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PUNITIVE ATTORNEYS' FEES FOR ABUSES OF THE JUDICIAL SYSTEM

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As a general rule, each party to a lawsuit bears his own attorneys' fees absent express statutory or contractual authorization for reimbursement. This rule, known as the American rule, has been modified by a number of judicially created exceptions, including the assessment of "punitive" attorneys' fees for abuses of the judicial system. In this article, Professor Mallor examines the three punitive exceptions to the American rule that are imposed for abusive litigation practices: the contempt exception, the prior litigation exception, and the bad faith exception. Proceeding from a discussion of the justifications underlying the American rule, Professor Mallor explores the current doctrinal elements of the three punitive exceptions, and analyzes how each can be applied to best accommodate the conflicting policies of protecting judicial resources and preserving free access to the courts.

In 1796, the Supreme Court first held that attorneys' fees are not recoverable as damages by a prevailing party.[1] This doctrine, which has come to be known as the "American rule,"[2] provides that absent express statutory or contractual authorization, each party to a lawsuit bears his own attorney's fees.[3] Despite recurrent scholarly criticism of the American rule,[4] modern American courts have given every indication of perpetuating the rule as a general principle.[5]

At the same time, lawmakers have recognized that the reallocation or

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1. Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796).

2. The no-fee rule with few exceptions apparently is unique to the American legal system. *See* Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 637 (1974); Note, *Theories of Recovering Attorneys' Fees: Exceptions to the American Rule*, 47 UMKC L. REV. 566, 591 (1979).

3. *See, e.g.*, F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 126 (1974); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967).

4. *See, e.g.*, Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966); Kuenzel, *The Attorney's Fees: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75 (1963).

5. *See, e.g.*, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975); F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116 (1974); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967); Fownes v. Hubbard Broadcasting, Inc., 310 Minn. 540, 246 N.W.2d 700 (1976). *See also* 1 S. SPEISER, ATTORNEY'S FEES 618 n.5 (1973) (collecting some of the "hundreds" of cases affirming the American rule).

A few states, however, have enacted statutes authorizing awards of attorneys' fees to prevailing parties. *See* ALASKA R. CIV. P. 82 (discretionary fee shifting with fee schedule provided); OR. REV. STAT. §§ 20.080, 20.085, 20.094, 20.096 (1981) (fee shifting in specified circumstances including tort cases in which the recovery is $3000 or less). *See also* WASH. REV. CODE § 4.84.010 (1962) (discretionary awards of "expenses" to prevailing parties).

shifting of attorneys' fees can be a powerful tool for social engineering[6] and have created an increasing number of inroads on the American rule.[7] Congress has enacted an extensive array of statutes containing fee shifting provisions designed to encourage private enforcement and to effectuate important legislative policies.[8]

A number of exceptions to the American rule have been created by the courts. In divorce cases, courts frequently impose a wife's attorney's fees upon her husband.[9] Under the "common fund" or "substantial benefit" exception, a court will tax a claimant's attorney's fees to a common fund when the claimant has created, increased, or protected a fund or right through active litigation from which others will benefit.[10] In a short-lived outgrowth of the common fund exception, federal courts awarded attorneys' fees to prevailing plaintiffs who had vindicated important congressional policies under the "private attorney general" exception,[11] until this practice was struck down by the Supreme Court in 1975 in *Alyeska Pipeline Service Co. v. Wilderness Society*.[12]

In addition to these statutorily and judicially created exceptions to the American rule that are designed to encourage litigation and effectuate substantive legal principles, courts have created a class of exceptions designed to protect the judicial institution by discouraging abusive litigation and litigation practices. These exceptions are punitive in the sense that a sanction greater than the normal permissible recovery is levied against a party because of that party's wrongful conduct precipitating litigation or occurring during the course of litigation. Like the doctrine of punitive damages, this sanction func-

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6. *See generally* Note, *Use of Taxable Costs to Regulate the Conduct of Litigants*, 53 COLUM. L. REV. 78 (1953).

7. *See generally* Note, *Awards of Attorney's Fees in the Federal Courts*, 56 ST. JOHN'S L. REV. 277 (1982).

8. *See, e.g.*, Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988 (1976); The Civil Rights Act of 1964 tit. VII, § 706(k), 42 U.S.C. § 2000e-5(k) (1976); The Clayton Act, 15 U.S.C. § 552(a)(4)(E) (1976); The Equal Access to Justice Act, 28 U.S.C. § 2412 (1976), 5 U.S.C. § 504 (Supp. IV 1980). For a more complete collection of federal statutes authorizing fee shifting, see Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 260-61 n.33 (1975).

9. *See, e.g.*, Foss v. Foss, 83 S.D. 574, 163 N.W.2d 354 (1968). *See also* McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN. L. REV. 619, 626 (1931).

10. *See* McCormick, *supra* note 9, at 623. The taxing of attorneys' fees from the common fund under these circumstances is not punitive, but is designed to prevent unjust enrichment. *Id.*; *see also, e.g.*, Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939); Trustees v. Greenough, 105 U.S. 527 (1881).

11. Under the private attorney general doctrine, a prevailing plaintiff could recover his attorney's fees even in the absence of statutory authorization if he had vindicated some important federal right or statute. *See, e.g.*, Red School House, Inc. v. OEO, 386 F. Supp. 1177 (D. Minn. 1974). *See generally* Comment, *supra* note 2, at 670-81; Note, *supra* note 2, at 576-81.

12. 421 U.S. 240 (1975). The Supreme Court rejected the private attorney general exception, because it required the federal courts to determine a number of issues better left to legislative resolution, such as determining which statutes were of sufficient importance to justify fee shifting. *Id.* at 269. Although by its long forbearance Congress has impliedly ratified certain judicially created exceptions to the American rule, it has reserved to itself the vindication of legislative policies. *Id.* at 259-62.

The private attorney general exception still enjoys viability in California. *See* Serrano v. Priest, 20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 1303 (1977) (rejecting the rationale of *Alyeska*). *See also* CAL. CIV. PROC. CODE § 1021.5 (West 1980) (codifying the *Serrano* doctrine).

tions to increase the admonitory force of the civil law.[13]

Although a fundamental rationale for the American rule is that no one should be punished for merely bringing or defending a lawsuit,[14] courts are faced with the problem of preserving the effectiveness of the judicial system in an increasingly litigious society.[15] If a court is forced to waste its limited resources on proceedings that should not have been brought, the entire judicial system and those it should be serving suffer as a result. Raising the risks of litigation by reallocating attorneys' fees is one way to discourage the wasting of judicial resources.

Although the shifting of attorneys' fees for abuses of the judicial system holds out the promise of alleviating the congestion that cripples courts,[16] it also holds out the threat of intimidating litigants with potentially meritorious claims[17] and inhibiting the growth and refinement of the substantive law.[18] Any exception to the no-fee rule must strike a delicate balance between deterring the abuse of judicial resources and maintaining free access to the courts.

I. THE AMERICAN RULE

It is curious that the principle of nonreimbursement of attorneys' fees should be so firmly rooted in American practice. In England, courts have had the power to award counsel fees to prevailing parties since the thirteenth century,[19] and they continue to do so today.[20]

There is some evidence that the English practice was retained for a short while in early America.[21] Some early statutes provided for the award of attorneys' fees according to fee schedules.[22] Because these statutory fee schedules were not updated to reflect the changing value of money, however, they became defunct in practice.[23] The precise reasons for the abandonment of fee shifting remain mysterious, although critics of the American rule have attributed it to "historical accident"[24] and "judicial preoccupation with stare decisis."[25]

Explanations for the abandonment of the English practice generally focus

13. See Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1174 (1931).

14. *See, e.g.*, Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1966).

15. *See generally* J. LIEBERMAN, THE LITIGIOUS SOCIETY (1981).

16. *See id.*, at 176-78; Comment, *supra* note 2, at 651.

17. *See* Comment, *supra* note 2, at 651; Note, *supra* note 2, at 593-94.

18. *See* Comment, *supra* note 2, at 652; Note, *Attorneys' Liability to Clients' Adversaries for Instituting Frivolous Lawsuits: A Reassertion of Old Values*, 53 ST. JOHN'S L. REV. 775, 796 (1979).

19. For a discussion of the evolution of fee shifting in England, see McCormick, *supra* note 9, at 618-19; Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 U. COLO. L. REV. 202, 204-07 (1966).

20. *See* Comment, *supra* note 2, at 638 n.7 (discussing current English practice).

