sanction the award of attorneys' fees state that such fees are necessary because a party who recovers an award for an injury is not really made whole unless his attorneys' fees are added to the recovery."

11. S. SPEISER, *ATTORNEYS' FEES* (1973) (2 vols.).

## II. TITLE VII AND NEWMAN

Title VII of the Civil Rights Act of 1964<sup>12</sup> permits the court to tax attorneys' fees as costs; this discretionary power has been interpreted to mandate a fee award when plaintiff prevails, although the converse is not true. Section 706(k) of the Act provides: "In any action or proceeding under this subchapter the court, *in its discretion*, may allow the prevailing party, other than the [Equal Employment Opportunity] Commission [EEOC] or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."<sup>13</sup> Similarly, the Fair Labor Standards Act (FLSA), including its Age Discrimination in Employment provisions, allows "a reasonable attorney's fee to be paid by the defendant" upon a finding that the Act has been violated.<sup>14</sup>

The two statutory provisions appear to be distinguishable. Whereas the award of attorneys' fees under the FLSA is "mandatory and

12. 42 U.S.C. §§ 2000e to e-15 (1970), *as amended*, 42 U.S.C. §§ 2000e to e-6, e-8, e-9, e-13 to e-17 (Supp. IV, 1974) (prohibiting employment discrimination based on race, color, religion, sex or national origin).

13. *Id.* § 2000e-5(k) (1970) (emphasis added). Note the express exception of the EEOC and the Justice Department from further consideration.

14. Fair Labor Standards Act § 16(b), 29 U.S.C. § 216(b) (1970), *as amended*, (Supp. IV, 1974) (providing a private remedy for violation of federal minimum wage and overtime standards). See *Bable v. T.W. Phillips Gas & Oil Co.*, 287 F.2d 21 (3d Cir. 1961); *Rau v. Darling's Drug Store, Inc.*, 388 F. Supp. 877 (W.D. Pa. 1975); *Retail Store Employees Local 400 v. Drug Fair—Community Drug Co.*, 307 F. Supp. 473 (D.D.C. 1969); *Foster v. Irwin*, 258 F. Supp. 709 (E.D. La. 1966).

This section applies to the Equal Pay Act and the Age Discrimination in Employment Act (ADEA), cited in note 3 *supra*, as well. See *Hodgson v. Miller Brewing Co.*, 457 F.2d 221 (7th Cir. 1972) (Equal Pay Act); *Rogers v. Exxon Research & Eng'r Co.*, 404 F. Supp. 324 (D.N.J. 1975) (ADEA); *Monroe v. Penn-Dixie Cement Corp.*, 335 F. Supp. 231 (N.D. Ga.), *aff'd per curiam*, 449 F.2d 348 (5th Cir. 1971) (ADEA). See generally CCH WAGE-HOUR REP. ¶ 25,970.

The "mandatory and unconditional" language of the Fair Labor Standards Act provisions, *see* text accompanying note 15 *infra*, should be clarified: the award is permissible only on individual or class-based private actions under section 16(b) of the Act, and not to suits brought pursuant to section 17 by the Secretary of Labor. Simply stated, this translates into a policy determination that there is no need for a private attorney general's incentive compensation when the public is actually assuming the conduct and expense of enforcing the statute. *Rios v. Steamfitters Local 638*, 400 F. Supp. 993 (S.D.N.Y. 1975). The presumption that an enforcement agency can and will perform its statutory mission should be indulged in to resolve any doubt against the conferring of fees for "coattail" litigation. *McDonald v. Oliver*, 525 F.2d 1217 (5th Cir. 1976); *Brewer v. School Bd.*, 456 F.2d 943 (4th Cir.), *cert. denied*, 409 U.S. 892 (1972); *Office of Communication v. FCC*, 359 F.2d 994 (D.C. Cir. 1966). In securities litigation, attorneys' fees may be denied if the benefit to plaintiffs resulted from acts of the government rather than those of plaintiffs' attorneys, *Wechsler v. Southeastern Prop., Inc.*, 506 F.2d 631 (2d Cir. 1974), or if an experienced investor has not been inveigled into a purchase, *Pearlstein v. Scudder & German*, 527 F.2d 1141 (2d Cir. 1975).

unconditional,"<sup>15</sup> the allowance of counsel fees pursuant to Title VII of the Civil Rights Act is specifically discretionary. Nonetheless, the judicial gloss in decisions under Title VII and Title II makes it clear that such discretion, if it exists, applies only to the *amount* of such fees; the award is compelled if the party "prevails."

In reaching this conclusion, the courts have relied upon the Supreme Court's statement in *Newman v. Piggie Park Enterprises*:<sup>16</sup>

When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. . . . Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.

It follows that one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.<sup>17</sup>

Although *Newman* was dealing with the attorneys' fees provisions of section 204(b) of the 1964 Act,<sup>18</sup> and despite the explicit recognition in *Newman* that "[w]hen a plaintiff brings an action under [Title II], he cannot recover damages,"<sup>19</sup> federal courts soon entertained the "private attorney general" concept in Title VII litigation.<sup>20</sup>

15. *Wright v. Carrigg*, 275 F.2d 448, 449 (4th Cir. 1960). The reasons for FLSA attorneys' fees were ably stated by Judge Wyzanski in *Hutchinson v. William C. Barry, Inc.*, 50 F. Supp. 292, 296-98 (D. Mass. 1943). See also *Rau v. Darling's Drug Store, Inc.*, 388 F. Supp. 877 (W.D. Pa. 1975).

16. 390 U.S. 400 (1968) (per curiam).

17. *Id.* at 401-02 (footnotes omitted). This "special circumstances" language is distinguished in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975), as inapplicable in the context of back pay awards; the standard applied to back pay is "avoidance of frustration of the central statutory purposes." *Id.* at 421. This distinction, admittedly, is less than pellucid.

18. 42 U.S.C. § 2000a-3(b) (1970) (dealing with discrimination in public accommodations; the language is similar to section 706(k) (42 U.S.C. § 2000e-5(k) (1970))).

19. 390 U.S. at 402.

20. In *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968), the Fifth Circuit stated: "Clearly the same logic applies to Title VII of the Act." *Id.* at 499. The *Oatis* court cited *Newman* in the context of permissibility of a class action in the absence of individual EEOC charges, and not with respect to attorneys' fees. Earlier decisions under the 1964 Act had adhered to the language of the statute. For example, in *Bell v. Alamatt Motel*, 243 F. Supp. 472 (N.D. Miss. 1965), the trial court exercised its discretion to deny taxing attorneys' fees as costs when the prevailing party was represented by the NAACP Legal Defense and Education Fund, Inc., because plaintiff had incurred no "obligation to pay." *Id.* at 475. This interpretation would be entirely correct if the case had proceeded under the Fair Housing Act of 1968, which contains a

The first appellate decision regarding Title VII attorneys' fees as affected by *Newman* was *Lea v. Cone Mills Corp.*<sup>21</sup> The Fourth Circuit was faced with a "test case" which Judge Boreman's dissenting opinion characterized as "'ambulance chasing'—with the plaintiffs themselves serving merely as puppets or as pawns in the game."<sup>22</sup> Plaintiffs had applied for work where no vacancies existed; they were not seeking jobs, but were attempting to test Cone Mills' employment practices. The trial court granted injunctive relief but denied back pay and attorneys' fees.<sup>23</sup>

The court of appeals affirmed the back pay denial but reversed as to attorneys' fees on the *Newman* rationale. Judge Boreman's dissent reflected a strong distaste for such a procedure. In addition to his comments about champerty, he pointed out that Title II is not identical to Title VII.<sup>24</sup> No investigative agency or machinery for conciliation is incorporated into Title II; moreover, the existence of the EEOC, he reasoned, made it unlikely that potential plaintiffs in Title VII cases would be "discouraged."<sup>25</sup>

The same court dealt with Title VII attorneys' fees later that year; again, a trial court's denial of counsel fees was reversed, finding an abuse of discretion in light of *Lea*.<sup>26</sup> *Newman* alone was rapidly being accepted as a sufficient criterion for the award of attorneys' fees. When viewed from the vantage point of eight years of post-*Newman* decisions, the judicial picture resembles an ever-widening circle of opinions relying, wisely or not, on the public interest rationale expressed by the Supreme Court.

A prime example is *Lee v. Southern Home Sites Corp.*,<sup>27</sup> in which

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proviso requiring plaintiff to satisfy the court of his inability to pay his attorney, 42 U.S.C. § 3612(c) (1970). If there is no obligation to pay, no fee should be obtained. Apparently, however, "obligation to pay" is irrelevant to Title VII attorneys' fees except insofar as the amount of the fee is concerned. See text accompanying notes 189-91 *infra*. Compare this with *Houser v. Matson*, 447 F.2d 860 (9th Cir. 1971) (FLSA case holding that trial court abused its discretion in awarding only a nominal \$1.00 fee out of fear that counsel would receive a double fee).

21. 438 F.2d 86 (4th Cir. 1971).

22. *Id.* at 90.

23. *Lea v. Cone Mills Corp.*, 301 F. Supp. 97 (M.D.N.C. 1969).

24. Title II of the 1964 Act provides only for injunctive or declaratory relief, via private actions or suits brought by the Justice Department. Since damages are not available, either expressly or through the "equitable restitution" medium, private actions are not common.

25. 438 F.2d at 90.

26. *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006 (1972).

27. 444 F.2d 143 (5th Cir. 1971).

the Fifth Circuit reversed a denial of attorneys' fees in an action under the 1866 Civil Rights Act,<sup>28</sup> saying: "[T]he effective remedy for securing the rights declared in § 1982 should include the award of attorney's fees . . . ." <sup>29</sup> The 1871 Act<sup>30</sup> was also incorporated by reference into *Newman*: "Indeed, under such circumstances [when a class is benefited], the award loses much of its discretionary character and becomes a part of the effective remedy a court should fashion to encourage public-minded suits and to carry out congressional policy."<sup>31</sup>

The Fifth Circuit maintained that an allowance of attorneys' fees as costs "is not mandatory,"<sup>32</sup> despite the fact that only eight days before a Fifth Circuit panel had reversed a lower court's denial of back pay in a section 1981<sup>33</sup> case. In the earlier case the court found that "[t]here is no relevant distinction between a section 1982 suit and a section 1981 suit such as this one,"<sup>34</sup> and ordered, "If on remand the district court cannot articulate specific and justifiable reasons for its denial of attorneys' fees, it should make a reasonable award."<sup>35</sup>

Not all courts hearing cases on employment discrimination in the civil rights context have been so willing to compensate successful counsel. The Eighth Circuit, for example, has been firm in section 1983

28. 42 U.S.C. § 1982 (1970). This provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

29. 444 F.2d at 147.

30. 42 U.S.C. § 1983 (1970). This provides:

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

31. NAACP v. Allen, 340 F. Supp. 703, 709 (M.D. Ala. 1972), *aff'd*, 493 F.2d 614 (5th Cir. 1973).

32. *Weeks v. Southern Bell Tel. & Tel. Co.*, 467 F.2d 95, 97 (5th Cir. 1972) (*per curiam*).

33. 42 U.S.C. § 1981 (1970) provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

34. *Golden v. Kentile Floors, Inc.*, 512 F.2d 838 (5th Cir. 1975); *Cooper v. Allen*, 467 F.2d 836, 841 (5th Cir. 1972).

35. *Id.* The trial court awarded \$12,000 counsel fees but no back pay. *Cooper v. Allen*, Civil No. 13257 (N.D. Ga. 1972). Such decisions prompted the First Circuit to suggest that district courts make findings in all civil rights cases about the desirability of counsel fees, *Knight v. Auciello*, 453 F.2d 852 (1st Cir. 1972), a course that would ultimately be adopted and expanded by the Fifth Circuit in *Johnson v. Georgia Hwy. Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). See text accompanying notes 163-67 *infra*.



cases, awarding attorneys' fees "only . . . as a punitive measure where a defendant has acted with obdurate recalcitrance."<sup>36</sup> But the practical significance of these decisions evaporated with the resurrection of the 1866 Civil Rights Act<sup>37</sup> and the passage of the 1972 amendments to Title VII,<sup>38</sup> both of which make it unlikely that section 1983 will be utilized to challenge employment discrimination.

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36. *Webb v. Lake Mills Community School Dist.*, 344 F. Supp. 791, 807 (N.D. Iowa 1972), *citing* *Clark v. Board of Educ.*, 449 F.2d 493, 502 [sic] (8th Cir. 1971), *cert. denied*, 405 U.S. 936 (1972); *Arkansas Educ. Ass'n v. Board of Educ.*, 446 F.2d 763, 770 (8th Cir. 1971); *Cato v. Parham*, 403 F.2d 12, 16 (8th Cir. 1968); *Kemp v. Beasley*, 352 F.2d 14, 23 (8th Cir. 1965); *and* *Rogers v. Paul*, 345 F.2d 117, 125-26 (8th Cir.), *vacated per curiam*, 382 U.S. 198 (1965). *But cf.* *Cato v. Parham*, 293 F. Supp. 1375, 1378 (E.D. Ark.), *aff'd*, 403 F.2d 12 (8th Cir. 1968) (need for "judicial prodding" found sufficient to justify a fee award).