21. *See* McCormick, *supra* note 9, at 620-21; Comment, *supra* note 2, at 640-42.

22. McCormick, *supra* note 9, at 620; *see also* Goodhart, *Costs*, 38 YALE L.J. 849, 873-74 (1929).

23. *See* McCormick, *supra* note 9, at 620-21.

24. Ehrenzweig, *supra* note 4, at 798.

25. Comment, *supra* note 2, at 642.

on public perceptions of law and lawyers in early America. Lawyers were viewed as characters of disrepute, whose power and prosperity were to be jealously restrained.[26] The law was not perceived as a complex or scientific body of knowledge, but rather as a matter of common sense and equitable principles, so that acting as an attorney was not thought to entitle one to compensation.[27] Because frontier trials were scarce and were occasions for huge public enjoyment,[28] one writer has theorized that Americans did not wish to erect any penalty that might have the effect of discouraging the trial of cases.[29]

For whatever reasons, the rule of nonreimbursement was apparently so well-engrained by 1796, that the Supreme Court, when it first addressed the issue, that the Court remarked that although the practice might not be strictly correct, it was the general practice of the United States and one that was "entitled to the respect of the court, till it is changed, or modified, by statute."[30]

Although the no-fee rule has been subject to some legislative and judicial modification since 1796, it is still well-entrenched, but not without serious flaws. The obvious effect of the American rule is that the party who prevails in a lawsuit is, in at least one respect, a loser. The net recovery received by a successful plaintiff will have been reduced by his counsel fees and other nonrecoverable expenses of litigation. The victory of a prevailing defendant is tainted by the fact that he will still be responsible for the attorney's fees incurred in the defense of the action. This state of affairs has been the basis of the most compelling criticism of the American rule: that a wronged party cannot be made completely whole.[31] One early advocate of reform asked: "On what principle of justice can a plaintiff wrongfully run down on a public highway recover his doctor's bill but not his lawyer's bill?"[32]

The failure of our legal system to award a full measure of recovery has given rise to the criticism that the American rule discourages the initiation or defense of lawsuits involving small amounts of money.[33] A potential plaintiff who has a meritorious but small claim will often suffer the injustice done to him rather than bring an action, because any judgment he might recover would be equalled or exceeded by the cost of bringing the action.[34] A contingent fee arrangement is not an antidote to this problem because the contingent fee is not appropriate in every case and might not be acceptable to an attorney in a close case or in one involving a small amount of money. A system of fee shifting could be an incentive for indigents to vindicate clear rights in court

26. *Id.* at 640-41. *See generally* Grant, *Observations on the Pernicious Practice of Law*, 68 A.B.A. J. 580 (1982).

27. R. POUND, THE SPIRIT OF THE COMMON LAW 112-38 (1921); Goodhart, *supra* note 22, at 873.

28. R. POUND, *supra* note 27, at 124-27.

29. McCormick, *supra* note 9, at 641-42.

30. Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306, — (1796).

31. F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 128 n.15 (1974); Kuenzel, *supra* note 4, at 84; Comment, *supra* note 2, at 649.

32. Judicial Counsel of Mass., *First Report*, 11 MASS. L.Q. 1, 64 (1925).

33. Ehrenzweig, *supra* note 4, at 792; Comment, *supra* note 2, at 650-51.

34. *See* Ehrenzweig, supra note 4, at 792-94.

and would make legal "aid" a matter of right.[35]

Conversely, a defendant might choose not to challenge a disputed claim, or even a groundless claim, if the costs of defending the claim would exceed the plaintiff's demands.[36] To this extent, the American rule may function as a "legalized form of blackmail"[37] that encourages frivolous claims and adds to the congestion of courts.[38]

Proponents of the American rule, while recognizing that it fails to provide full compensation to a prevailing party,[39] maintain that this flaw is outweighed by important countervailing interests. One commentator has argued that total redress is in itself an impracticable ideal:

> The web of events connects every wrongful act with too many varied losses and injuries for the law to protect against them all. The law selects certain risks of loss and injury and requires the wrongdoers to bear these; others . . . the law finds it more expedient to pass over. The essential question here, as always in such problems of delimitation of interests to be protected, is one of expediency or public good.[40]

A variety of objections to fee shifting have been raised to justify the conclusion that the no-fee rule is in the public good. One objection is that attorney's fees are too remote from the original injury to be included in the measure of damages.[41] This objection is not compelling, however, because it is foreseeable and often necessary that the injured person will obtain the services of an attorney in order to gain redress for those injuries.[42] A lawyer's fee for obtaining financial redress of an injury is only slightly more removed from the original wrong than is a physician's fee for physical redress of an injury, yet physicians' fees are routinely included in the measure of damages.

The fear that lawyers' fees might become exorbitant if they could be shifted to an opponent[43] is similarly unfounded, given the discretion of the court to determine and award an amount that constitutes a reasonable fee in the case.[44] Moreover, there is no indication that the cost of lawyers' services have increased in the numerous situations in which courts now award attor-

35. *See id.* at 796. *Cf.* Comment, *supra* note 2, at 651-52 (noting that fee shifting would deter poor litigants from bringing novel claims). *See generally* McLaughlin, *The Recovery of Attorney's Fees: A New Method of Financing Legal Services*, 40 FORDHAM L. REV. 761 (1972).

36. *See* Kuenzel, *supra* note 4, at 78.

37. *Id.*

38. *Id. See also* J. LIEBERMAN, *supra* note 15, at 176-78; Ehrenzweig, *supra* note 4, at 797.

39. *See, e.g.*, F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 128 n.15 (1974).

40. McCormick, *supra* note 9, at 641.

41. *Id.* at 639 n.99.

42. See Comment, *supra* note 2, at 648-49.

43. See McCormick, *supra* note 9, at 639.

44. *See* Lystarczyk v. Smits, 435 N.E.2d 1011, 1017 (Ind. Ct. App. 1982). For discussion of the standards used in determining the amount of attorneys' fees to be awarded, see Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-720 (5th Cir. 1974). *See also* Comment, *supra* note 2, at 701-12; Note, *supra* note 7, at 335-48. *See generally* Berger, *Court Awarded Attorney's Fees: What is "Reasonable"?*, 126 U. PA. L. REV. 281 (1977).

neys' fees pursuant to various statutes.[45]

A more serious argument for the maintenance of the American rule is that the extra time and attention necessary to hear motions, evidence, and arguments on the amount of attorneys' fees would constitute a serious burden on already-congested courts.[46] This extra burden cannot be denied, although courts would probably become efficient in awarding attorneys' fees if it became a routine matter. When public policy has favored fee shifting,[47] courts have undertaken the added time and cost in levying attorneys' fees.

A number of additional concerns militate against discarding the American rule as a universal practice. One concern expressed by the Supreme Court is that "having the earnings of the attorney flow from the pen of the judge before whom he argues" poses a threat to the principle of independent advocacy.[48] Presumably, this means that a system of fee shifting would place a lawyer in position in which he would be tempted to curry favor with the judge at the expense of his client's interests. The validity of this concern is difficult to evaluate, although it would be enlightening to study current practices in fee shifting cases in federal courts. It would appear, however, that if a lawyer earns court-awarded fees only if he or she prevails, there would not be a conflict between the lawyer's interests and the client's interests.

The most compelling argument in favor of maintaining the current practice of nonreimbursement of attorneys' fees is that universal fee shifting would discourage free access to the courts in the very type of case that the legal system is designed to resolve.[49] If a universal system of fee shifting were adopted, anyone who had a novel, disputed, or uncertain claim involving a substantial possibility of adverse judgment would be deterred from filing suit by the fear that he would be responsible for his opponent's attorney's fees as well as his own.[50] Even a litigant who had a contingent fee arrangement with his own attorney would be deterred from filing suit; this would cancel the benefit of the contingency fee as a means of financing litigation for litigants of modest means.

The free access issue is a doubled-edged sword. Some class of persons will be discouraged from using the courts whether a system of universal fee shifting is adopted or whether the current system of nonreimbursement is maintained. Under the current system, small claimants and poor litigants are deterred from using the courts; the small claimant because the potential recovery may not cover the cost of litigation, and the poor litigant because he can-

45. See McLaughlin, *supra* note 35, at 781.

46. *See* F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 129 (1974); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967); Oelrichs v. Spain, 82 U.S. 211, 231 (1872); Trails Trucking, Inc. v. Bendix-Westinghouse Automotive Air Brake Co., 32 Cal. App. 3d 519, 525, 108 Cal. Rptr. 30, 34 (1973).

47. *See supra* note 8.

48. F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 129 (1974).

49. *See id.*; Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967); Cordeco Dev. Corp. v. Santiago Vasquez, 539 F.2d 256, 263 (1976). *See also* McCormick, *supra* note 9, at 639-40.

50. *See* Comment, *supra* note 2, at 651-52.

not afford the cost of bringing the litigation. Because court congestion is one of the greatest problems facing modern courts, public policy favors the out-of-court settlement of small claims and the expansion and use of small claims courts.[51] The use of the contingency fee in appropriate cases and the availability of legal aid organizations help to improve access to the courts for poor litigants.[52] In any case, a poor litigant who has a novel or disputed claim would be doubly deterred under a fee shifting system, because he would run the risk of responsibility for two attorneys' fees if he lost the suit.[53]

The deterrence of disputed claims under a broad fee-shifting rule is troubling for several reasons. First, it is the disputed claim that should be brought to the judicial system for resolution, because no other social system provides an adequate process for resolving disputes of fact and law or providing the finality and enforceability of courts' judgments. Second, disputed and uncertain claims are instruments for the development and refinement of the substantive law. In a society in which flexibility and growth in the law are prized, it does not make sense to erect obstacles to the institution of such suits.[54] This is particularly true in areas of law, such as tort law, that are growing rapidly.

Given the magnitude of the social and political consequences that would be caused by complete abrogation of the American rule, it is no wonder that courts have repeatedly stated that such a change should be made by the legislature.[55] Even if the maintenance of the American rule is justified in most cases, however, it does not follow that it is appropriate in all cases. Fact-specific exceptions to the American rule can be used to remedy some of the flaws in the rule enumerated by its critics. Deterrence of frivolous litigation, compensation of litigants who have been wrongfully subjected to litigation, and punishment of abusive litigation practices can be accomplished through the principled use of the punitive exceptions to the American rule.

II. PUNITIVE EXCEPTIONS TO THE AMERICAN RULE

All of the exceptions to the American rule serve a compensatory function, since they all permit reimbursement of the benefited party for actual, out-of-pocket expenses. If compensation were the only rationale, however, there

51. Comment, *supra* note 2, at 651. *But see* Ehrenzweig, *supra* note 4, at 795-96 (arguing that small claims courts are an inadequate solution because not available in every community or frequently function as mere collection agencies).

Statutory authorization for fee shifting in small claims cases would permit full compensation for small claimants. *See, e.g.*, OR. REV. STAT. § 20.080 (1981). Such a statute, however, should allow fees awards to a prevailing defendant only if the suit had been groundless. Otherwise, small claimants with disputed or close claims would be deterred by the fear of being responsible for two fees.

52. Comment, *supra* note 2, at 651-52.

53. *See* McLaughlin, *supra* note 35, at 784-88; Comment, *supra* note 2, at 651.

54. *See* Comment, *supra* note 2, at 652. *See also* Note, *supra* note 18, at 796.

55. *See, e.g.*, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247, 250, 262 (1975); F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 131 (1974); Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796); Young v. Redman, 55 Cal. App. 3d 827, 840, 128 Cal. Rptr. 86, 93-94 (1976); Sorin v. Board of Educ., —— Ohio St.2d ——, 347 N.E.2d 527, 529 (1976).

would be no American rule. The compensation rationale must, therefore, be ancillary to other policies that compel compensating some, but not all, litigants for their transactional expenses in bringing or defending lawsuits.

Therefore, when an exception to the American rule is made there must have been something about the case that justifies taxing the amount of money necessary to pay attorneys' fees to one of the litigants and awarding it to the other. That "something" is usually found in some blameworthy conduct exhibited by the party against whom the fees are assessed. When the blameworthy conduct consists of some abuse of the judicial system, the exceptions may compensate the individual injured by the abuse, but the interest vindicated is the preservation of judicial authority and resources.

A. Awards of Attorneys' Fees in Civil Contempt Proceedings

Contempt of court is an act of disobedience or disrespect toward a judicial body, or obstruction of a court's orderly process.[56] The power to punish contempt through summary civil or criminal procedures is an inherent judicial power.[57] In the United States, contempt of court is considered to be an insult "offered to the authority of the people themselves, and not to the humble agents of the law, whom they employ in the conduct of their government."[58]

The violation of a court order also has the potential of causing injury to a litigant's opponent. In recognition of this possibility, an individual who is harmed by his opponent's violation of a court order may institute a private action for civil contempt.[59] In such actions, most frequently initiated by a postjudgment motion,[60] the plaintiff may be compensated for actual losses resulting from the contemnor's defiance.[61]

An overwhelming majority of courts have held that the actual damages recoverable in a civil contempt proceeding are not limited to the ordinary losses directly traceable to the contemnor's noncompliance, but also include transactional costs, such as attorneys' fees.[62] The Supreme Court has stated

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56. R. GOLDFARB, THE CONTEMPT POWER 1 (1963).

57. *Id.* at 2. *See also* Roadway Express, Inc. v. Piper, 447 U.S. 752, 764-66 (1980); Cooke v. United States, 267 U.S. 517, 539 (1925).

58. R. GOLDFARB, *supra* note 56, at 4 (quoting Watson v. Williams, 36 Miss. 331, 341 (1858)).

59. *See generally* Rendleman, *Compensatory Contempt: Plaintiff's Remedy When Defendant Violates an Injunction*, 1980 U. ILL. L.F. 971.

60. *Id.* at 974.

61. *Id.* at 971-72, 986.

62. *E.g.*, Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 428 (1923); Allied Materials Corp. v. Superior Prods. Co., 620 F.2d 224, 227 (10th Cir. 1980); Cook v. Ochsner Found. Hosp., 559 F.2d 270 (5th Cir. 1977); Sheila's Shine Prods., Inc. v. Sheila Shine, Inc., 486 F.2d 114 (5th Cir. 1973); Moody v. State *ex rel.* Payne, 355 So. 2d 1116 (Ala. 1978), *cert. denied*, 439 U.S. 910 (1978); Lewis v. Lorenz, 144 Colo. 23, 27, 354 P.2d 1008, 1011 (1960); Thomas v. Woollen, 255 Ind. 612, 615, 266 N.E.2d 20, 22 (1971); *In re* Marriage of Morriss, 573 S.W.2d 101 (Mo. Ct. App. 1978); Frankel v. Moskovitz, 503 S.W.2d 428 (Mo. Ct. App. 1973); State *ex rel.* Fraternal Order of Police v. City of Dayton, 49 Ohio St. 2d 219, 361 N.E.2d 428 (1977); Arvin, Inc. v. Sony Corp. of Am., 215 Va. 704, 213 S.E.2d 753 (1975); Ramstead v. Hauge, 73 Wash. 2d 162, 437 P.2d 402 (1968). Attorneys' fees are not recoverable in *criminal* contempt proceedings, however. *See Moody*, 355 So. 2d at 1119.

A few courts have implied that attorneys' fees cannot be awarded in civil contempt proceed-

that the power to award fees in such cases is one of the inherent powers of courts.[63] Under this exception to the American rule, however, recoverable fees are limited to those incurred in bringing the contempt action, and do not include those incurred in bringing the original suit[64] or in defending an appeal of the contempt judgment.[65] There is some authority holding that a defendant who is successful in exonerating himself from a contempt charge may not recover his attorney's fees.[66] Ordinarily, fees will not be awarded to a plaintiff who claims injury from wrongful conduct, but is unsuccessful in establishing contempt.[67]

The creation of this exception is justified by the broad discretion needed to enforce compliance with court orders. As one court explained:

> Courts have, and must have, the inherent authority to enforce their judicial orders and decrees in cases of civil contempt. Discretion, including the discretion to award attorneys' fees, must be left to a court in the enforcement of its decrees. The theory for allowing attorneys' fees for civil contempt is that civil contempt is a sanction to enforce compliance with an order or to compensate for losses or damages sustained by reason of non-compliance.[68]

The overriding goal of preserving court authority is furthered by the extraction of a financial penalty in the form of otherwise nonrecoverable damages from the contemnor.[69] This penalty is designed to coerce the contemnor's compliance,[70] and to discourage others from flouting court authority.[71]

The need to make full compensation to the injured is compelling in contempt cases. The person who institutes the contempt proceeding is the instrument for the enforcement of the law and the vindication of the court's authority. It would be undesirable for this person to be required to bear the

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ings absent statutory or other authorization. *See In re* Marriage of Neidert, 583 S.W.2d 461, 463 (Tex. Civ. App. 1979) (*dictum*). *Cf.* Bauguess v. Paine, 22 Cal. 3d 626, 586 P.2d 942, 150 Cal. Rptr. 461 (1978) (not within inherent power of trial court to require attorney whose alleged misconduct caused mistrial to pay opponent's fees); Wisniewski v. Clary, 46 Cal. App. 3d 499, 120 Cal. Rptr. 176 (1975) (trial court had no rule authorizing imposition of fees for failure to appear; fees could not be imposed as a condition of dismissal).