Other courts have sometimes adopted similar views. *See, e.g.*, *Bridgeport Guardians Inc. v. Members of Bridgeport Civil Serv. Comm'n*, 497 F.2d 1113 (2d Cir. 1974), *cert. denied*, 421 U.S. 991 (1975); *Donahue v. Staunton*, 471 F.2d 475 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973); *Rolfe v. County Bd. of Educ.*, 391 F.2d 77 (6th Cir. 1968); *Palmer v. Columbia Gas Co.*, 375 F. Supp. 634 (N.D. Ohio 1974); *Smith v. City of East Cleveland*, 363 F. Supp. 1131, 1151 (N.D. Ohio 1973); *Commonwealth of Pennsylvania v. Charleroi Area School Dist.*, 63 F.R.D. 440 (E.D. Pa. 1973); *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala.), *aff'd*, 409 U.S. 942 (1972).

37. *See* *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), first applied to employment discrimination in *Waters v. Wisconsin Steel Works of International Harvester Co.*, 427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970). *See also* Note, *Remedies—Attorney Fees Should be Awarded to a Successful Plaintiff Suing Under the Property Rights Section of the 1866 Civil Rights Act*, 50 TEXAS L. REV. 204 (1971). Judge Friendly disagrees; noting the paucity of cases proceeding solely under the 1866 act, he mused, "one must wonder where the suitors are." H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 80 (1973).

38. Act of Mar. 24, 1972, Pub. L. No. 92-261, 86 Stat. 103, *amending* 42 U.S.C. §§ 2000e to e-15 (1970) (codified at 42 U.S.C. §§ 2000e to e-6, e-8, e-9, e-13 to e-17 (Supp. IV, 1974)). For the first time, governmental employers were brought within Title VII's coverage by the amendments. *See* Comment, *Retroactivity and the Equal Employment Opportunity Act*, 1975 U. ILL. L.F. 106 (1975). A claim of sovereign immunity by the federal government cannot be sustained in light of the section 706(k) proviso. *See* *Van Hoomissen v. Xerox Corp.*, 503 F.2d 1131 (9th Cir. 1974); *Day v. Weinberger*, 9 CCH EPD ¶ 10,074 (D.D.C. 1975), *vacated sub nom.* *Day v. Mathews*, 530 F.2d 1083 (D.C. Cir. 1976). The Justice Department has announced that it will no longer oppose the award of fees against the United States in suits brought under Title VII by federal employees. Asst. Atty. Gen. letter, May 6, 1975, CCH EMPLOYMENT PRACTICES GUIDE ¶ 5327. As to state governments, however, the governmental defendant can rely upon the implications of *Edelman v. Jordan*, 415 U.S. 651 (1974), which holds that the eleventh amendment prevents federal courts from awarding damages against the state. Courts disagree on *Edelman's* applicability to attorneys' fees. *See, e.g.*, *Wade v. Mississippi Coop. Ext. Serv.*, 528 F.2d 508 (5th Cir. 1976); *Jordan v. Gilligan*, 500 F.2d 701 (6th Cir. 1974); *Massachusetts Bd. of Retirement v. Murgia*, 386 F. Supp. 179 (D. Mass. 1974) (three-judge court), *aff'd mem.*, 421 U.S. 972 (1975); *Kirkland v. Department of Correctional Serv.*, 374 F. Supp. 1361 (S.D.N.Y. 1974), *modified*, 520 F.2d 420 (2d Cir. 1975). The different facets of the *Edelman* doctrine are reviewed in Leed, *The Development of the Fee-Shifting Doctrine: Attorneys' Fees for the Private Attorney General*, 11 LAW NOTES 39 (1975). A three-judge court in *Fitzpatrick v. Bitzer*, 390 F. Supp. 278, 289 (D. Conn. 1974), denied fee-shifting saying: "While the amount sought in this case is not prohibitive, once the flood-

No matter what the statutes say about the "prevailing party,"<sup>39</sup> the courts have looked askance at requests by successful defendants for the award of their attorneys' fees as costs. Only a few reported decisions have made such awards. In one case, *United States v. Jacksonville Terminal Co.*,<sup>40</sup> the government was taxed with attorneys' fees, but the award was mooted by reversal.<sup>41</sup> A bellwether decision is the Ninth Circuit's approval of an award against the EEOC in *Van Hoomissen v. Xerox Corp.*,<sup>42</sup> in which the court rejected a Commission argument that the word "costs" in section 706(k) has two separate meanings, one of which does not include attorneys' fees.

Few employment cases have awarded attorneys' fees to a prevailing defendant when plaintiffs were individuals or a class of individuals. The reasoning of *Richardson v. Hotel Corp. of America*<sup>43</sup> is typical:

Having prevailed, the defendant seeks to recover its attorney's fees from the indigent plaintiff who proceeded in forma pauperis. What practical purpose such an award would serve in this matter is inscrutable, though it might conceivably serve as precedent in *terrorem* to discourage other Title VII plaintiffs.

. . . The statutory language may . . . be broad enough in terms to permit a successful defendant to recover attorney's fees, but it is unnecessary to decide that here. In any event, the award is discretionary with the court. The court finds that the award is not justified here for, so far as can be determined from the record,

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gates are opened, adequate control no longer prevails." The Supreme Court has now resolved this issue by concluding that *Edelman* does not bar the recovery of either back pay or attorney fees from the state in light of the congressional waiver of immunity contained in the 1972 Amendments to Title VII. *Fitzpatrick v. Bitzer*, 96 S. Ct. 2666 (1976).

See also Note, *Awarding Attorneys' Fees Against a State Official Sued in His Official Capacity After Edelman v. Jordan*, 55 B.U.L. REV. 228 (1975); Comment, *Federal Powers and the Eleventh Amendment: Attorneys' Fees in Private Suits Against the State*, 63 CALIF. L. REV. 1167 (1975); Comment, *Edelman v. Jordan: The Case of the Vanishing Retroactive Benefit and the Reappearing Defense of Sovereign Immunity*, 12 HOUSTON L. REV. 891 (1975); Note, *Award of Attorneys' Fees Against a State Barred by Eleventh Amendment: Jordan v. Gilligan*, 29 SW. L.J. 454 (1975); Comment, *Who Is to Guard the Guardians: Awarding Attorneys' Fees Against a State Defendant in Public Benefit Litigation*, 9 U. SAN FRANCISCO L. REV. 465 (1975).

39. See Annot., 66 A.L.R.3d 1115 (1975), and Annot., 66 A.L.R.3d 1087 (1975), for discussions of the difficulty of determining whether a party has been "successful" or has "prevailed."

40. 316 F. Supp. 567 (M.D. Fla. 1970).

41. 451 F.2d 418 (5th Cir. 1971), cert. denied, 406 U.S. 906 (1972).

42. 503 F.2d 1131 (9th Cir. 1974). "As useful as legislative history is as an aid to statutory construction, however, it should not be used to torture the plain meaning of the words of the statute as finally enacted." *Id.* at 1133. *Accord*, *EEOC v. Western Elec. Co.*, 10 CCH EPD ¶ 10,370 (D. Md. 1975).

43. 332 F. Supp. 519 (E.D. La. 1971), *aff'd mem.*, 468 F.2d 951 (5th Cir. 1972).

the plaintiff proceeded in good faith on the advice of competent counsel to attempt to vindicate statutory rights.<sup>44</sup>

*Richardson* epitomizes the maxim that "hard cases make bad law." Naturally an award of counsel fees against an indigent plaintiff would be a fruitless exercise; nonetheless, there are cases in which the acts of plaintiff or of plaintiff's counsel justify an award.

Without recognizing this distinction, other decisions echo the *Richardson* doctrine.<sup>45</sup> Unaccountably, the doctrine is applied in cases brought by the EEOC,<sup>46</sup> and reaches its outer limits in *Stambler v. Dillon*,<sup>47</sup> a pro se action pursuant to the fifth, sixth, thirteenth and fourteenth amendments and 42 U.S.C. sections 1981, 1982, 1983, 1985, 1986 and 1994. Although the court determined the suit to be "unfounded," "probably maintained in bad faith," "frivolous and vexatious," and to include "reckless accusations" unsupported by facts, defendants had to bear their own costs because the litigation was "not . . . so unconscionably oppressive and harassing to warrant the harsh sanctions sought by defendants."<sup>48</sup> Apparently, it all depends on whether you're pitching or catching.<sup>49</sup>

These decisions that rely on the good faith of plaintiff stand in stark contrast to repeated statements that the good faith of *defendant* is meaningless in the assessment of attorneys' fees under Title VII.<sup>50</sup> As

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44. *Id.* at 521-22.

45. *Paddison v. Fidelity Bank*, 60 F.R.D. 695 (E.D. Pa. 1973); *Ward v. Firestone Tire & Rubber Co.*, 260 F. Supp. 579 (W.D. Tenn. 1966). *See also* *Haythe v. Decker Realty Co.*, 468 F.2d 336 (7th Cir. 1972) (involving 42 U.S.C. sections 1982, 3604 & 3606).

46. *United States Steel Corp. v. United States*, 385 F. Supp. 346 (W.D. Pa. 1974), *aff'd*, 519 F.2d 359 (3d Cir. 1975).

47. 302 F. Supp. 1250 (S.D.N.Y. 1969).

48. *Id.* at 1257.

49. This statement is true despite the fact that Congress in 1972 expressly rejected a proposed amendment to provide attorneys' fees to the "prevailing plaintiff." 1972 U.S. CODE CONG. & AD. NEWS 2166, 2174 (92d Cong., 2d Sess.). Likewise, a 1970 proposal to allow costs of up to \$1000 for unsuccessful plaintiffs who had brought suit in reliance upon an EEOC probable cause determination was not enacted. *See Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1255 n.330 (1971).

50. *E.g.*, *LeBlanc v. Southern Bell Tel. & Tel. Co.*, 333 F. Supp. 602, 611 (E.D. La. 1971), *aff'd per curiam*, 460 F.2d 1228 (5th Cir.), *cert. denied*, 409 U.S. 990 (1972); *Ridinger v. General Motors Corp.*, 325 F. Supp. 1089, 1098, 1100 (S.D. Ohio 1971), *rev'd*, 474 F.2d 949 (6th Cir. 1972); *Local 246, Utility Workers v. Southern Cal. Edison Co.*, 320 F. Supp. 1262, 1267 (C.D. Cal. 1970); *Richards v. Griffith Rubber Mills*, 300 F. Supp. 338, 341 (D. Ore. 1969). *But see* *Jones v. New York City Human Resources Ad.*, 391 F. Supp. 1064 (S.D.N.Y. 1975), *aff'd*, 528 F.2d 696 (2d Cir. 1976) (fees denied when defendants had sincerely tried to develop a "valid" test); *Twitty v. Vogue Theatre Corp.*, 242 F. Supp. 281 (M.D. Fla. 1965) (Title VII fees re-

the judge in *Rosen v. Public Service Electric & Gas Co.* put it, counsel fees "should reflect not only an hourly compensation but also that the attorney's achievement in successfully prosecuting a new and difficult case has conferred benefits upon a class of individuals exceeding those by whom he is retained."<sup>51</sup> Decisions like *Rosen* miss the mark. Certainly the "common benefit" concept is a long-established exception to the American rule, but by its very terms that concept is inapplicable to the usual Title VII action in which an employee or class of employees sues an employer, a labor union, or both. Under the common benefit theory, "a successful litigant confers a 'common benefit' on an ascertainable group of persons and a fee award will operate to spread the litigation costs proportionately among them."<sup>52</sup> But under Title VII, it is not the benefited "ascertainable group" but the employer and the union who bear these expenses.<sup>53</sup>

Less result-oriented analyses of Title VII fee-shifting recognize that a successful defendant should sometimes recover his costs. There has been a recent upsurge of trial court decisions that tax *plaintiffs* with the fees of *defendants* and that recognize the inherent unfairness of the "one-way street" approach. In *Ash v. Hobart Manufacturing Co.*,<sup>54</sup> a successful employer-defendant applied for taxation of its attorneys' fees against plaintiffs, individual employees and the United Auto Workers (UAW). Recognizing that the Ninth Circuit's decision in *Van Hoomissen*<sup>55</sup> had allowed a fee award against the EEOC and finding no express authority for such fee-shifting as to individual plaintiffs, the court

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duced by 80% when defendants in good faith had believed the Act to be unconstitutional); cf. *Young v. International Tel. & Tel. Co.*, 56 F.R.D. 7 (E.D. Pa. 1972) (victory in merely establishing existence of jurisdiction not found to justify attorneys' fees).

51. 328 F. Supp. 454, 468 (D.N.J. 1971), *aff'd*, 477 F.2d 90 (3d Cir. 1973); cf. *Brunwasser v. Suave*, 400 F.2d 600 (4th Cir. 1968); *Featherstone v. Barash*, 382 F.2d 641 (10th Cir. 1967).

52. *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 1, 170 (1975), citing *Hall v. Cole*, 412 U.S. 1, 15 (1973), and *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 393-94 (1970); see text accompanying notes 65-72 *infra*.

53. The Title VII plaintiffs' bar strongly disagrees: "The individual, case by case approach which has been the backbone of enforcement of federal equal employment legislation is time consuming, expensive and often a frustrating experience for the victims of discrimination." Belton, *How to Settle a Discrimination Case: An Individual Viewpoint*, PROCEEDINGS OF 28TH ANNUAL N.Y.U. CONF. ON LABOR 111, 112 (1975). Certainly it is expensive for defendant and probably for plaintiffs' counsel, but the accuracy of that statement, if it refers to pecuniary expense to *plaintiffs*, is doubtful.

54. 10 CCH EPD ¶ 10,444 (S.D. Ohio 1975).

55. *Van Hoomissen v. Xerox Corp.*, 503 F.2d 1131 (9th Cir. 1974), discussed in text accompanying note 42 *supra*. For a securities fraud case taxing fees against unsuccessful plaintiffs, see *Browning Debenture Holders' Comm. v. DASA Corp.*, CCH FED. SEC. L. REP. ¶ 95,405 (S.D.N.Y. 1976).

nonetheless expressed its belief that such an award could be made. While employee plaintiffs were not ordered to bear the employer's attorneys' fees because "the interest of justice would not be served" by such an award, "the actions of plaintiff union throughout this litigation have been such that the Court is of the opinion that said union has been substantially responsible for the existence of this fruitless litigation in a manner which requires it to share with defendant the costs thereof."<sup>56</sup> The UAW was ordered to reimburse Hobart for half of its legal expenses.

Similarly, another trial court ordered an *individual* plaintiff (a university professor with a comfortable income) to repay her employer's legal fee incurred in defense of a baseless Title VII action that had claimed both sex and race discrimination.<sup>57</sup> The court characterized plaintiff's testimony as "an unmitigated tissue of lies . . . motivated solely by spleen."<sup>58</sup>

These cases are far from commonplace; federal district judges are less than impressed with a defendant's prayer for reimbursement when plaintiff's claim is not utterly frivolous or malicious.<sup>59</sup> In most cases, therefore, the best a Title VII defendant can hope for is to obtain a judgment in its behalf and to absorb its own costs.<sup>60</sup> Even this result

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56. 10 CCH EPD ¶ 10,444, at 5929.

57. *Carrion v. Yeshiva Univ.*, 397 F. Supp. 852 (S.D.N.Y. 1975), *aff'd*, 535 F.2d 722 (2d Cir. 1976).

58. 397 F. Supp. at 852-53. Other recent cases approving fee-shifting from defendant to plaintiff are *Lee v. Chesapeake & O. Ry.*, 389 F. Supp. 84, 85 (D. Md. 1975) (union defending itself against "baseless action" awarded attorneys' fees and summary judgment, but similar prayer by employer denied); *EEOC v. C & D Sportswear Corp.*, 398 F. Supp. 300 (M.D. Ga. 1975); *Robinson v. KMOX-TV*, 10 CCH EPD ¶ 10,512 (E.D. Mo. 1975); *Mayti v. Beer Bottlers Local 187*, 392 F. Supp. 60 (E.D. Mo. 1974). *Contra*, *United States Steel Corp. v. United States*, 385 F. Supp. 346 (W.D. Pa. 1974), *aff'd*, 519 F.2d 359 (3d Cir. 1975) (no fees to employer prevailing in EEOC demand for documents); *EEOC v. McLean Trucking Co.*, 64 F.R.D. 643 (W.D. Tenn. 1974) (awarding costs but denying fees); *Robinson v. Union Carbide Corp.*, 380 F. Supp. 731, 733, 734 n.2, 735 (S.D. Ala. 1974) (after characterization of efforts of plaintiff's counsel as "utilizing the courts to establish pet theories," sending "runners" to solicit potential plaintiffs in violation of ABA Canons 28 and 42, and using "manipulatable statistics," the court entered judgment for defendant and taxed costs to plaintiffs, but denied a prayer for attorneys' fees); *Gazan v. Vadsco Sales Corp.*, 6 F. Supp. 568, 568 (E.D.N.Y. 1934) ("Every fisherman, including novices, realizes that any one who contemplates a fishing trip must be prepared to pay the expenses.").

59. *Wright v. Stone Container Corp.*, 524 F.2d 1058, 1063-64 (8th Cir. 1975) ("We agree with the plaintiff that an award of attorneys' fees to defendants in cases such as this would discourage future litigation under Title VII."); *Barton v. ITE Imperial Corp.*, Civil No. C75-1682A (N.D. Ga., Jan. 26, 1976); *Turner v. Texas Instruments, Inc.*, 401 F. Supp. 1179 (N.D. Tex. 1975).

60. A number of reported decisions have allowed prevailing defendants their costs, but not attorneys' fees. See, e.g., *Whitney v. W.R. Grasle Co.*, 3 CCH EPD ¶ 8253

may be difficult to attain in light of the Eighth Circuit's interpretation of the "prevailing party" concept:

Although we find no injunction warranted here, we believe [plaintiff's] lawsuit acted as a catalyst which prompted the appellee to take action implementing its own fair employment policies and seeking compliance with the requirements of Title VII. In this sense, [plaintiff] performed a valuable public service in bringing this action. Having prevailed in his contentions of racial discrimination against blacks generally prior to February, 1967, [he] is entitled to reasonable attorney's fees, including services for this appeal . . . .<sup>61</sup>

This language is particularly surprising in light of the same court's attitude in section 1983 cases.<sup>62</sup>

### III. THE CLASS ACTION PROBLEM

A complicating factor in employment discrimination cases is the tendency for such litigation to proceed as a class action. The award of large attorneys' fees in employee class actions has been applauded by employees and their attorneys, and criticized by employers as a procedural perversion of the judicial system.

In the words of Judge Herlands, "Study of the subject of counsel fees in . . . derivative and other class litigation . . . [has given] rise to a veritable literature."<sup>63</sup> In the class action context, commentators

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(D. Ore. 1969), *aff'd per curiam*, 442 F.2d 1346 (9th Cir. 1971). Costs were taxed against the Maryland Commission on Human Relations in *Ferguson v. United Parcel Serv.*, 270 Md. 202, 311 A.2d 220 (1973). Note the language of *Woods v. North American Rockwell Corp.*, 6 CCH EPD ¶ 8792, at 5402 (N.D. Okla. 1971), *aff'd*, 480 F.2d 644 (10th Cir. 1973): "Defendants, having waived recovery of their reasonable attorneys' fees pursuant to 42 U.S.C. Sec. 2000e-(k) [sic] shall have their costs." *But see* *Head v. Timken Roller Bearing Co.*, 6 CCH EPD ¶ 8679 (S.D. Ohio 1972), *rev'd in part*, 486 F.2d 870 (6th Cir. 1973) (although defendants prevailed, the costs were borne equally by the parties). The court in *United States v. Lee Way Motor Freight, Inc.*, 7 CCH EPD ¶ 9067 (W.D. Okla. 1973), stated that cost-splitting was a way of punishing the Government, which would have received its costs had the Attorney General not violated a court order. A detailed discussion of the costs question is found in *Banks v. Seaboard Coast Line R.R.*, 7 CCH EPD ¶ 9102 (N.D. Ga. 1974).

61. *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421, 429-30 (8th Cir. 1970); *accord*, *Fogg v. New England Tel. & Tel. Co.*, 346 F. Supp. 645 (D.N.H. 1972). *Contra*, *Ackerman v. Board of Educ.*, 387 F. Supp. 76, 81-83 (S.D.N.Y. 1974).

62. See text accompanying note 36 *supra*.

63. *Cloth v. Hyman*, 146 F. Supp. 185, 193 n.6 (S.D.N.Y. 1956); see Annot., 38 A.L.R.3d 1384 (1971). See also 3B J. MOORE, FEDERAL PRACTICE ¶ 23.91, at 1701-03 (2d ed. 1975); Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 HARV. L. REV. 658 (1956); 13 STAN. L. REV. 141 (1960). Two recent decisions lucidly detail one court's approach to class action attorneys' fees. In *Kiser v. Miller*, 364 F. Supp. 1311 (D.D.C. 1973), the court set out nine criteria for assessment of the value of an attorney's services to the class of retired coal miners suing the UMW

make statements such as "[a]ttorneys' fees ought to be awarded, as a matter of course, in all civil rights and constitutional litigation,"<sup>64</sup> and refer to attorneys' fee awards as "therapeutic."<sup>65</sup>

In a study on class actions conducted at the behest of the Senate Commerce Committee,<sup>66</sup> it was found that "[a]ttorneys' fees were often substantial and accounted for the greatest reduction in the recovery ultimately received by the class."<sup>67</sup> Out of thirty-two cases studied, fees in twenty exceeded \$100,000, and fees ranged from less than twenty-five percent to more than fifty percent of total recovery. The study concluded: "There is no way to assess whether attorneys were grossly overcompensated but the question is legitimately raised when fees reach such great amounts."<sup>68</sup> On the other hand, compensation of this nature is precisely the reason that a class action may be carried on when no individual litigation would be entertained by an attorney.<sup>69</sup> Such cases are, in fact, the basis for the "common benefit" exception to the Ameri-

for pension fund recovery. In the second case, *Larionoff v. United States*, 365 F. Supp. 140 (D.D.C. 1973), Judge Richey applied these tests again to a class of Navy petty officers seeking re-enlistment bonuses. Compare the Third Circuit's two reversals on the ground of incomplete evidentiary presentation in *Merola v. Atlantic Richfield Co.*, 493 F.2d 292 (3d Cir. 1974), *appeal after remand*, 515 F.2d 165, (3d Cir. 1975), with the Tenth Circuit's denial of a fee award in *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263, 273 (10th Cir. 1975).

64. Falcon, *Award of Attorneys' Fees in Civil Rights and Constitutional Litigation*, 33 MD. L. REV. 379, 420 (1973).

65. Indeed, Justice Harlan discussed these "corporate therapeutics" in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 396 (1970). See also Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 HARV. L. REV. 658 (1956); Hornstein, *The Counsel Fee in Stockholder's Derivative Suits*, 39 COLUM. L. REV. 784 (1939); Note, *Attorneys' Fees in Shareholder Derivative Suits: The Substantial Benefit Rule Re-examined*, 60 CALIF. L. REV. 164 (1972); Note, *Attorneys' Fees and the Common Fund Doctrine*, 10 GONZAGA L. REV. 236 (1974); Note, *Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest*, 24 HAST. L.J. 733 (1963); Note, *Reimbursement for Attorneys' Fees From the Beneficiaries of Representative Litigation*, 58 MINN. L. REV. 933 (1974).

66. STAFF OF SENATE COMM. ON COMMERCE, 93D CONG., 2D SESS., CLASS ACTION STUDY (Comm. Print 1974).

67. *Id.* at 29.

68. *Id.* at 29-30. For examples of such class action fees awards see, *inter alia*, *Miller v. Mackey Int'l, Inc.*, 515 F.2d 241 (5th Cir. 1975) (per curiam) (Securities Act and Securities Exchange Act; \$20,500 fee vacated because counsel not given opportunity to show adequacy of \$425,000 damage settlement); and *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 1975-2 Trade Cas. ¶ 60,551 (S.D.N.Y. 1975), *rev'd*, 1976-1 Trade Cas. ¶ 60,843 (2d Cir. 1976) (Sherman and Clayton Acts, \$325,000). Judge Friendly has characterized some recoveries as "inordinate even in these days of high legal fees." H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973).

69. See *Kramer v. Scientific Control Corp.*, 64 F.R.D. 558 (E.D. Pa. 1974) (defendant's claim that attorney-plaintiffs brought suit as class action with motive of obtaining counsel fees rejected). *But cf.* *Ash v. Brunswick Corp.*, 405 F. Supp. 234 (D. Del. 1974).

can rule.<sup>70</sup> This situation can raise curious questions: in a class action for damages or back pay,<sup>71</sup> a percentage of the possible recovery is, under normal circumstances, the goal toward which plaintiff's counsel is striving. The normal understanding is embodied in a contingent fee contract. But the award of attorneys' fees by the court, which is also designed to encourage lawyers to accept such cases, may well be too much of a good thing. Even advocates of a total rejection of the American rule may find such double compensation untenable; those who favor indemnity<sup>72</sup> would not endorse double indemnity.

Consequently, the judicial attitude toward such contractual arrangements is, at best, checkered. Some early decisions under the Fair Labor Standards Act expressed the opinion that if the contractual fee is in addition to that conferred by the court, the agreement is invalid,<sup>73</sup> while others either skirted the issue,<sup>74</sup> denied the additional request for court-awarded fees,<sup>75</sup> or concluded that the prior arrangements between attorney and client should not influence the court's determination.<sup>76</sup> More recent decisions under the act seem to be inclined toward plaintiff's point of view; for example, in *Houser v. Matson*,<sup>77</sup> the Ninth Circuit found an abuse of discretion in a trial court's one-dollar award to plaintiff's counsel who also had a contingent fee agreement with his client.<sup>78</sup> Comparable standards are utilized in antitrust litigation.<sup>79</sup>

70. See text accompanying notes 51-52 *supra*.

71. The terms are not identical. See *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971); Edwards, *The Back Pay Problem in Title VII Actions: Problems of Procedure*, 8 GA. L. REV. 781, 791 (1974); Mott, *Harnessing Class Back Pay Relief under Title VII: A Return to the Theory of Compensation*, 4 CLASS ACTION REP. 169 (Mar.-Apr. 1975).

72. See Mause, *Winner Takes All: A Re-examination of the Indemnity System*, 55 IOWA L. REV. 26, 29 (1969), criticized in *Equal Access*, *supra* note 4, at 652.