63. Roadway Express, Inc. v. Piper, 447 U.S. 752, 764-66 (1980); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 275 (1974) (Marshall, J., dissenting).

64. *E.g.*, Thompson v. Johnson, 410 F. Supp. 633, 643 (E.D. Pa. 1976), *aff'd*, 556 F.2d 568 (3d Cir. 1977); Universal Athletic Sales Co. v. Salkeld, 376 F. Supp. 514, 519 (W.D. Pa. 1974), *vacated*, 511 F.2d 904 (3d Cir.), *cert. denied*, 423 U.S. 863 (1975).

65. McFerran v. McFerran, 55 Wash. 2d 471, 476, 348 P.2d 222, 225 (1960).

66. *See* Glo-Klen Co. v. Far W. Chem. Prods., Inc., 53 Wash. 2d 9, 12, 330 P.2d 180, 182 (1958).

67. Hensley v. Board of Unified School Dist. No. 443, 210 Kan. 858, 864, 504 P.2d 184, 189-90 (1972). *See also* Rendleman, *supra* note 59, at 1001 n.144. *But cf.* Thompson v. Johnson, 410 F. Supp. 633, 644 (E.D. Pa. 1976) (suggesting in dicta that fees might be recoverable even when the court, in its discretion, does not issue a citation of contempt).

68. Cook v. Ochsner Found. Hosp., 559 F.2d 270, 272 (5th Cir. 1977).

69. *See* Hutto v. Finney, 437 U.S. 678, 691 (1978) (award of fees against obdurate litigant similar to contempt sanction, vindicating court's authority over recalcitrant litigant and discouraging protracted litigation).

70. Thomas v. Woollen, 255 Ind. 612, 615, 266 N.E.2d 20, 22 (1971); Frankel v. Moskovitz, 503 S.W.2d 428, 432 (Mo. Ct. App. 1973).

71. Rendleman, *supra* note 59, at 999.

costs of enforcing the court's order, for this would further reduce the benefits that he would have enjoyed but for the contemnor's noncompliance.[72] Furthermore, in many cases the only cognizable loss caused by contempt will be the attorneys' fees incurred in enforcing the court's order.[73]

In view of the plaintiff's position as a facilitator of desirable social policy, it is important that there be no disincentive to his instituting contempt proceedings. The availability of full compensation encourages plaintiffs to act as "private attorneys general" in instituting actions that vindicate court authority.[74]

The desire to maintain the incentive for individuals to bring socially desirable private actions is so important that courts have held it proper to award attorneys' fees against a contemnor even when there is no proof of willfulness in the violation of a court order.[75] In *Cook v. Ochsner Foundation Hospital*,[76] the Fifth Circuit Court of Appeals upheld the propriety of plaintiffs' recovery of damages and attorneys' fees compensating them for "bringing appellants' contempt to the court's attention,"[77] despite the absence of proof that the contemnor's noncompliance had been deliberate. The court rejected the contemnor's argument that the Supreme Court in *Alyeska* had limited the award of attorneys' fees to instances of "willful" disobedience of a court's order,[78] stating that *Alyeska* had not abrogated the inherent authority of a court to enforce its orders by any means necessary.[79]

In awarding attorneys' fees for compensatory purposes, the court stated that it was merely seeking to ensure that its original order was followed.[80] Regardless of whether the disobedience was willful, the plaintiffs' costs in

72. *See* Cook v. Ochsner Found. Hosp., 559 F.2d 270, 272 (5th Cir. 1977).

73. *See, e.g.*, Thompson v. Johnson, 410 F. Supp. 633, 643 (E.D. Pa. 1976) (mental anguish not proper element of compensatory damages). *See also* Rendleman, *supra* note 59, at 1001-02.

74. *See* Cook v. Ochsner Found. Hosp., 559 F.2d 270, 272 (5th Cir. 1977); Rendleman, *supra* note 59, at 998.

"Private attorney general" here refers to the idea that a private individual is encouraged to institute a legal proceeding that furthers a social interest as well as his own self-interest. One of the justifications for the imposition of punitive damages is that it provides an incentive for individuals to bring wrongdoers to justice. *See* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.9, at 205 (1973); Morris, *supra* note 13, at 1183-88. Presumably, the same rationale is true of any other extraordinary bounty offered to a claimant, including devices such as treble damages and the award of attorneys' fees.

75. Cook v. Ochsner Found. Hosp., 559 F.2d 270 (5th Cir. 1977); Ramstead v. Hauge, 73 Wash. 2d 162, 166, 437 P.2d 402, 405 (1960) (acting on advice of counsel no excuse). *Cf.* Gaddis v. Wyman, 336 F. Supp. 1225, 1227 (S.D.N.Y. 1972) (mem.) (no willful violation, but no fees awarded because lawyers of publicly funded legal aid association expended no personal funds). *See also* Rendleman, *supra* note 59, at 1000-01.

76. 559 F.2d 270 (5th Cir. 1977).

77. *Id.* at 271.

78. *Id.* at 271-73. The argument was based on language in Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258 (1975) (quoting Fleischman Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967)), in which the Court stated that "a court may assess attorney's fees for the 'willful disobedience of a court order . . . as part of the fine to be levied on the defendant.'"

79. 559 F.2d at 272. The court remanded the case to the trial court for hearing on and determination of the amount of reasonable attorneys' fees. *Id.* at 273.

80. *Id.* at 272.

bringing the matter to the attention of the court would be the same, and those costs would otherwise reduce the benefit gained by the prevailing party.[81] The decision in *Cook* is well-founded for several other reasons relating to judicial authority and economy. If a scienter element were required for awarding attorneys' fees in civil contempt proceedings, some violators might escape sanction merely because wrongful intent is difficult to prove. Moreover, such an element would require additional litigation in an already protracted proceeding.

Thus, awarding attorneys' fees to a prevailing plaintiff in a contempt proceeding serves a variety of desirable functions. The award provides an additional sanction designed to enforce a court's orders, fully compensates the party injured by the violation of those orders, and supports the underlying substantive law that originally gave rise to the order.

This exception to the American rule is particularly appropriate because the normal objections to fee shifting do not apply when one of the parties has violated a court order. The necessity of hiring an attorney to enforce a clear right pursuant to a court decree is a foreseeable consequence of the contemnor's noncompliance. There simply is no course of action open to the person injured by his opponent's disregard of a court order other than to return to the court for its assistance in enforcing the order.

Furthermore, the levying of attorneys' fees in such cases does not involve a great additional burden on the court. Because of the contemnor's obstinacy, the court will have already been forced to hold an expensive and protracted proceeding. The only additional work will be to determine the amount of a reasonable attorney's fee for the preparation of the contempt proceeding. In addition, any threat to the independence of attorneys that might exist in a universal system of fee shifting is not present in contempt cases. The plaintiff's attorney will not be placed in an inherent conflict of interest situation, since his client's interest and the judge's interest are one: to insure compliance with the court's prior ruling.

Finally, shifting attorneys' fees to a contemnor does not pose any threat to free access to the courts. The parties involved in a contempt proceeding will have already appeared before the court in which the decree question was rendered. Fee shifting in this limited situation poses no threat to other persons who contemplate filing or defending a lawsuit. Rather, it facilitates access to the courts by those injured by their opponents' noncompliance with court orders. In addition, fee shifting in this instance cannot chill the further development of the substantive law in evolving areas of jurisprudence because the substantive issue at hand will have already been decided.

The only person whose access to the court might be deterred is the defendant contemnor, since he cannot recover his attorney's fees if he is successful in defending the action. Fearing liability for two attorneys' fees, he might choose not to defend the contempt proceeding. On the other hand, the threat

81. *Id.*

could encourage the desired voluntary compliance with the court's order. Presumably, the exonerated contemnor might have the option of seeking his fees under the bad faith exception if the contempt proceeding had been instituted in bad faith.[82]

In sum, the award of attorneys' fees in contempt proceedings promotes the authority of the courts, the enforcement of the substantive law, and the compensation of the injured without posing a threat to the interests that underlie the American rule.

B. Recovery of Attorneys' Fees Incurred in Prior Litigation with a Third Party

Another exception to the general rule of nonreimbursement of attorneys' fees has been recognized in situations in which a defendant has, through some wrongful or tortious action, subjected the plaintiff to previous litigation with a third party.[83] This exception, often referred to as the "prior litigation" or "third party" exception, allows attorneys' fees incurred in the bringing or defense of previous litigation to be included as an item of damages in a suit against the party whose wrongful act caused that litigation.[84] The attorneys' fees so incurred are considered the natural and proximate consequences of the defendant's tort.[85] The elements of the prior litigation exception have been succinctly set out by a District of Columbia appellate court:

(1) The plaintiff must have incurred attorneys' fees in the prosecution or defense of a prior action;
(2) the litigation ordinarily must have been with a third party and not with the defendant in the present action; and
(3) the plaintiff must have become involved in such litigation because of some tortious act of the defendant.[86]

Unlike the contempt exception, in which attorneys' fees are imposed for conduct that threatens judicial authority, the prior litigation exception imposes attorneys' fees for conduct that threatens judicial resources. In contrast to the contempt plaintiff who recovers attorneys' fees incurred in the preparation of the contempt proceeding but not those incurred in presenting the main action, the prior litigation plaintiff recovers fees incurred in the presentation of the prior action against a third party, but not those incurred in prosecution of the action against the tortfeasor whose wrongful conduct instigated the prior action.[87] Attorneys' fees are part of the damages caused by the original wrong

82. *See infra* notes 171-213 and accompanying text.

83. *See* RESTATEMENT (SECOND) OF TORTS § 914 (1977); McCormick, *supra* note 9, at 631; Comment, *Recovery of Attorney Fees from Third Party Tortfeasors*, 66 CALIF. L. REV. 94 (1978).

84. *E.g.*, Earven v. Smith, 127 Ariz. 354, 621 P.2d 41 (1980); Prentice v. North Am. Title Guar. Corp., 59 Cal. 2d 618, 381 P.2d 645, 30 Cal. Rptr. 821 (1963) (in bank [sic]); Brem v. United States Fidelity & Guar. Co., 206 A.2d 404 (D.C. 1965); Osborne v. Hay, 284 Or. 133, 585 P.2d 674 (1978); Hoage v. Westlund, 43 Or. App. 435, 602 P.2d 1147 (1979).

85. *Brem*, 206 A.2d at 407.

86. Biddle v. Chatel, 421 A.2d 3, 7 (D.C. 1980).

87. *See* Empire Realty Co. v. Fleisher, 269 Md. 278, 286, 305 A.2d 144, 148-49 (1973).

that led to the prior litigation, and are not part of the cost of recovering for that wrong. Although the prior litigation exception is undeniably compensatory, it also punishes and deters conduct that involves an unreasonably great risk of creating additional burdens on the courts by instigating litigation among other parties.[88]

For example, in *Osborne v. Hay*[89] defendant real estate broker misrepresented income figures on the data sheet of a motel that was being offered for sale. Relying on these figures, plaintiff purchased the motel. Protracted litigation with the previous owner of the motel ensued when plaintiff stopped making payments after learning of the discrepancies in the income figures. When plaintiff later brought suit against the real estate broker, the Oregon Supreme Court affirmed the award of expenses of the prior litigation suffered as a result of defendant's fraud.[90]

At least one court has evidenced an intent to apply the prior litigation exception only to circumstances in which the dispute is *primarily* with a third party and occurs *prior* to litigation with the actual tortfeasor.[91] Such a rigid construction of the rule is unjustified. If the purpose of the prior litigation exception is to punish and deter conduct that exposes an innocent party to litigation, it should not matter whether the dispute with the tortfeasor who caused that litigation occurs before, during, or after the dispute with the third party. The key factor should be whether the defendant was guilty of some wrongful conduct that caused the plaintiff to be involved in litigation other

88. *See* Comment, *supra* note 83, at 97. *See also* Contra Costa County Title Co. v. Wolff, 184 Cal. App. 2d 59, 68, 7 Cal. Rptr. 358, 363 (1960) (recovery of fees based on conduct "calculated to result in litigation").

89. 284 Or. 133, 585 P.2d 674 (1978).

90. *Id.* at 142, 585 P.2d at 679.

91. Biddle v. Chatel, 421 A.2d 3 (D.C. 1980). In *Biddle* plaintiffs had sought the services of defendant real estate brokerage firm in helping them locate a house with a garage. They eventually purchased a house based on defendant's assurances that an alley which provided sole access to the garage was a public alley. After purchasing the house and using the alley, they received notice from a neighbor, Mrs. Yasuna, that the alley belonged to her. In fact, evidence was admitted at trial which showed that defendant had been involved with Mrs. Yasuna's purchase of her property some years before. After seeking satisfaction from defendant, the Biddles filed actions against Mrs. Yasuna to establish a prescriptive easement over the alley and against the brokers for misrepresentation. The suit with Mrs. Yasuna was eventually settled out of court after defendant paid Mrs. Yasuna $10,000 for easement rights. The action against the brokerage firm was maintained, and plaintiffs sought to recover the cost of the easement suit against Mrs. Yasuna from defendant.

Although the case appeared to meet the requirements of the prior litigation exception, the court held that it failed on all three. First, the court noted that the action against Mrs. Yasuna had not been a previous action, but rather had been filed concurrently with the misrepresentation action against defendant. Second, the court found the trial court's statement that fees were being awarded as a matter of equity to be insufficient, and stated that the court must have explicitly found the existence of a tort on the part of defendant. Most compelling to the court was its finding that the initial dispute was primarily between the Biddles and Chatel, rather than between the Biddles and Mrs. Yasuna. It stated that the Biddles had initially sought compensation from defendant, and Mrs. Yasuna had been drawn into the litigation as an afterthought. As such, it affirmed the denial of fees. The court had noted that it could not ignore the salient fact that defendant had financed the settlement between the Biddles and Mrs. Yasuna. Thus, the court may have felt that defendant had discharged its obligation to avert litigation by facilitating the settlement of the case. *Id.* at 8-9.

than a mere suit by the plaintiff to gain redress for that conduct.[92]

A party could escape the operation of the American rule by gratuitously naming a third party as a "front" for his dispute with the primary tortfeasor. Thus, the plaintiff should be required to prove that the action against the third party was reasonably necessary. When a reasonably necessary and good faith dispute with a third party is found to have resulted from the defendant's wrongful conduct, courts should not insist that a separate action be filed against the tortfeasor who caused the litigation.[93] Construing literally the "prior" in "prior litigation" runs counter to considerations of judicial economy, which militate in favor of settling all related issues in the same proceeding by a judge who is knowledgeable of the facts of the dispute.[94]

The degree of misconduct justifying application of the prior litigation exception has expanded with the development of the doctrine. Originally, the prior litigation exception applied only to palpable and intentional misconduct on the part of the defendant, such as fraud, malicious prosecution, slander of title, false imprisonment, tortious removal from office, or conversion.[95] More recently, however, the application of the prior litigation exception has been expanded to embrace cases in which the tortfeasor's conduct was merely negligent.[96] Thus, real estate brokers, insurance agents, escrow holders, and others whose ordinary negligence is likely to cause litigation for third parties are common targets for this exception.

In a seminal California case, *Prentice v. North American Title Guaranty Corporation*,[97] an escrow holder erred in the closing of the sale of a parcel of real estate, necessitating a quiet title action by plaintiffs against the buyers and first mortgagee of the property. In the same action, plaintiffs sought to recover the expenses of the action from the negligent escrow holder. The California Supreme Court stated that if the tort of another requires a person to act in protection of his interests by bringing or defending a lawsuit against a third person, he is entitled to recover the reasonably necessary expenditures thereby caused.[98] It commented that the American rule, codified in California,[99] pro-

92. McCormick, *supra* note 9, at 632.

93. Conversely, a party cannot escape the American rule by the mere institution of a second suit against an opponent for the expenses of the first. *Id.* at 633.

94. Several courts have dispensed with the requirement of a separate litigation. *See, e.g.*, Prentice v. North Amer. Title Guar. Corp., 59 Cal. 2d 618, 621, 381 P.2d 645, 647, 30 Cal. Rptr. 821, 823 (1963) (en banc): "there is no reason why recovery of such fees should be denied simply because the two causes . . . are tried in the same court at the same time." *See also* Ruth v. Lytton Sav. & Loan Ass'n, 266 Cal. App. 2d 831, 845, 72 Cal. Rptr. 521, 530 (1968); Hoage v. Westlund, 43 Or. App. 435, 602 P.2d 1147 (1979).