73. *Harrington v. Empire Constr. Co.*, 167 F.2d 389 (4th Cir. 1948); *Burke v. Mesta Mach. Co.*, 79 F. Supp. 588 (W.D. Pa. 1948).

74. *Skidmore v. Casale, Inc.*, 160 F.2d 527 (2d Cir.), cert. denied, 331 U.S. 812 (1947); *Aucoin v. Mystic Waste Co.*, 55 F. Supp. 672 (D. Mass. 1944).

75. *Miller v. Fox-Pelletier Int'l Detective Agency*, 13 CCH Lab. Cas. ¶ 64,167 (W.D. Tenn. 1947).

76. *Ivey v. Foremost Dairies*, 106 F. Supp. 793 (W.D. La. 1952), modified, 204 F.2d 186 (5th Cir. 1953). *Contra, In re Mullendore*, 527 F.2d 1031 (10th Cir. 1975) (Bankruptcy Act).

77. 447 F.2d 860 (9th Cir. 1971).

78. The decision of the court of appeals was prompted by the fact that the trial court had found defendant liable for a wilful violation of the Act, coupled with assurances by plaintiff's attorney that any court-awarded fees would be credited against his contractual 20% contingency. *Id.* at 863-64. See also *International Ass'n of Machinists Lodge 1194 v. Sargent Indus.*, 63 F.R.D. 623 (N.D. Ohio 1974), *rev'd*, 522 F.2d 280 (6th Cir. 1975).

79. *Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 421 F.2d 61 (1st Cir. 1969); *Gossner v. Cache Valley Dairy Ass'n*, 307 F. Supp. 1090 (D. Utah 1970);



However, the existence of a contingent fee contract in a Title VII case is not susceptible to the same analysis, as is exhibited by a 1974 Fifth Circuit ruling,<sup>80</sup> discussed below.<sup>81</sup>

A strong argument can be made that, when back pay is awarded to a class of employees, plaintiffs' lawyers should be compensated from the fund so created. This position, borrowed from the antitrust field,<sup>82</sup> has been utilized in few labor cases,<sup>83</sup> none of which involved employment discrimination. It is unlikely that the judiciary would accept this argument in a Title VII case, although it may have merit in a suit under the 1866 Act. It should be remembered that a Title VII attorney's fee is

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Springer, *Fee Awards in Antitrust Litigation*, 44 ANTI-TRUST L.J. 97 (1975). The ability of the class to reimburse its attorney for costs has been held to be nondiscoverable. *Sayre v. Abraham Lincoln Fed. Sav. & Loan Ass'n*, 65 F.R.D. 379 (E.D. Pa. 1974); see *P.D.Q., Inc. v. Nissan Motor Corp.*, 61 F.R.D. 372, 378 n.6 (S.D. Fla. 1973). See also Hausmann, *Legal Ethics and Litigation Tactics*, 2 CLASS ACTION REP. 3 (1973); notes 84 & 87 *infra*.

80. *Johnson v. Georgia Hwy. Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). See also *Barth v. Bayou Candy Co.*, 379 F. Supp. 1201 (E.D. La. 1974).

81. See text accompanying notes 163-67 *infra*. Attempting discovery about such contingent fee (or retainer) agreements runs head-on into the attorney-client privilege. While plaintiffs' counsel have tried to delve into the amounts paid by defendants, see cases cited note 79 *supra*, apparently no reciprocity was contemplated. Such discovery was forbidden by writ of mandamus in *Sanderson v. Winner*, 507 F.2d 477 (10th Cir. 1974), *cert. denied*, 421 U.S. 914 (1975). Compare *Ralson v. Volkswagenwerk, A.G.*, 61 F.R.D. 427 (W.D. Mo. 1973), with cases cited note 79 *supra*. See also *United States v. Jones*, 517 F.2d 666 (5th Cir. 1975). But the attorney-client privilege does not, "[i]n the absence of special circumstances," apply to the amount paid or owed to an attorney by his client. *United States v. Haddad*, 527 F.2d 537, 538 (6th Cir. 1975); *Moberly v. Herboldsheimer*, 276 Md. 211, 345 A.2d 855 (1975).

82. *United States v. ASCAP*, 466 F.2d 917 (2d Cir. 1972); *Quirke v. Chessie Corp.*, 368 F. Supp. 558 (S.D.N.Y. 1974); *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 341 F. Supp. 1077 (E.D. Pa. 1972), *aff'd*, 487 F.2d 161 (3d Cir. 1973); Comment, *Attorneys' Fees in Individual and Class Action Antitrust Litigation*, 60 CALIF. L. REV. 1656 (1972); Note, *Reimbursement for Attorneys' Fees From the Beneficiaries of Representative Litigation*, 58 MINN. L. REV. 933 (1974); Comment, *Attorneys—New Standard, Reflecting the Nature of Action, Applied to Determine Reasonable Fee Award for Class Action Attorneys*, 8 SUFFOLK U.L. REV. 1354 (1974). The class generally pays only to the extent it benefits. *Kahan v. Rosenstiel*, 424 F.2d 161, 174-75 n.16 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970); *Dillon v. Berg*, 351 F. Supp. 584 (D. Del. 1972), *vacated*, 482 F.2d 1237 (3d Cir. 1973). But see *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188 (6th Cir. 1974), *cert. denied*, 422 U.S. 1048 (1975).

83. *Powell v. Pennsylvania R.R.*, 267 F.2d 241 (3d Cir. 1959) (contempt of NRAB order); *Paris v. Metropolitan Life Ins. Co.*, 94 F. Supp. 792 (S.D.N.Y. 1947) (securing wage increase in behalf of class of employees); cf. *Leisner v. New York Tel. Co.*, 398 F. Supp. 1140 (S.D.N.Y. 1974) (settlement of Title VII case; fees to be paid "from the settlement fund and not from the class members"). At least one court has denied a fee award when the case was settled, relying on the language of section 4 of the Clayton Act (15 U.S.C. § 15 (1970)), which provides for fees on "judgment." *Byram Concretanks, Inc. v. Warren Concrete Prods. Co.*, 374 F.2d 649 (3d Cir. 1967). But in derivative actions, since the shareholders "own" the corporation, no "fund" is needed. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970).

"taxed as costs" and not paid by plaintiff. Payment out of the fund would thus diminish the recovery of each class member and that in turn would undermine the "public policy" objectives set forth in *Newman*.<sup>84</sup>

On the other hand, grave doubts have been cast upon the soundness of the *Newman* rationale.<sup>85</sup> A real barrier to utilization of a "common benefit" procedure for spreading Title VII class action costs over the entire class is the statutory language itself, which requires that attorneys' fees, if *awarded*, be "taxed as costs." Since Title VII did not expressly envision class actions,<sup>86</sup> a court must strain to award fees in the face of the mandate of section 706(k); such straining could be avoided if Title VII were amended to allow the awarding of attorneys' fees, but that solution is highly improbable. Little is accomplished by analyzing Title VII to determine what "exception" to the American rule is embodied in section 706(k). The legislative history, which has been consistently ignored by the courts,<sup>87</sup> is of little help.

#### IV. CONVENTIONAL LABOR LAW MEETS NEWMAN

The National Labor Relations Act, the Railway Labor Act and other "conventional" labor statutes do not, as a rule, permit fee-shifting. Nonetheless, both the courts and the NLRB have, in appropriate cases, taxed the prevailing party's fees against the losing adversary. The "public interest" rationale for fee-shifting is present in the class action situation; the individual complaint or grievance in the NLRA or RLA context, in which class actions are rare, does not inspire this rationale or leniency in the award of counsel fees for plaintiff. This has historically

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84. Note, however, that in *Powell v. Pennsylvania R.R.*, 267 F.2d 241 (3d Cir. 1959), the grant of attorneys' fees was mandated by section 3 of the Railway Labor Act (45 U.S.C. § 153 (¶ 'First') (p) (1970)), which says that the petitioner shall, if he prevails, "be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit." Cf. *Tischler v. Airline Pilots Ass'n*, 57 CCH Lab. Cas. ¶ 12,538 (S.D. Fla. 1968) (granting attorneys' fees for plaintiffs in a seniority merger dispute under section 2 of the Railway Labor Act); *Walker v. Grand Int'l Bhd. of Locomotive Eng'rs*, 186 Ga. 811, 199 S.E. 146 (1938). *But see* *Burlington Northern Inc. v. American Ry. Supervisors Ass'n*, 527 F.2d 216 (7th Cir. 1975); *REA Express, Inc. v. Brotherhood of Ry., Airline & S.S. Clerks*, 77 CCH Lab. Cas. ¶ 10,886 (S.D.N.Y. 1975); *United Transp. Union v. Patapsco & Back Rivers R.R.*, 59 F.R.D. 374 (D. Md. 1974). A pro se plaintiff gets no fee award, *Smith v. United Press Int'l*, 8 CCH EPD ¶ 9512 (S.D.N.Y. 1974).

85. See text accompanying notes 195-214 *infra*.

86. *Hall v. Werthan Bag Corp.*, 251 F. Supp. 184 (M.D. Tenn. 1966); Edwards, *The Back Pay Remedy in Title VII Class Actions: Problems of Procedure*, 8 GA. L. REV. 781, 785-87 (1974).

87. See, e.g., *Quarles v. Phillip Morris, Inc.*, 279 F. Supp. 505, 515-16 (E.D. Va. 1968),

been true; however, the current judicial trend indicates an increasing proclivity for the allowance of attorneys' fees in traditional labor cases.

#### A. LMRA Section 303: Strike Damages

Section 303 of the Labor-Management Relations Act<sup>88</sup> provides a federal forum for the recovery of damages suffered by virtue of violations of the secondary boycott provisions of section 8(b)(4) of the National Labor Relations Act.<sup>89</sup> The language of section 303(b) restricts such recovery to "the damages . . . sustained and the cost of the suit."<sup>90</sup> Courts have generally interpreted this as precluding the award of either punitive damages<sup>91</sup> or attorneys' fees.<sup>92</sup>

The major appellate decisions that have approved the award of counsel fees as strike damages have come from the Fifth Circuit. In *H.L. Robertson & Associates, Inc. v. Plumbers Local 519*,<sup>93</sup> the court affirmed a damage award for the employer consisting entirely of legal costs incurred in participation by the employer in unfair labor practice proceedings before the NLRB and the District of Columbia Circuit.<sup>94</sup> The argument of the union that attorneys' fees were "not proper elements of damage"<sup>95</sup> was flatly rejected: "Section 303 is compensatory in nature, and damages may be recovered only for actual losses sustained as a result of the unlawful secondary activity. . . . Under the circumstances of this case, the contention that the attorney's fees sustained by Robertson are not allowable is without merit."<sup>96</sup> The court cited *Sheet Metal Workers Local 223 v. Atlas Sheet Metal Co.*<sup>97</sup> for the

88. 29 U.S.C. § 187 (1970).

89. 29 U.S.C. § 158(b)(4) (1970).

90. 29 U.S.C. § 187(b) (1970).

91. *Local 20, Teamsters v. Morton*, 377 U.S. 252 (1964); *Harnischfeger Corp. v. Sheet Metal Workers Local 94*, 436 F.2d 351 (6th Cir. 1970); *UMW v. Patton*, 211 F.2d 742 (4th Cir.), *cert. denied*, 348 U.S. 824 (1954); *Navios Corp. v. National Maritime Union*, 236 F. Supp. 657 (E.D. Pa. 1964), *aff'd on other grounds*, 359 F.2d 853 (3d Cir.), *cert. denied*, 385 U.S. 900 (1966); *cf. Iodice v. Calabrese*, 345 F. Supp. 248 (S.D.N.Y. 1972) (nominal damages). *Contra*, *UMW v. Osborne Mining Co.*, 279 F.2d 716 (6th Cir.), *cert. denied*, 364 U.S. 881 (1960).

92. *Capeletti Bros. v. Local 487, Operating Eng'rs*, 514 F.2d 1239 (5th Cir. 1975); *Bryant Air Cond. & Heating Co. v. Sheet Metal Workers Local 541*, 472 F.2d 969 (8th Cir. 1973); *Local 984, Teamsters v. HumKo Co.*, 287 F.2d 231 (6th Cir.), *cert. denied*, 366 U.S. 962 (1961).

93. 429 F.2d 520 (5th Cir. 1970) (per curiam).

94. *Local 519, United Ass'n of Plumbers*, 171 N.L.R.B. 251 (1968), *enforced as modified*, 416 F.2d 1120 (D.C. Cir. 1969).

95. 429 F.2d at 521.

96. *Id.* at 522 (citations omitted).

97. 384 F.2d 101 (5th Cir. 1967).

proposition that attorneys' fees can be an element of damages.<sup>98</sup> That case said that "costs of reasonable action taken by Atlas of Jacksonville to effect a resumption of work may be recovered."<sup>99</sup> The court also noted: "[A]ttorneys' fees, in themselves, are not recoverable. They are only recoverable as an element of the damages inflicted by the illegal secondary activity. Thus, the attorneys' fees involved in prosecuting this suit may not be recovered as they are not a loss or expense incurred as a result of the picketing."<sup>100</sup>

Three days after *Robertson*, another Fifth Circuit panel decided *Abbott v. Local 142, United Associations of Pipe Fitters*.<sup>101</sup> Judge Godbold, who had also heard the *Robertson* case,<sup>102</sup> sustained without comment a damage award that included \$924.25 in counsel fees, citing *Robertson*, but remanded for determination of the possibility of double recovery. This rationale prevails in the Fifth Circuit<sup>103</sup> and has found scattered acceptance in other circuits.<sup>104</sup>

### B. Section 301 Actions: Breach of Contractual Duties

Actions pursuant to section 301 of the LMRA<sup>105</sup> generally fall into three categories: breach of a collective bargaining agreement,

98. It also cited *Gulf Coast Bldg. & Supply Co. v. IBEW Local 480*, 428 F.2d 121 (5th Cir.), cert. denied, 400 U.S. 942 (1970), but that case makes no reference to attorneys' fees. Perhaps the intended citation was *Gulf Coast Bldg. & Constr. Trades Council v. F.R. Hoar & Son, Inc.*, 370 F.2d 746 (5th Cir. 1967), which does allow recovery of attorneys' fees.

99. 384 F.2d at 110.

100. *Id.* at 110 n.10. See also *Construction Laborers Local 438 v. Hardy Eng'r & Constr. Co.*, 354 F.2d 24 (5th Cir. 1965); *Aircraft Maint. Employees Local 290 v. I.E. Schilling Co.*, 340 F.2d 286 (5th Cir. 1965), cert. denied, 382 U.S. 972 (1966); *Local 984, Teamsters v. HumKo Co.*, 287 F.2d 231 (6th Cir.), cert. denied, 366 U.S. 962 (1961).

101. 429 F.2d 786 (5th Cir. 1970).

102. *Robertson* was considered without oral argument, pursuant to 5TH CIR. R. 18. 429 F.2d at 521 n.1.

103. *Refrigeration Contractors, Inc. v. Local 211, United Ass'n of Plumbers*, 501 F.2d 668 (5th Cir. 1974); see *Vulcan Materials Co. v. United Steelworkers*, 316 F. Supp. 509 (N.D. Ala.), *aff'd*, 430 F.2d 446 (5th Cir. 1970), cert. denied, 401 U.S. 963 (1971); *American Potash & Chem. Corp. v. United Ass'n of Plumbers Local 714*, 304 F. Supp. 1144 (N.D. Miss. 1969).

104. *Mason-Rust v. Laborers' Local 42*, 435 F.2d 939 (8th Cir. 1970); *Plumbers Local 761 v. Matt J. Zaich Constr. Co.*, 418 F.2d 1054 (9th Cir. 1969); *contra*, *Sillman v. Teamsters Local 386*, 78 CCH Lab. Cas. ¶ 11,428 (9th Cir. 1976).

105. 29 U.S.C. § 185(a) (1970). This provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

failure to comply with an arbitration award, and breach of the duty of fair representation. An action for breach of contract under section 301 is similar to a section 303 case: both stem from claimed violation of section 7 rights. Since there is no language in the statute concerning costs or fees, the courts are forced to use the language of punitive damages, "arbitrary or capricious action"<sup>106</sup> or "bad faith"<sup>107</sup> to justify an award. The impact of *Newman* is felt, however, in opinions such as *Butler Manufacturing*.<sup>108</sup> "[A]n award of attorneys' fees . . . is justified as compensatory, rather than punitive . . . [and] constitutes an appropriate item of damage to be awarded by the courts in the enforcement of national labor policy."<sup>109</sup>

In section 301 actions that seek to compel compliance with arbitrators' awards, the grant of counsel fees is discretionary.<sup>110</sup> Thus, doubts about the meaning of recent court decisions,<sup>111</sup> split decisions by the arbitrator or the court,<sup>112</sup> or the question of "justification" for failure to comply<sup>113</sup> are often dispositive; conversely, arguable inconsistency of an

106. *New Park Mining Co. v. United Steelworkers Local 4264*, 288 F.2d 225 (8th Cir. 1961) (suit to compel checkoff); *Sheeder v. Eastern Express, Inc.*, 375 F. Supp. 655 (W.D. Pa. 1974); *United Papermakers v. Penntech Papers Co.*, 360 F. Supp. 236 (W.D. Pa. 1973); *Worcester Stamped Metal Co. v. United Steelworkers*, 234 F. Supp. 823 (D. Mass. 1964) (denied to both parties).

107. *International Union of Elec. Workers v. Peerless Pressed Metal Corp.*, 489 F.2d 768 (1st Cir. 1973); *De Arroyo v. Sindicato de Trabajadores Packinghouse*, 425 F.2d 281 (1st Cir. 1970), *cert. denied*, 400 U.S. 877 (1971); *Local 494, IBEW v. Artkraft, Inc.*, 375 F. Supp. 129 (E.D. Wis. 1974); *Holodnak v. Avco Corp.*, 381 F. Supp. 191 (D. Conn. 1974).

108. *United Steelworkers v. Butler Mfg. Co.*, 439 F.2d 1110 (8th Cir. 1971).

109. *Id.* at 1112-13. See also *Local 494, IBEW v. Artkraft, Inc.*, 375 F. Supp. 129 (E.D. Wis. 1974); cf. *International Ass'n of Machinists Lodge 1194 v. Sargent Indus.*, 522 F.2d 280 (6th Cir. 1975); *A.H. Belo Corp. v. Dallas Typographical Union*, 82 L.R.R.M. 2574 (N.D. Tex. 1972); *Retail Clerks v. Employers Committee*, 81 L.R.R.M. 2671 (D. Ore. 1972).

110. *Nashville Newspaper Printing Pressmen's Local 50 v. Newspaper Printing Corp.*, 518 F.2d 351 (6th Cir. 1975); *Local 4, IBEW v. Radio Thirteen-Eighty, Inc.*, 469 F.2d 610 (8th Cir. 1972); *Local 369, Bakery Workers v. Cotton Baking Co.*, 377 F. Supp. 1172 (W.D. La. 1974), *rev'd*, 514 F.2d 1235 (5th Cir. 1975), *petition for cert. filed* (No. 75-690); *Communications Workers v. Arkansas W. Gas Co.*, 329 F. Supp. 896 (W.D. Ark. 1971); *United Cement Workers Local 84 v. Penn-Dixie Cement Corp.*, 216 F. Supp. 667, 669 (E.D. Pa. 1963) ("not provided for under § 301"); *United Furniture Workers v. Fort Smith Couch & Bedding Co.*, 214 F. Supp. 164 (W.D. Ark. 1963).

111. *Bangor and Aroostook R.R. v. BLF&E*, 442 F.2d 812 (D.C. Cir. 1971); *Local 149, UAW v. American Brake Shoe Co.*, 298 F.2d 212 (4th Cir.), *cert. denied*, 369 U.S. 873 (1962); *UAW v. Buhr Mach. Tool Corp.*, 388 F. Supp. 1357 (E.D. Mich. 1974).

112. *Dallas Typographical Union, No. 173 v. A.H. Belo Corp.*, 372 F.2d 577 (5th Cir. 1967).

113. *International Ass'n of Machinists, Lodge 917 v. Air Prods. & Chems., Inc.*, 341 F. Supp. 874 (E.D. Pa. 1972); *International Union of Dist. 50, UMW v. James Julian*,

arbitrator's order and findings will not compel reversal of the grant of attorneys' fees.<sup>114</sup> The appellate decisions afford greater deference to the equitable discretion of the trial judge under section 301 than under the expressly discretionary provisions of Title VII. Additionally, the courts will not exercise pendent jurisdiction to award attorneys' fees under state law.<sup>115</sup>

Attorneys' fees are often awarded in class actions for breach of the duty of fair representation under section 301, although individual actions are unable to invoke the common benefit theory or inspire credence by the courts.<sup>116</sup> If an individual action for unfair representation is based upon some discriminatory classification, the "common benefit" theory is applicable and attorneys' fees may be recovered.<sup>117</sup> When a group of employees will benefit from the relief obtained, and the recovery is "substantial," plaintiffs' attorneys may be entitled to payment from that recovery upon equitable principles.

### C. LMRDA Section 102: Union Members' Rights

Section 102 of the Labor-Management Reporting and Disclosure Act (LMRDA)<sup>118</sup> provides a civil remedy to employees for union infringements of employee rights. Judicial attitudes toward such litigation have seen the same sort of metamorphosis as in the section 303 area,<sup>119</sup> changing from the rejection of fee-shifting<sup>120</sup> to the grant of

Inc., 341 F. Supp. 503 (M.D. Pa. 1972); *Parker v. Mercury Freight Lines, Inc.*, 307 F. Supp. 789 (N.D. Ala. 1969).

114. *International Union of Dist. 50, UMW v. Bowman Transp., Inc.*, 421 F.2d 934 (5th Cir. 1970). In *Amalgamated Transit Union Local 1384 v. Greyhound Lines, Inc.*, 529 F.2d 1073 (9th Cir. 1976), it was stated that an injunction bond could include reasonable attorneys' fees.

115. *Cf. McBride v. Trans World Airlines, Inc.*, 312 F. Supp. 731 (E.D. Mo. 1971).

116. *William H. Lee Co. v. New Haven Printing Pressmen Local 74*, 255 F. Supp. 929 (D. Conn. 1966).

117. *Gartner v. Soloner*, 384 F.2d 348 (3d Cir. 1967), *cert. denied*, 390 U.S. 1040 (1968); *Rolax v. Atlantic Coast Line R.R.*, 186 F.2d 473 (4th Cir. 1951); *Local 4076, Steelworkers v. United Steelworkers*, 338 F. Supp. 1154 (W.D. Pa. 1972); *Blankenship v. Boyle*, 337 F. Supp. 296 (D.D.C. 1972); *Burch v. International Ass'n of Machinists*, 78 L.R.R.M. 2444 (S.D. Fla. 1971); *Local 648, Retail Clerks v. Retail Clerks Int'l Ass'n*, 299 F. Supp. 1012 (D.D.C. 1969); *Sands v. Abelli*, 290 F. Supp. 677 (S.D.N.Y. 1968).

118. 29 U.S.C. § 412 (1970). This Act guarantees individual union members' rights to equal treatment, freedom of speech and assembly, fair dues and assessments, access to the courts and administrative agencies without fear of retaliation, and due process in intra-union disciplinary proceedings.

119. See text accompanying notes 88-104 *supra*.

120. *McCraw v. United Ass'n of Plumbers Local 43*, 341 F.2d 705 (6th Cir. 1965); *Jacques v. Local 1418, I.L.A.*, 246 F. Supp. 857 (E.D. La. 1965); *Magelssen v. Local 518, Plasterers*, 240 F. Supp. 259 (W.D. Mo. 1965); *Leonard v. M.I.T. Employees' Union*,

attorneys' fees "in appropriate cases."<sup>121</sup> In *Hall v. Cole*,<sup>122</sup> the Supreme Court examined the propriety of an attorney's fee award under section 102 of the LMRDA.<sup>123</sup> After the standard prefatory statement that the American rule disfavors the granting of attorneys' fees to the successful party, the Court catalogued the exceptions to that rule: the court may award counsel fees when the adverse party acted "in bad faith, vexatiously, wantonly, or for oppressive reasons,"<sup>124</sup> or when the litigation results in "substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them."<sup>125</sup> The Court specifically declined to consider whether *Mills* and *Newman* compelled the award of attorneys' fees via the "private attorney general" rationale;<sup>126</sup> however, the Court

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225 F. Supp. 937 (D. Mass. 1964); *Cutler v. American Fed'n of Musicians*, 231 F. Supp. 845 (S.D.N.Y. 1964), *aff'd per curiam*, 366 F.2d 779 (2d Cir. 1966), *cert. denied*, 386 U.S. 993 (1967); *Vars v. International Bhd. of Boilermakers*, 215 F. Supp. 943 (D. Conn.), *aff'd*, 320 F.2d 576 (2d Cir. 1963).

121. *Morrissey v. Segal*, 526 F.2d 121 (2d Cir. 1975); *Gartner v. Soloner*, 384 F.2d 348 (3d Cir. 1967), *cert. denied*, 390 U.S. 1040 (1968); *Schmidt v. McCarthy*, 369 F.2d 176 (D.C. Cir. 1966); *Bakery Workers v. Ratner*, 335 F.2d 691 (D.C. Cir. 1964), *appeal after remand*, 354 F.2d 504 (D.C. Cir. 1965); *Holdeman v. Sheldon*, 311 F.2d 2 (2d Cir. 1962); *Milone v. English*, 306 F.2d 814 (D.C. Cir. 1962); *Cox v. International Alliance of Theatrical Employees*, 398 F. Supp. 239 (N.D. Ga. 1975); *Hammond v. Housing Auth.*, 328 F. Supp. 586 (D. Ore. 1971); *Koonce v. Gaier*, 320 F. Supp. 1321 (S.D.N.Y. 1971); *Sands v. Abelli*, 290 F. Supp. 677 (S.D.N.Y. 1968); *Highway Truck Drivers Local 107 v. Cohen*, 215 F. Supp. 938 (E.D. Pa. 1963), *aff'd*, 334 F.2d 378 (3d Cir.), *cert. denied*, 379 U.S. 921 (1964); *Highway Truck Drivers Local 107 v. Cohen*, 182 F. Supp. 608 (E.D. Pa.), *aff'd*, 284 F.2d 162 (3d Cir. 1960), *cert. denied*, 365 U.S. 833 (1961); *cf. Brennan v. Connecticut State UAW CAP*, 60 F.R.D. 626 (D. Conn. 1974). Such cases are ably discussed in Comment, *Attorney's Fees Under the Landrum-Griffin Act: The Need for "Union Therapeutics,"* 7 LOYOLA OF L.A.L. REV. 137 (1974), which opines that "such awards must be made mandatory in every successful suit." *Id.* at 161.