95. *See* McCormick, *supra* note 9, at 631-35; Comment, *supra* note 83, at 97; RESTATEMENT (SECOND) OF TORTS § 671(b) (1977) (reasonable expense of defense included as an item of special damages in a malicious prosecution case).

96. *See, e.g.*, Highlands Underwriters Ins. Co. v. Eleganté Inns, Inc., 361 So. 2d 1060, 1066 (Ala. 1978) (per curiam); Earp v. Nobmann, 122 Cal. App. 3d 270, 175 Cal. Rptr. 767 (1981); Manning v. Sifford, 111 Cal. App. 3d 7, 168 Cal. Rptr. 387 (1980); Hoage v. Westlund, 43 Or. App. 35, 602 P.2d 1147 (1979).

97. 59 Cal. 2d 618, 381 P.2d 645, 30 Cal. Rptr. 821 (1963) (in bank [sic]).

98. *Id.* at 620, 381 P.2d at 647, 30 Cal. Rptr. at 823.

99. CAL. CIV. PROC. CODE § 1021 (West 1954).

hibits fee shifting only in ordinary two-party cases, and is not applicable when the defendant has made it necessary to sue third persons.[100] The award of fees against the escrow holder was distinguishable because it was an award of damages and not an award of costs.[101] In addition, the court held that there was no reason to limit the operation of the exception to prior actions, since the defendant was not prejudiced by the resolution of the two issues in the same action.[102]

The broad language of *Prentice* expanded the potential application of the prior litigation exception on two fronts. First, it permitted the recovery of fees without the necessity of instituting a later, separate action against the tortfeasor. Second, it imposed attorneys' fees when the defendant's conduct had been less culpable than intentionally wrongful conduct. If the commission of any tort that leads to litigation with third parties can be the basis for shifting fees, it would stand to reason that the exception could be widely used in product liability and medical malpractice litigation. A supplier named as a defendant in a product liability suit along with the manufacturer of the product could argue that the manufacturer should be required to indemnify him for the expenses of defending the suit.[103] A physician named as a defendant in a malpractice suit based on the supply of a defective medical product could argue that the manufacturer of the defective product should indemnify him for the cost of his defense.[104] Although these arguments seem convincing under the language of *Prentice*, courts have not accepted them under the prior litigation exception.

For example, in *Trails Trucking, Inc. v. Bendix-Westinghouse Automotive Air Brake Co.*,[105] plaintiff's truck was involved in a collision with a third party, Crews. Crews sued Trails, and Trails cross-complained against the manufacturer of the truck's brakes, Bendix. When Bendix was found to have been at fault in the manufacture of the brakes, Trails brought a separate action over against Bendix for reimbursement of the expenses of its litigation with Crews. The California Court of Appeals refused to award attorneys' fees to Trails, stating that the third party exception was only to be used in extraordi-

100. Prentice v. North Amer. Title Guar. Corp., 59 Cal. 2d 618, 620, 381 P.2d 645, 647, 30 Cal. Rptr. 821, 823 (1963) (in bank [sic]).

101. *Id. But see* Comment, *supra* note 83, at 99 (questioning the logic of distinguishing costs from damages in this situation).

102. *Prentice*, 59 Cal. 2d at 620, 381 P.2d at 647, 30 Cal. Rptr. at 823.

103. *See, e.g.*, Davis v. Air Technical Indus., Inc., 22 Cal. 3d 1, 582 P.2d 1010, 148 Cal. Rptr. 419 (1978) (in bank [sic]); Trails Trucking, Inc. v. Bendix-Westinghouse Automotive Air Brake Co., 32 Cal. App. 3d 519, 108 Cal. Rptr. 30 (1973); Sorenson v. Safety Flate, Inc., 306 Minn. 300, 235 N.W.2d 848 (1975).

104. *See* Oskenholt v. Lederle Laboratories, 51 Or. App. 419, 625 P.2d 1357 (1981). In *Oskenholt*, a physician was sued by a patient when a drug he had prescribed caused blindness. The physician settled the malpractice suit for $100,000. He then sued the manufacturer of the drug, seeking to recover the cost of the settlement. The Oregon Court of Appeals analyzed the case under the prior litigation exception and remanded the case for further consideration of factual issues. Although the physician had not asked to recover his attorney's fees, the court stated that he would be able to recover expenses if he could prove their reasonableness.

105. 32 Cal. App. 3d 519, 108 Cal. Rptr. 30 (1973).

nary cases.[106] Although no language in *Prentice* required it,[107] the court stated that since there was no fraud, separate litigation brought by Bendix, or chain of vexatious litigation, there was nothing to justify the court in opening up a "Pandora's Box" of prolonged litigation.[108] Although Bendix owed Trails the duty to manufacture its brakes carefully so as not to harm Trails' truck, it had not undertaken any duty to pay Trails' attorneys' fees.[109] To impose such a duty, stated the court, might deter and defeat settlement, causing a multiplicity of litigation by successful defendants.[110]

In a similar case, *Davis v. Air Technical Industries, Inc.*,[111] the California Supreme Court reached the same result, but used a different analysis. In *Davis*, the manufacturer and the retailer of a defective elevator were named as defendants in a product liability suit. The retailer cross-complained against the manufacturer, seeking indemnification for the judgment as well as the attorneys' fees for defense of the action. The court stated that an exceptional case must be presented to justify the shifting of fees, and that fees would not be shifted in the ordinary product liability case.[112] The court distinguished *Prentice* by stating that the *Prentice* rule would not be applicable when a party had defended for his own benefit rather than for the benefit of another whose actual default had caused the litigation.[113] Over a vigorous dissent by Justice Mosk, who argued that this was a paradigm situation for full indemnification because the seller was innocent of any wrongdoing,[114] the court refused to indemnify the seller for the cost of defense of the action.[115] The majority's underlying reasoning was that "the judicial exception would swallow the rule."[116]

Obviously, the courts in *Trails* and *Davis* were pursuing a policy of containment, but their reasoning requires clarification beyond the conclusion that these cases were not "extraordinary." The language of *Prentice* can be construed to permit fee changing in almost any multiple party case when one of the defendants is primarily culpable. Danger exists in the application of a simple "but for" test which would provide that but for the acts of one of the defendants, the other would not have been exposed to litigation.

In product liability cases like *Trails* and *Davis*, both the distributor and the manufacturer of the product owe independent duties to the consumer. To hold a manufacturer of a product responsible for the defense costs of a distributor based only on a "but for" rationale would impose on the manufacturer a

106. *Id.* at 525, 108 Cal. Rptr. at 34.
107. Comment, *supra* note 83, at 100 n.33.
108. Trails Trucking, Inc. v. Bendix-Westinghouse Automotive Air Brake Co., 32 Cal. App. 3d 519, 525, 108 Cal. Rptr. 30, 34 (1973).
109. *Id.* at 525, 108 Cal. Rptr. at 33-34.
110. *Id.*
111. 22 Cal. 3d 1, 582 P.2d 1010, 148 Cal. Rptr. 419 (1978) (in bank[sic]).
112. *Id.* at 5, 7, 582 P.2d at 1012, 1014, 148 Cal. Rptr. at 421, 423.
113. *Id.* at 5, 582 P.2d at 1012, 148 Cal. Rptr. at 421.
114. *Id.* at 8-11, 582 P.2d at 1014-16; 148 Cal. Rptr. at 423-25 (Mosk, J., dissenting).
115. *Id.* at 8, 582 P.2d at 1014, 148 Cal. Rptr. at 423.
116. *Id.* at 7, 582 P.2d at 1013, 148 Cal. Rptr. at 422.

duty to pay for the defense of issues not confined to its manufacturing of a defective product. Total indemnification of the distributor would remove him from the scheme of risk distribution that the courts and legislatures have seen fit to impose in their development of product liability law. Distributor indemnification would not encourage the manufacturer as the "true" defendant to come in and defend, since he will have already been named by the plaintiff. If anything, it might nurture nuisance suits; manufacturers would be encouraged to make quick settlements of relatively small claims instead of disputing the claims against them.