122. 412 U.S. 1 (1973), *opinion on remand*, 376 F. Supp. 460 (E.D.N.Y. 1974).

123. See Comment, *Title I of the LMRDA: Rights and Remedies of Union Members with Respect to Their Unions*, 11 WILLAMETTE L.J. 258 (1975); Comment, *Counsel Fees For Union Officers Under the Fiduciary Provision of Landrum-Griffin*, 73 YALE L.J. 443 (1964).

124. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 n.4 (1968) (*per curiam*); *Vaughan v. Atkinson*, 369 U.S. 527, 530-31 (1962); *Bell v. School Bd.*, 321 F.2d 494, 500 (4th Cir. 1963); *Rolax v. Atlantic Coast Line R.R.*, 186 F.2d 473, 481 (4th Cir. 1951); 6 J. MOORE, FEDERAL PRACTICE ¶ 54.77[2], at 1703 (2d ed. 1976). A striking example is found in *Tiidee Prods., Inc.*, 174 N.L.R.B. 705 (1969); see text accompanying notes 138-52 *infra*. Compare *Food Store Employees Local 347 v. NLRB*, 476 F.2d 546 (D.C. Cir. 1973), *rev'd*, 417 U.S. 1 (1974), with *AFTRA v. Taft Broadcasting Co.*, 368 F. Supp. 123 (W.D. Mo. 1973).

125. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 393-94 (1970); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 719 (1967); *Trustees v. Greenough*, 105 U.S. 527 (1881).

126. *Hall v. Cole*, 412 U.S. 1, 5-6 n.7. Another court has analyzed the exceptions to the general rule as threefold: "obdurate behavior," "common fund," and "private at-

quoted with approval the Second Circuit's statement that "[w]ithout counsel fees the grant of federal jurisdiction is but a gesture for few union members could avail themselves of it."<sup>127</sup> As commentators have pointed out,<sup>128</sup> the fiduciary obligations of section 501(a)<sup>129</sup> inherent in Landrum-Griffin proceedings make attorneys' fees especially appropriate in LMRDA cases.<sup>130</sup>

#### D. Pension Plans and Arbitration

Other labor statutes have occasionally been used as vehicles for attorneys' fees requests. The award of fees for plaintiff's counsel is usually not deemed appropriate in actions under section 302 of the Labor-Management Relations Act,<sup>131</sup> which have been labelled "fund-producing."<sup>132</sup> However, if the requirements of the Employee Retirement Income Security Act (Pension Reform Act)<sup>133</sup> are met, a statutory assessment of fees may be allowed.<sup>134</sup> In the arbitration area, at least

torney general," while stating that the *Mills* and *Yablonski* decisions defy categorization. *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972). A thorough review can be found in *Bradley v. School Bd.*, 53 F.R.D. 28 (E.D. Va. 1971), *rev'd*, 472 F.2d 318 (4th Cir. 1973), *vacated*, 416 U.S. 696 (1974).

127. 412 U.S. at 13, quoting *Cole v. Hall*, 462 F.2d 777, 781 (2d Cir. 1972).

128. See, e.g., Comment, *Labor Law—Mandatory Attorney's Fees—Section 102, Labor-Management Reporting and Disclosure Act—Hall v. Cole*, 51 DENVER L.J. 169 (1974); Comment, *Attorney's Fees Under the Landrum-Griffin Act: The Need for "Union Therapeutics"*, 7 LOYOLA OF L.A.L. REV. 137 (1974); Comment, *The Changing American Rule Against Attorney Fee Shifting: Mills v. Electric Auto-Lite Co. and Hall v. Cole*, 28 Sw. L.J. 542 (1974).

129. 29 U.S.C. § 501(a) (1970).

130. Recent LMRDA decisions contain excellent analyses of the *Hall v. Cole* rationale. See, e.g., *McDonald v. Oliver*, 525 F.2d 1217 (5th Cir. 1976); *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975); *Cox v. International Alliance of Theatrical Employees*, 398 F. Supp. 239 (N.D. Ga. 1975). A further extension of fee-shifting is *Robins v. Schonfeld*, 326 F. Supp. 525 (S.D.N.Y. 1971), which awards attorneys' fees to plaintiffs even in the absence of bad faith or common benefit. But in *Signal Deliv. Serv., Inc. v. Highway Truck Drivers Local 107*, 68 F.R.D. 318 (E.D. Pa. 1975), fees were denied on all portions of a section 102 suit except those concerning contempt—a traditional "bad faith" example.

131. 29 U.S.C. § 186 (1970), as amended, (Supp. IV, 1974).

132. *Snider v. All State Adm'rs, Inc.*, 481 F.2d 387 (5th Cir. 1973), *cert. denied*, 415 U.S. 957 (1974); *Cutler v. American Fed'n of Musicians*, 231 F. Supp. 845 (S.D.N.Y. 1964), *aff'd per curiam*, 366 F.2d 779 (2d Cir. 1966), *cert. denied*, 386 U.S. 993 (1967). But see *Thomas v. Honeybrook Mines, Inc.*, 428 F.2d 981 (3d Cir. 1970), *cert. denied*, 401 U.S. 911 (1971), *opinion on remand*, 362 F. Supp. 747 (M.D. Pa. 1973).

133. 29 U.S.C. §§ 1001-144 (Supp. IV, 1974). This Act substantially incorporates the former Welfare and Pension Plans Disclosure Act (formerly codified at sections 301 *et seq.* of 29 U.S.C.). The present Act, like its predecessor, requires willful violation as a condition precedent to recovery for nondisclosure or misuse of covered employee benefit plans. *Id.* § 1131.

134. *Id.* § 1132(g), discussed in Comment, *The New Federal Pension Reform Act*,



two cases have dealt with attorneys' fees, with conflicting results: in *Montgomery County Community Action Agency*<sup>135</sup> counsel fees were denied to the grievant, but in *Sunshine Convalescent Hospital*<sup>136</sup> an *ex parte* award ordered reimbursement of the union attorney's fee when the employer's defense was "known . . . to be without merit."<sup>137</sup>

*E. Attorneys' Fees and the NLRB: The Tiidee Products Case*

The history of the *Tiidee Products* litigation reveals the extreme reluctance of the courts to engraft a variant of the British rule upon "conventional" labor relations. *Tiidee*, a manufacturer of parts for mobile homes and trailers, refused to bargain with the Electrical Workers (IUE). The NLRB entered an order to compel *Tiidee* to bargain,<sup>138</sup> whereupon the union sought and obtained judicial endorsement of the Board's power to order reimbursement of the union's legal expenses (*Tiidee I*).<sup>139</sup> On remand, not only was IUE awarded its legal fees, but also the Board's attorneys' fees were to be reimbursed.<sup>140</sup>

*Tiidee* again refused to bargain, and the Board again declined to tax legal costs.<sup>141</sup> The District of Columbia Circuit, in *Tiidee II*,<sup>142</sup> remanded for reconsideration in light of *Tiidee I*, whereupon the NLRB found the second refusal to bargain frivolous and intertwined with the

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4 CLASS ACTION REP. 45 (1975). See generally *Redman v. Warren*, 516 F.2d 766 (1st Cir. 1975) (per curiam); *Pete v. UMW Welfare & Retirement Fund of 1950*, 517 F.2d 1275 (D.C. Cir. 1975); *Mumford v. Glover*, 503 F.2d 878 (5th Cir. 1974); *Kiser v. Huger*, 517 F.2d 1237 (D.C. Cir. 1974), *opinion on reh'g sub nom. Pete v. UMW Welfare & Retirement Fund of 1950*, *supra*; *Harrold v. Coble*, 380 F.2d 18 (4th Cir. 1967); *Porter v. Teamsters Health, Welfare & Life Ins. Funds*, 321 F. Supp. 101 (E.D. Pa. 1970).

Another possible area of attorneys' fees confrontation is presented by section 11(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(c) (1970), allowing an employee who alleges discharge or discrimination for assisting the Department of Labor to file suit for "all appropriate relief." *Id.* § 660(c)(2). Similar provisions are found in the Coal Mine Health and Safety Act, 30 U.S.C. § 820(b)(3) (1970); *id.* § 938(c) (Supp. IV, 1974), but not in the Metal and Nonmetallic Mine Safety Act, 30 U.S.C. §§ 721-40 (1970). See O'Reilly, *Job-Related Discrimination and Discharge Under the Federal Safety Statutes*, 24 LAB. L.J. 718 (1973).

135. 62 Lab. Arb. 1278 (1974).

136. 62 Lab. Arb. 276 (1974).

137. *Id.* at 279. The employer failed to appear at the arbitration hearing.

138. *Tiidee Prods., Inc.*, 174 N.L.R.B. 705 (1969).

139. *International Union of Elec. Workers v. NLRB*, 426 F.2d 1243 (D.C. Cir.), *cert. denied*, 400 U.S. 950 (1970) (*Tiidee I*).

140. *Tiidee Prods., Inc.*, 194 N.L.R.B. 1234 (1972).

141. *Tiidee Prods., Inc.*, 176 N.L.R.B. 969 (1969).

142. *International Union of Elec. Workers v. NLRB*, 440 F.2d 298 (D.C. Cir. 1970) (per curiam) (*Tiidee II*).

previous unfair labor practice. Again *Tiidee* was ordered to bear the legal expenses of both the Board and the IUE.<sup>143</sup>

Meanwhile, the District of Columbia Circuit had been faced with another case involving similar remedial issues. A month after *Tiidee I*, the court had rendered a per curiam order sending the case of Heck's, Inc., a retail discount chain in its ninth round of unfair labor practice charges,<sup>144</sup> back to the Board for proceedings consistent with *Tiidee I*.<sup>145</sup> When Heck's again came before the court in 1972, attorneys' fees incurred by both the union and the NLRB were taxed to Heck's along with the union's "excess" organizational expenditures.<sup>146</sup>

When *Tiidee I* again reached the court, this time on review of the Board's fees award, it was decided that although *Tiidee's* conduct had been "brazen" and "frivolous," since this case had been the employer's first bout with Board procedures,<sup>147</sup> *Tiidee*, as a "stranger" to NLRB mandates, was entitled to the status of a first offender. Consequently, only a portion of the union's attorneys' fees, and none of the Board's, were to be taxed to the employer.

The next month, the Supreme Court viewed the *Tiidee I* rule as a mid-game switch and ordered that the Heck's reimbursement order be returned to the NLRB to enable the Board, rather than the courts, to determine whether *Tiidee I* would be applied retroactively.<sup>148</sup> A unanimous Court found that the court of appeals improperly exercised the authority granted by sections 10(e) and 10(f) of the National Labor Relations Act.<sup>149</sup> Even though comparison of the Board's orders for Heck's and *Tiidee* revealed "factual inconsistencies," the Court felt the Board should be given a shot at making a "plausible reconciliation" of the apparently diametrical resolutions of the two cases.<sup>150</sup> The Board has not yet resolved the conflict.<sup>151</sup>

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143. *Tiidee Prods., Inc.*, 196 N.L.R.B. 158 (1972).

144. See *Food Store Employees Local 347 v. NLRB*, 433 F.2d 541, 543 n.5 (D.C. Cir. 1970) (per curiam).

145. *Id.* at 543.

146. *Food Store Employees Local 347 v. NLRB*, 476 F.2d 546 (D.C. Cir. 1973).

147. *International Union of Elec. Workers v. NLRB*, 502 F.2d 349 (D.C. Cir. 1974).

148. *NLRB v. Food Store Employees Local 347*, 417 U.S. 1 (1974).

149. 29 U.S.C. §§ 160(e)-(f) (1970).

150. 417 U.S. at 9. Certiorari was denied in other litigation involving *Tiidee Prods., Inc. v. NLRB*, 421 U.S. 991 (1975); *Tiidee Prods., Inc. v. NLRB*, 417 U.S. 921 (1974).

151. See *NLRB v. Local 396, Teamsters*, 509 F.2d 1075 (9th Cir.), cert. denied, 421 U.S. 976 (1975); *Federal Prescription Serv., Inc. v. NLRB*, 496 F.2d 813 (8th Cir.), cert. denied, 419 U.S. 1049 (1974). See generally Comment, *NLRB Attorneys' Fees Awards: An Inadequate Remedy for Refusal to Bargain*, 63 GEO. L.J. 955 (1975).

State courts have also been reluctant to embrace the British rule: the Supreme Court of Hawaii has denied a fee award in a suit brought by a female supervisor to gain entry into a union, predicating the denial upon a lack of "issues of general significance."<sup>152</sup>

#### V. HOW MUCH DOES IT COST?

The criteria for determining adequacy of a court-awarded attorney's fee are exhaustive but not enlightening. The only sure index for the trial court is whether the award is sustained or reversed on appeal.

Although the Supreme Court has found that fee schedules constitute illegal price-fixing,<sup>153</sup> such lists historically have received great deference from the judiciary in assessing counsel fees as costs.<sup>154</sup> A court, however, has always been entitled through its equity powers to consider factors other than strict per-hour compensation. The necessary considerations for the trial court to take into account were recited in one opinion:

They include the intricacy of the case and the difficulty of proof, the time reasonably expended in the preparation and trial of the case, the degree of competence displayed by the attorneys seeking compensation and the measure of success achieved by these attorneys. In public interest cases, courts also should consider the benefit inuring to the public, the personal hardships that bringing this kind of litigation cause plaintiffs and their lawyers, and the added responsibility of representing a class rather than only individual plaintiffs.<sup>155</sup>

Other factors include the attorneys' loss of opportunity for other employment,<sup>156</sup> the financial status of the defendant,<sup>157</sup> and the lawyers' over-

152. *Salvador v. Popaa*, 530 P.2d 7, 8 (Haw. 1974).

153. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), *rev'g* 497 F.2d 1 (4th Cir. 1974).

154. *See, e.g., King v. Georgia Power Co.*, 474 F.2d 906, 927 (5th Cir. 1973). At least one decision has reduced the fee demand to reflect the fee rate at the time the services were rendered. *Locklin v. Day-Glo Color Corp.*, 378 F. Supp. 423 (N.D. Ill. 1974). After *Goldfarb*, these decisions are of doubtful value as precedent.

155. *Wyatt v. Stickney*, 344 F. Supp. 387, 409 (M.D. Ala. 1972). One court has held that the amount of recovery, when counsel is expert in that area of the law, is more important than the time spent. *Derdiarian v. Futterman Corp.*, 254 F. Supp. 617 (S.D.N.Y. 1966). But a higher court insists that time records are "the only legitimate starting point." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 471 (2d Cir. 1974). Note also that the Supreme Court has held that the issue of the amount of attorneys' fees is a jury question. *Simler v. Conner*, 372 U.S. 221 (1963) (*per curiam*).

156. *Confederated Bands of Ute Indians v. United States*, 120 Ct. Cl. 609 (1951).

157. *Pergament v. Kaiser-Frazer Corp.*, 224 F.2d 80 (6th Cir. 1955) (*per curiam*). As one court stated in a section 1981-Title II case, "The purpose of the law is to accomplish 'Equal Rights under the Law' to 'all persons.' It is not to put any one out of business." *Black v. Bonds*, 308 F. Supp. 774, 776 (S.D. Ala. 1969).

head expenses.<sup>158</sup> Inventive attorneys keep coming up with new items for possible reimbursement. A demand for compensation of paralegal personnel in *Michelman v. Clark-Schwebel Fiber Glass Corp.*<sup>159</sup> resulted in the denial of such an award, "although the portion of such paraprofessionals' salary relating to the case may be recovered as an out-of-pocket expense."<sup>160</sup> Since such matters are already figured as overhead by most firms, secretaries' salaries, office rental space and the like should not be recovered as an out-of-pocket expense.

A more thorough compilation of criteria can be found through study of attorneys' compensation claims in non-labor contents, particularly in the divorce and bankruptcy fields.<sup>161</sup> The ABA's Code of Professional Responsibility has been used as a standard for the proper measure of legal fees in these contexts.<sup>162</sup>

The Fifth Circuit's recent opinion in *Johnson v. Georgia Highway Express, Inc.*,<sup>163</sup> enumerated twelve considerations upon which trial courts should make specific findings in an award of Title VII attorneys' fees: (1) time and labor required, (2) novelty and difficulty of questions, (3) requisite skill, (4) preclusion of other employment by the attorney, (5) customary fee, (6) fixed or contingent fee, (7) time limitations, (8) amount involved and results obtained, (9) attorney reputation, (10) "undesirability" of case, (11) length and nature of professional relationship with client, and (12) awards in similar cases.<sup>164</sup> The court expressly refused to criticize the amount (\$1350) of the trial court's award of attorneys' fees to plaintiffs' counsel. The problem was that the trial judge did not enumerate all the criteria that the Fifth Circuit deemed to be important. Lest the court give the wrong impression, Judge Roney stated:

To put these guidelines into perspective and as a caveat to their application, courts must remember that they do not have a mandate under Section 706(k) to make the prevailing counsel rich. Concomitantly, the Section should not be implemented in a manner to make the private attorney general's position so lucrative

158. *Hammer v. Tuffy*, 145 F.2d 447, 451 (2d Cir. 1944).

159. 1975-2 Trade Cas. ¶ 60,551 (S.D.N.Y. 1975), *rev'd and appeal from award of attorneys' fees dismissed as moot*, 534 F.2d 1036 (2d Cir. 1976).

160. *Id.* at 67,413.

161. See generally Annot., 56 A.L.R.2d 13 (1957); Annot., 143 A.L.R. 672 (1943).

162. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106, cited in *Clark v. American Marine Corp.*, 320 F. Supp. 709, 711-12 (E.D. La. 1970), *aff'd*, 437 F.2d 959 (5th Cir. 1971).

163. 488 F.2d 714 (5th Cir. 1974).

164. *Id.* at 717-19.

as to ridicule the public attorney general. The statute was not passed for the benefit of attorneys but to enable litigants to obtain competent counsel worthy of a contest with the caliber of counsel available to their opposition and to fairly place the economical burden of Title VII litigation. Adequate compensation is necessary, however, to enable an attorney to serve his client effectively and to preserve the integrity and independence of the profession. The guidelines contained herein are merely an attempt to assist in this balancing process.<sup>165</sup>

In further explaining the import of *Johnson*, Judge Griffin Bell has stated: "If you're a 'private attorney general,' you have to think about what the *public* Attorney General gets paid."<sup>166</sup>

Decisions like *Johnson* have resulted in increasing demands that trial courts justify their fee assessments or the lack of a fee award.<sup>167</sup> In some close cases, the trial courts have responded with percentage recoveries. A Title VII action in point is *Gunn v. Layne & Bowler, Inc.*,<sup>168</sup> in which defendant prevailed on three of five counts; the trial judge found: ". . . [T]he Court adopts the principle that the fee may be based upon that portion of the case in which the plaintiff and those in his class prevailed."<sup>169</sup> Similarly, the court in *Taylor v. Goodyear Tire & Rubber Co.*<sup>170</sup> reduced the award of fees to deny compensation for efforts that were not successful, ignoring an argument that the action "had a certain prophylactic effect."<sup>171</sup> Slightly different standards may apply on appeal, however; in *Culpepper v. Reynolds Metal Co.*, the court denied plaintiff-appellants their costs of challenging the adequacy of the fee awarded by the trial court but allowed fees for the defense of the award.<sup>172</sup>

165. *Id.* at 719-20.

166. BNA LABOR RELATIONS YEARBOOK—1974, at 147 (1975) (emphasis added). Judge Bell has since returned to private practice.

167. *E.g.*, *Evans v. Seaman*, 496 F.2d 1318 (5th Cir. 1974) (Title VII case; remanded for consideration in light of *Johnson*, with "no intimation" of whether \$1750 fee award was acceptable). *See also* *Evans v. Sheraton Park Hotel*, 503 F.2d 177 (D.C. Cir. 1974).

168. 1 CCH EPD ¶ 9823 (W.D. Tenn. 1967).

169. *Id.* at 885; *see* *Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d 1002, 1008 (9th Cir. 1972); *cf.* *Local 205, United Elec. Workers v. General Elec. Co.*, 172 F. Supp. 960, 961 (D. Mass. 1959) (costs).

170. 6 CCH EPD ¶ 8693 (N.D. Ala. 1973).

171. *Id.* at 5086. Judge McFadden also observed, "In this case, the time involved is next to useless even as a factor because of the mixture of successful and unsuccessful efforts." *Id.* at 5087. *See also* *Williams v. General Foods Corp.*, 492 F.2d 399 (7th Cir. 1974).

172. 442 F.2d 1078 (5th Cir. 1971). *See also* *Henlopen Hotel Corp. v. Aetna Ins. Co.*, 251 F. Supp. 189 (D. Del. 1966). *But see* *Rosenfeld v. Southern Pac. Co.*, 519 F.2d 527 (9th Cir. 1975) (per curiam).

Vesting such broad discretion in the trial court has produced some peculiar results. In *Wilder v. Isenberg*,<sup>173</sup> the court awarded a fee based on a scale of fifty dollars per hour, without differentiating between time spent by partners and that of associates. In *Blank v. Talley Industries, Inc.*,<sup>174</sup> however, claimed fees of \$3,055,000 were halved because, among other reasons, partners had performed work that "could have been performed by junior associates." Even the time required of the judge's law clerk<sup>175</sup> and the precarious financial condition of defendant<sup>176</sup> have been utilized to reduce the award.

On the other hand, at least two courts have conferred "bonuses" on plaintiff's counsel,<sup>177</sup> and another has allowed counsel to take the unclaimed portion of a settlement fund.<sup>178</sup> Requests for interim fees, while generally disallowed,<sup>179</sup> have been favorably received in some instances.<sup>180</sup> Seven-figure fees awards have become commonplace in securities and antitrust litigation,<sup>181</sup> and awards have reached six figures in employment practices cases.<sup>182</sup>

Courts have also considered the "substandard financial status of the aggrieved party,"<sup>183</sup> while "public interest" attorneys have argued

When the trial court feels that the initial fee award was adequate, there is Fair Labor Standards Act precedent for denial of additional fees for appellate proceedings. See, e.g., *Martin Nebraska Co. v. Culkin*, 197 F.2d 981 (8th Cir. 1952); *United States Steel Co. v. Burkett*, 192 F.2d 489 (4th Cir. 1951); *Mid-Continent Petroleum Corp. v. Keen*, 157 F.2d 310 (8th Cir. 1946). For other discussion of this issue see *Ellis v. Flying Tiger Corp.*, 504 F.2d 1004 (7th Cir. 1972); *Cole v. Hall*, 376 F. Supp. 460 (E.D.N.Y. 1974).

173. CCH FED. SEC. L. REP. ¶ 94,818 (S.D.N.Y. 1974).

174. 390 F. Supp. 1, 4 (S.D.N.Y. 1975).

175. *Reynolds v. Wise*, 375 F. Supp. 145, 152 (N.D. Tex. 1974).

176. *Grunin v. International House of Pancakes*, 513 F.2d 114 (8th Cir.), cert. denied, 96 S. Ct. 124 (1975).

177. *Davis v. County of Los Angeles*, 8 CCH EPD ¶ 9444 (C.D. Cal. 1974) (Title VII); *Arenson v. Board of Trade of Chicago*, 372 F. Supp. 1349 (N.D. Ill. 1974) (antitrust case awarding four times the requested hourly rate (thus up to \$500 per hour) for services of twenty attorneys).

178. *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co.*, 1974-2 Trade Cas. ¶ 75,366 (S.D.N.Y. 1974).

179. *Young v. International Tel. & Tel. Co.*, 56 F.R.D. 7 (E.D. Pa. 1972).

180. *Patterson v. American Tobacco Co.*, 9 CCH EPD ¶ 10,039 (E.D. Va. 1974), *aff'd in part & remanded in part*, 11 CCH EPD ¶ 10,728 (4th Cir. 1976); cf. *SEC v. Trio Sec., Inc.*, 1974-1975 CCH FED. SEC. L. REP. ¶ 94,777 (E.D.N.Y. 1974); *Mazur v. Behrens*, 1974-2 Trade Cas. ¶ 75,213 (N.D. Ill. 1974).

181. *In re Gypsum Cases*, 386 F. Supp. 959 (N.D. Cal. 1974) (\$9,262,559; plaintiffs' counsel had requested more than \$21,000,000); *Levin v. Mississippi River Corp.*, 377 F. Supp. 926 (S.D.N.Y. 1974), *aff'd mem.*, 508 F.2d 836 (2d Cir. 1974) (\$2,600,000); *Oppenlander v. Standard Oil Co.*, 64 F.R.D. 597 (D. Colo. 1974) (cash and stock worth \$3,780,000).

182. *Boles v. Union Camp Corp.*, Civil No. 2804 (S.D. Ga. 1975) (\$101,500).

183. *Snelling v. O.K. Serv. Garage, Inc.*, 311 F. Supp. 842, 847 (E.D. Ky. 1970).

that plaintiff's attorney's compensation should be measured by the amount expended by defendant in resisting the claim.<sup>184</sup> But such arguments are difficult to support. As one commentator noted,

Why should the private defendant bear a greater potential liability toward a poorer or less well organized plaintiff than toward one who is able to finance litigation on his own? This seems to create something of a double standard, particularly where the attorney's fee award exceeds the other monetary relief.<sup>185</sup>

Similarly, contentions of this type ignore the reality that monetarily insignificant claims may be contested because unfavorable disposition of the issue would engender a flood of coattail litigation.<sup>186</sup>

It also seems unfair to saddle defendant with double liability for attorneys' fees in a situation in which plaintiff does not prevail. Although it has been held that a party does not prevail when the court refuses relief,<sup>187</sup> expansion of fee awards under *Newman* has resulted in a trend toward awarding fees to a plaintiff who does not prevail on the theory that "pro bono publico" litigation should be encouraged.<sup>188</sup> And although one court denied attorneys' fees when plaintiffs "incurred no obligation to pay,"<sup>189</sup> and other courts have reduced the amount of attorneys' fees because of NAACP or Department of Justice participation,<sup>190</sup> the majority of courts ignore the fee obligation or the amount of non-compensated services rendered, since the "prevailing party" rather than his attorneys receives the reimbursement.<sup>191</sup>

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184. See, e.g., Kohn, *Symposium on Class Actions: Panel Discussion*, 41 ANTI-TRUST L.J. 321, 345-46 (1972); Moore, *The Potential Function of the Modern Class Suit*, 2 CLASS ACTION REP. 47, 55 (1973).