In addition, such an application of the prior litigation exception distorts the purpose of the exception, which is not only to provide compensation to those who have been wrongfully exposed to litigation, but also to promote judicial economy by punishing and deterring the avoidable use of the courts.[117] The breach of duty that leads to liability for the marketing of a defective product is a broad, flexible duty owed primarily to the consumer of the product; proof of fault on the part of the manufacturer is usually not required. The marketing of a defective product creates no inherent or foreseeable abuse of the courts[118] that would be deterred by application of the exception. In any case, adequate deterrence to the marketing of defective products already exists through liberal doctrines providing for compensatory and punitive damages in product liability actions. The imposition of an additional sanction in the form of liability for a codefendant's attorney's fees would prolong litigation for no perceptible gain.

On the other hand, an argument can be made that it is justifiable to impose liability for attorneys' fees on a defendant who has exposed another to litigation through his negligent miscarriage of a clear contractual obligation. Examples of such conduct would include an insurance agent's negligent endorsement of a policy to a third person,[119] a title company's negligent failure to prorate taxes on a building,[120] or a real estate broker's negligent misrepresentation of the attributes or boundaries of a parcel of real estate.[121]

These situations do not present the problem of independent breaches of duty owed to a third party by both the tortfeasor and the person whom he has exposed to litigation. Rather, they involve the exposure of a trusting innocent to litigation with some third party. Although the negligent execution of a contractual duty does not constitute morally reprehensible conduct or involve an inherent abuse of the courts, such conduct has a high probability of causing litigation. This is especially true when the tortfeasor holds a position of re-

117. Comment, *supra* note 83, at 96-97.

118. *Cf. id.* at 97 (arguing no inherent abuse in quiet title actions).

119. *See* Highlands Underwriters Ins. co. v. Eleganté Inns, Inc., 361 So. 2d 1060 (Ala. 1978) (per curiam) (approving the application of the prior litigation exception but remanding for proof of reasonable attorneys' fees).

120. *See* Hoage v. Westlund, 43 Or. App. 435, 602 P.2d 1147 (1979).

121. *See, e.g.*, Manning v. Sifford, 111 Cal. App. 3d 7, 168 Cal. Rptr. 387 (1980) (existence of an easement); Walters v. Marler, 83 Cal. App. 3d 1, 147 Cal. Rptr. 655 (1978) (misdescribed property). *But see* Pederson v. Kennedy, 128 Cal. App. 3d 976, 979, 180 Cal. Rptr. 740, 742 (1982) (*Walters* in error because it allows attorneys' fees in ordinary two-party case).

sponsibility over ownership interests in highly regulated items of property, such as real estate and insurance funds. The interest in preventing avoidable litigation militates for the establishment of a high degree of care in such situations.

When the source of the duty owed is a clear contractual obligation rather than the more nebulous duties found in personal injury and product liability law, expectations of a high degree of care are not unreasonable. Indeed, there may be no other adequate deterrent to negligence of this type, since an injured person's actual damages may consist of no more than the cost of litigating the prior claim with the third person.

Consequently, application of the prior litigation exception is only appropriate when the resulting litigation was a highly foreseeable result of the defendant's conduct. If the exception is applied in a principled manner, focusing on the purpose of deterring the unnecessary creation of litigation, attorneys' fees will not be seen as remote from the original harm. As with the contempt exception, the prior litigation exception requires little additional use of judicial resources, since the court must convene to settle an already protracted proceeding. Although a party need not have prevailed in the other action to be compensated for the costs of that action under the prior litigation exception, it is unlikely that a threat would be posed to independent advocacy by this fee shifting because the attorney who seeks to apply the exception to a tortfeasor might not be the same attorney who defended or prosecuted the main action. When the same attorney tries both actions before the same judge, however, the attorney might be susceptible to judicial encouragement to settle the main action or to other possible divisions of loyalty. That negligible possibility, however, is not sufficient to override the benefits of the prior litigation exception.

The prior litigation exception deters wrongful conduct giving rise to litigation without affecting the interest in free access to the courts. The exception does not penalize the injured person's resort to the courts; rather, it compensates him for having been exposed to litigation. Furthermore, since this exception permits fee awards only for the prosecution or defense of the primary action, it does not deter the tortfeasor from defending the secondary action in which the prior litigation exception is raised. Although the normal American rule applies to the plaintiff's expenses of litigating against the tortfeasor, the prior litigation exception encourages him to try to obtain compensation for his expenses incurred in the primary action.

C. Awards of Attorneys' Fees Under the Bad Faith Exception

The most versatile exception to the American rule is avowedly punitive and is based on the existence of bad faith on the part of one of the litigants.[122] The power to levy fees against a party who has litigated in bad faith arises from the courts' traditional equitable powers[123] and has been recognized as an

122. *See* Hall v. Cole, 412 U.S. 1, 5 (1973). *See also* Hutto v. Finney, 437 U.S. 678, 691 (1978).

123. Courts of equity in the United States were endowed with the judicial powers possessed by

inherent, presumably supervisory, power of the federal courts.[124] Although a few state courts have indicated in dicta the existence of a nonstatutory power to levy attorneys' fees for bad faith,[125] and at least one state court has used this power to award fees,[126] the nonstatutory bad faith exception is primarily a creature of the federal courts.[127] Although language in some cases suggests that the bad faith exception authorizes the award of fees to prevailing parties only,[128] there are cases in which fees were awarded to nonprevailing parties

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the High Court of Chancery of England at the time of adoption of the Constitution. Fontain v. Ravenel, 58 U.S. 369, 384 (1854); Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1845). Included among these powers was the power to levy attorneys' fees for bad faith litigation. For an extensive treatment of the historical development of this power, see Guardian Trust Co. v. Kansas City So. Ry., 28 F.2d 233, 241-46 (8th Cir. 1928), *rev'd on other grounds*, 281 U.S. 1 (1930); Note, *Attorney's Fees and the Federal Bad Faith Exception*, 29 HASTINGS L.J. 319, 323-24 (1977). *See also* Vaughan v. Atkinson, 369 U.S. 527, 530 (1962) (power to award fees part of equitable powers of court).

Although the bad faith exception may have arisen in equity cases, application of the exception has not been limited to suits in equity. Note, *supra*, at 324.

124. *See, e.g.*, Roadway Express, Inc. v. Piper, 447 U.S. 752, 765 (1980); Alyeska Pipeline Co. v. Wilderness Soc'y, 421 U.S. 240, 259 (1975). See also Note, *supra* note 123, at 323.

125. *See* Fownes v. Hubbard Broadcasting, Inc., 310 Minn. 540, 542, 246 N.W.2d 700, 702 (1976); Barela v. Barela, 95 N.M. 207, 211, 619 P.2d 1251, 1255 (1980), Sorin v. Board of Educ. — — Ohio St. 2d ——, 347 N.E.2d 527, 531 (1976); 1901 Wyoming Ave. Coop. Ass'n v. Lee, 345 A.2d 456, 464-65 (D.C. 1975); Lystarczyk v. Smits, —— Ind. App. ——, 435 N.E.2d 1011, 1016-17 (1982); Umbreit v. Chester B. Stem, Inc., —— Ind. App. ——, 373 N.E.2d 1116, 1119-20 (1978); City of Indianapolis v. Central R.R., —— Ind. App. ——, 369 N.E.2d 1109, 1113 (1977); Saint Joseph's College v. Morrison, Inc., 158 Ind. App. 292, 302 N.E.2d 865, 870 (1973). *But see* Young v. Redman, 55 Cal. App. 3d 827, 838-39, 128 Cal. Rptr. 86, 93-94 (1976) (in absence of statute, trial courts do not have discretion to impose attorneys' fees for bad faith). *See* Note, *supra* note 123, at 338-43 (criticizing *Young v. Redman* and arguing for the application of the bad faith exception at the state level).

A few states have codified the bad faith exception. *See, e.g.*, GA. CODE ANN. § 20-1404 (1977); ILL. ANN. STAT. ch. 110, § 41 (Smith-Hurd Supp. 1982); MASS. ANN. LAWS ch. 231, §§ 6, F, G. (Michie/Law. Coop. Supp. 1982); WISC. STAT. ANN. § 814.025 (West Supp. 1982). *See generally* Sundby, *Awarding Reasonable Attorney Fees Upon Frivolous Claims and Counterclaims Under § 814.025, Stats.*, 53 WIS. B. BULL., May 1980, at 11. The scope of these statutes is not as broad as the federal bad faith exception. *See* Note, *supra* note 123, at 332-35. A number of other states have trial rules that permit the imposition of attorneys' fees for various types of bad faith. *See, e.g.*, Harden v. Widovich, 361 Mich. 422, 105 N.W.2d 224 (1960); Jensen v. Arntzen, 67 Wash. 2d 202, 406 P.2d 954 (1965).