185. *Equal Access*, supra note 4, at 672 n.219, citing *Advance Business Sys. & Supply Co. v. SCM Corp.*, 287 F. Supp. 143 (D. Md. 1968), modified, 415 F.2d 55 (4th Cir. 1969), cert. denied, 397 U.S. 920 (1970).

186. "It must be remembered . . . that not all small claims are clearly meritorious. . . ." *Equal Access*, supra note 4, at 651.

187. *Long v. Georgia Kraft Co.*, 455 F.2d 331, 337 (5th Cir. 1972). See also *Clanton v. Allied Chem. Corp.*, 409 F. Supp. 282 (E.D. Va. 1976) (court expresses inability to determine who "prevailed" in consent decree).

188. *McEntaggart v. Cataldo*, 451 F.2d 1109 (1st Cir.), cert. denied, 408 U.S. 943 (1971). But see *Thomas v. J.C. Penney Co.*, 531 F.2d 270 (5th Cir. 1976), rev'g 9 CCH EPD ¶ 10,130 (E.D. Tex. 1975); *Colorado PIRG, Inc. v. Train*, 373 F. Supp. 991 (D. Colo.), rev'd, 507 F.2d 743 (10th Cir. 1974), cert. granted, 421 U.S. 998 (1975). See generally Comment, *Balancing the Equities in Attorney's Fees Awards: Losing Plaintiffs and Private Defendants*, 62 GEO. L.J. 1439 (1974).

189. *Bell v. Alamatt Motel*, 243 F. Supp. 472, 475 (N.D. Miss. 1965) (Title II).

190. See, e.g., *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conf.*, 166 F. Supp. 163, 168 (E.D. Pa. 1958), aff'd, 273 F.2d 218 (3d Cir. 1959), rev'd on other ground, 365 U.S. 127 (1961).

191. See, e.g., *Fairley v. Patterson*, 493 F.2d 598 (5th Cir. 1974); *Clark v. American Marine Corp.*, 320 F. Supp. 709 (E.D. La. 1970), aff'd per curiam, 437 F.2d 959

## VI. ALYESKA PIPELINE: IS THE GOLD RUSH ENDING?

Until recently the "private attorney general" rationale was the accepted basis for fee-shifting. But the juridical basis for this argument abruptly disappeared when the Supreme Court, on May 12, 1975, rendered its 5-2<sup>192</sup> decision in *Alyeska Pipeline Service Co. v. Wilderness Society*.<sup>193</sup> In an opinion that reviews the development of the American rule and its exceptions, the Court reversed the District of Columbia Circuit's allowance of attorneys' fees to the Wilderness Society as "private attorneys general" for the Society's challenge to construction of the Alaska pipeline. This decision dealt a severe blow to the public interest bar in cases not governed by express statutory authorization to shift fees.<sup>194</sup>

The Court of Appeals had based its fee award on the idea that the Society had been pursuing "important statutory rights of all citizens."<sup>195</sup> Thus, a fee award against Alyeska<sup>196</sup> was deemed appropriate, "lest the great cost of litigation of this kind, particularly against well-financed defendants such as Alyeska, deter private parties desiring to see the laws protecting the environment properly enforced."<sup>197</sup>

The Supreme Court majority, however, ruled that "it would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation in the manner and to the extent urged by respondents and approved by the Court of Appeals."<sup>198</sup> The *Newman* rationale was described as limited to cases in which fee-shifting is authorized by statute.<sup>199</sup> Three accepted nonstatutory, noncontractual exceptions to the American rule were recognized: the "common benefit" exception,<sup>200</sup> "willful disobedience of a court order,"<sup>201</sup> and

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(5th Cir. 1971); *but see*, Lockheed Minority Solidarity Coalition v. Lockheed Missiles & Space Co., 12 CCH EPD ¶ 10,993 (N.D. Cal. 1976).

192. Mr. Justice White spoke for Chief Justice Burger and Justices Stewart, Blackmun and Rehnquist. Justices Marshall and Brennan dissented, while Justices Douglas and Powell did not participate.

193. 421 U.S. 240 (1975).

194. *Id.* at 241, *rev'g* Wilderness Soc'y v. Morton, 495 F.2d 1026 (D.C. Cir. 1974).

195. 495 F.2d at 1032.

196. A fee award against the United States was denied on the basis of 28 U.S.C. § 2412 (1970), *see id.* at 1036. Taxation of fees against the State of Alaska was also deemed inappropriate, *id.* at 1036 n.8.

197. 421 U.S. at 245-46. The quotation is Mr. Justice White's interpretation of the court of appeals' decision.

198. *Id.* at 247.

199. *Id.* at 262.

200. *Id.* at 245; *see text* accompanying notes 52-53 *supra*.

201. 421 U.S. at 258, *quoting* Fleischmann Distilling Corp., v. Maier Brewing Co., 386 U.S. 714, 718 (1967).



instances "when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons. . . .'"<sup>202</sup> In instances other than statutory authorization, the three stated nonstatutory exceptions, or express contractual provision,<sup>203</sup> *Alyeska Pipeline* censures court-fashioned grants of attorneys' fees.

One of the most curious references in the majority opinion directly concerns employment-related litigation. In discussing the hazards of making inroads into the American rule, the question is posed, "if any statutory policy is deemed so important that its enforcement must be encouraged by awards of attorneys' fees, how could a court deny attorneys' fees to private litigants in actions under 42 U.S.C. § 1983 seeking to vindicate constitutional rights?"<sup>204</sup> As previously noted,<sup>205</sup> this question has been asked and answered in a far different manner in a host of section 1983 cases,<sup>206</sup> and Mr. Justice White's reference to the practice as an outrageous example constitutes amazement at the commonplace.

"Moreover," the majority asks, "should courts, if they were to embark on the course urged by respondents, opt for awards to the prevailing party, whether plaintiff or defendant, or only to the prevailing plaintiff?"<sup>207</sup> In a footnote, the Court observes that while some legislation restricts recovery to prevailing plaintiffs, Title VII contains no such limitation.<sup>208</sup> The Court seems to ignore the lower courts' de facto restriction of fee awards to only plaintiffs.

Hence, while purporting to retain the validity of the *Newman* rule, *Alyeska* imposes significant limitations upon the private attorney general rationale.<sup>209</sup> However, restriction of fee awards to circumstances in

202. 421 U.S. at 258-59, quoting *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974).

203. The opinion identifies thirty federal statutes that permit fee-shifting by explicit congressional grant, including FED. R. Civ. P. 37, and notes the breadth of sanctions available against frivolous litigation instituted by legal aid offices. 421 U.S. at 260-62 nn.33, 35, 36.

204. 421 U.S. at 264 (emphasis in original).

205. See text accompanying notes 30-36 *supra*. See also *Carter v. Noble*, 526 F.2d 677 (5th Cir. 1976) (per curiam).

206. See *Miller v. Carson*, 401 F. Supp. 835 (M.D. Fla. 1975); cases cited notes 30-36 *supra*.

207. 421 U.S. at 264.

208. *Id.* at 264 n.37.

209. The majority noted, "In recent years, some lower federal courts, erroneously, we think, have employed the private-attorney-general approach to award attorneys' fees." 421 U.S. at 270 n.46. The disapproved cases include decisions from nearly every circuit. Nonetheless, only days after *Alyeska* the Eighth Circuit adopted what appears to be a new standard of "bad faith" in circumvention of the proscriptive language of *Alyeska*. *Doe v. Poelker*, 515 F.2d 541 (8th Cir. 1975). It has been recommended that statutes expressly provide for fee-shifting, see ABA/American Assembly, *Law in a Changing So-*

which there is an express statutory grant leaves a vast amount of fee-shifting in force. In 1974 alone, many statutes allowing recovery of attorneys' fees were enacted.<sup>210</sup> The effect of the adoption of criteria such as in *Johnson* can be to punish defendant for a good defense or a bad one; for the fact that plaintiff's counsel is skilled, or that he is not; for the novelty of questions presented; or for the apparent nature of the ultimate result. Actual evidence of the reasonable value of counsel's services is not required.<sup>211</sup>

Sweeping departures from the general rule have prompted critics to conclude that the rule should be officially interred.<sup>212</sup> One commentator has advocated the broadening of the class action rule to provide attorneys' fees if plaintiff prevails in order to fund public-interest suits.<sup>213</sup> The plaintiffs' attorneys' magazine, *Trial*, has hailed the "explicit authorization of counsel fee allowances" under Title VII as a boon to the profession in the wake of the "sharp loss of business" occasioned by no-fault insurance.<sup>214</sup> If the general rule is formally abandoned, however, its replacement should not be a one-way street,<sup>215</sup> a subsidy for plaintiffs' attorneys. A policy that supports a statutory grant of attorneys' fees to a prevailing party should apply equally to plaintiffs and defendants: a bad faith complaint as well as a bad faith defense may justify fee-shifting; conversely, good faith should constitute a defense to a claim for attorneys' fees.

A clear recognition of this principle is expressed in *Tillman v. Wheaton-Haven Recreation Association, Inc.*<sup>216</sup> After evaluating the *Newman* test, the trial court concluded: "When damages are awarded

*ciety*, 61 A.B.A.J. 931, 933 (1975). A number of such bills are now pending. See, e.g., S. 2530, 94th Cong., 1st Sess. (1975) (to cover all civil litigation against U.S. governmental agencies); S. 2715, 94th Cong., 1st Sess. (1975) (administrative agency proceedings); H.R. 8219, 94th Cong., 1st Sess. (1975) (injunctive relief under Clayton Act).

210. E.g., Employment Retirement Income Security Act of 1974, Act of Sept. 2, 1974, Pub. L. No. 93-406, § 502(g), 88 Stat. 891 (codified at 29 U.S.C. § 1142 (Supp. IV, 1974)).

211. *Montalvo v. Tower Life Bldg.*, 426 F.2d 1135 (5th Cir. 1970) (no expert testimony required); *Day & Zimmerman, Inc. v. Reid*, 168 F.2d 356 (8th Cir. 1948). *Contra*, *Hayes v. Bill Haley & His Comets, Inc.*, 274 F. Supp. 34 (E.D. Pa. 1967).

212. See, e.g., Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966); Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 U. COLO. L. REV. 202 (1966).

213. J. GOULDEN, *THE SUPERLAWYERS* 380 (paper ed. 1972).

214. Cooper & Rosenthal, *Equal Employment Opportunity . . . New Legal Field*, 8 TRIAL, Jan./Feb. 1972, at 47.

215. One court has found that a statutory allowance of fees only to plaintiffs is violative of equal protection. *Gaster v. Coldiron*, 297 A.2d 384 (Del. 1972) (mechanic's lien).

216. 367 F. Supp. 860 (D. Md. 1973), *rev'd*, 517 F.2d 1141 (4th Cir. 1975).

. . . the need for recovery of attorney fees is decreased significantly. . . . [W]here no economic burden exists or where the nature of the burden is such that no relief is obtained by an award of attorney fees, this Court sees no useful purpose in making such an award."<sup>217</sup>

The court criticized the Fifth Circuit for the rule set forth in *Miller v. Amusement Enterprises, Inc.*<sup>218</sup> as "not giv[ing] sufficient weight" to the *Newman* decision's logical implications: non-frivolous good faith defenses are "special circumstances" that could well justify a denial of plaintiff's demand for attorneys' fees.<sup>219</sup> Certainly a rule awarding attorneys' fees only when the opposing party acted in bad faith would not be inconsistent with a positive view of litigation. Any other result has the effect of casting a defendant into Ambrose Bierce's classic definition of a litigant: "A person about to give up his skin for the hope of retaining his bones." The very least the legal process should provide is an equal opportunity for assertion of the defense of good faith.

In summary, equitable considerations dictate that a defendant not be penalized unless a plaintiff in like circumstances is subject to sanctions. Frivolous complaints, just as frivolous defenses, should warrant the award of attorneys' fees; the good faith of either party should shield it from paying the fee of opposing counsel. Finally, as implicitly stated in *Hall v. Cole*,<sup>220</sup> when a fund is produced, counsel fees, as any other contingent recovery, should be compensated from that fund with deductions or adjustments made for fee agreements between plaintiff and his attorney. Title VII should not be a lawyers' relief act; these recommendations, if adopted, would bring some degree of justice into the award of attorneys' fees.

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217. *Id.* at 867.

218. 426 F.2d 534 (5th Cir. 1970).

219. 367 F. Supp. at 868. See also *Aid Auto Stores, Inc. v. Cannon*, 1974-1975 CCH FED. SEC. L. REP. ¶ 94,971 (S.D.N.Y. 1975).

220. 412 U.S. 1 (1973). But see *Burlington Northern Inc. v. American Ry. Supervisors Ass'n*, 527 F.2d 216, 222 (7th Cir. 1975), denying a fee award but stating that the purpose of fee-shifting under section 3 of the Railway Labor Act is "to redress the imbalance in the wealth of the parties."