126. City Nat'l Bank & Trust Co. v. Owens, 565 P.2d 4 (Okla. 1977).

In a hybrid exception having features of both the bad faith and the prior litigation exceptions, state and federal courts award attorneys' fees incurred in a prior action in which an insurance company breached its duty to defend. *See, e.g.*, Siegel v. William E. Bookhultz & Sons, Inc., 419 F.2d 720 (D.C. Cir. 1969); Brokers Title Co. v. St. Paul Fire & Marine Ins. Co., 466 F. Supp. 1174 (E.D. Pa. 1979); New Jersey Mfg. Indem. Ins. Co. v. United States Casualty Co., 91 N.J. Super. 404, 220 A.2d 708 (1966). *Cf.* Davis v. National Pioneer Ins. Co., 515 P.2d 580, 583-84 (Okla. Ct. App. 1973) (attorneys' fees not imposed for insurer's failure to settle within policy limits); MFA Mut. Ins. Co. v. Keller, —— Ark. ——, 623 S.W.2d 841 (1981) (attorneys' fees awarded to insured in action against insurer over disputed claim, pursuant to Arkansas statute authorizing awards of attorneys' fees in actions against insurance companies).

127. *See* Note, *supra* note 123, at 332. In diversity cases, a federal court is to follow the state rule on award of attorneys' fees. Alyeska Pipeline Co. v. Wilderness Soc'y, 421 U.S. 240, 259 n.31 (1975).

128. *See, e.g.*, F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 129 (1974) (noting that a court may award attorneys' fees "to a *successful* party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons" (emphasis added)), *cited with approval in* Roadway Express, Inc. v. Piper, 447 U.S. 752, 766 (1980) *and* Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 258-59 (1975). *See also* Nemeroff v. Abelson, 469 F. Supp. 630, 640-42 (S.D.N.Y. 1979), *rev'd*, 620 F.2d 339 (2d Cir. 1980).

when the bad faith was unrelated to the merits of the case.[129]

The bad faith exception includes instances of bad faith occurring during litigation and bad faith conduct that precedes litigation.[130] The exception embraces three variants of misconduct, all of which constitute abuse of the judicial system: obdurate or obstinate conduct that necessitates legal action; bad faith in propounding a frivolous claim, counterclaim, or defense; and vexatious conduct occurring during the course of litigation.

1. Prelitigation Misconduct

The branch of the bad faith exception that has the broadest potential application focuses on the prelitigation conduct of the defendant. The prelitigation conduct that traditionally has given rise to an award of attorneys' fees is obstinacy in the face of a clearly valid claim. When the defendant resists the plaintiff's clearly established right without justification for doing so, his obstinacy gives the plaintiff no choice but to seek judicial assistance in enforcing his right.[131] In such cases, shifting fees "recognizes the unfairness of imposing the costs of litigation on the party who should have freely enjoyed his rights."[132]

An illustrative case is *Vaughan v. Atkinson*,[133] in which a seaman brought suit in admiralty against his former employer when the employer failed without justification to respond to his claim for maintenance and cure. Although the Supreme Court awarded the seaman attorneys' fees under the rubric of compensatory damages,[134] it emphasized the role that defendant's bad faith had played in causing those damages. The Court stated that as a result of defendant's callous attitude and recalcitrance in neither admitting nor denying the claim, plaintiff had been forced to hire an attorney to get what was plainly owed to him under well-settled law.[135]

Plaintiff Vaughan's mere incurrences of attorneys' fees for purposes of pressing his claim, however, could not have been the central factor militating for the inclusion of attorneys' fees in compensatory damages. If defendant had opposed Vaughan's claim on the merits after careful investigation, Vaughan would still have been put to the expense of hiring a lawyer to press his claim. The cost of the employer's denial of the claim would have been the same had the claim been honestly disputed, but the court presumably would

129. *See* McEntaggart v. Cataldo, 451 F.2d 1109 (1st Cir. 1971), *cert. denied*, 408 U.S. 943 (1972) (fees imposed on prevailing party for bad faith refusal to release information); Marston v. American Employers Ins. Co., 439 F.2d 1035, 1042 (1st Cir. 1971) (fees imposed on defendants who asserted meritorious defense for delay and assertion of a frivolous defense). *See also* Weaver v. Bowers, 657 F.2d 1356, 1362 (3rd Cir. 1981) (en banc) (costs of appeal and posttrial proceedings imposed on prevailing party for failure to raise an issue in a timely manner).

130. Huecker v. Milburn, 538 F.2d 1241, 1245 n.9 (6th Cir. 1976).

131. Note, *supra* note 123, at 325.

132. Comment, *supra* note 2, at 661.

133. 369 U.S. 527 (1962).

134. *Id.* at 530.

135. *Id.* at 530-31.

not have awarded attorney's fees to Vaughan.[136] Such an award would have been tantamount to the dismantling of the American rule in favor of a new rule allowing the award of attorneys' fees to any prevailing party. Thus, the conduct warranting the award of fees in *Vaughan* was conduct that necessitated litigation when none should have been required.[137]

When a defendant causes unnecessary litigation by unjustifiably resisting an indisputable claim, he creates unwarranted expenses not only for his opponent, but for the public and the courts as well.[138] Clearly established rights should be respected and accorded without the intervention of a formal decision maker. The gravamen of the sin of obstinacy is the wasting of private and judicial resources. The imposition of attorneys' fees as a sanction for obstinacy is both compensatory and punitive or admonitory.[139] In this respect, the award of attorneys' fees for bad faith can be likened to remedial fines imposed by a court for civil contempt.[140] Such an award "vindicate[s] the . . . Court's authority over a recalcitrant litigant" and gives the defendant an incentive to see that further protracted litigation will not be necessary.[141]

The obstinacy branch of the bad faith exception proved especially useful in financing litigation in constitutional cases in which nonmonetary relief was sought and no statute authorizing attorneys' fees had yet been passed.[142] For example, in *Bell v. School Board*[143] defendant school board had maintained rigidly segregated schools and had made no progress toward integration despite the number of years that had elapsed since *Brown v. Board of Education*.[144] In fact, it had resisted the transfer of black students by creating complicated transfer procedures that in practice applied only to blacks. In granting injunctive relief and awarding attorneys' fees to plaintiffs, the Court of Appeals for the Fourth Circuit took into account the long pattern of evasion and obstruction on the part of defendant, [145]which included pretextuous invocation of discriminatory rules and specious objections to plaintiffs' exercise of their rights.[146] In *Bell*, defendant's misconduct included two discrete types of bad faith: bad faith in creating the original dispute by denying plaintiffs their constitutional rights (nonlitigation conduct) and bad faith in rebuffing plaintiffs' claims for redress of their grievances, which caused litigation that should

136. Walthall, *Award of Attorneys' Fees in the Absence of Statute: Trends and Prospects in the Fifth Circuit*, 10 CUM. L. REV. 359, 371 (1979).

137. *See also* Bradley v. School Bd., 345 F.2d 310, 321 (4th Cir. 1965); Gates v. Collier, 70 F.R.D. 341 (N.D. Miss. 1976); Gonzalez v. Gonzalez, 385 F. Supp. 1266 (D.P.R. 1974).

138. Haycroft v. Hollenbach, 606 F.2d 128, 133 (6th Cir. 1979).

139. *See* Huecker v. Milburn, 538 F.2d 1241, 1245 n.9 (6th Cir. 1976).

140. Hutto v. Finney, 437 U.S. 678, 691 (1978). Defendant's obstinacy was found in its failure to remedy constitutional violations that had been found in an earlier case.

141. *Id.*

142. Walthall, *supra* note 136, at 370. The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976), has since been enacted. The Act provides for the award of attorneys' fees to a party other than the United States in any action to enforce federal civil rights laws.

143. 321 F.2d 494 (4th Cir. 1963).

144. 347 U.S. 483 (1954).

145. 321 F.2d at 500.

146. *Id.* at 497.

not have been necessary (prelitigation conduct). Under the facts of *Bell* it would have been nearly impossible to separate the two types of misconduct, since an ongoing, consistent pattern of obstinacy had been established.[147] Nevertheless, *Bell* opened the door for considerable expansion in the application of the bad faith exception to nonlitigation conduct.

A questionable illustration of the application of the bad faith exception to nonlitigation conduct is *NAACP v. Allen*.[148] In *Allen* plaintiffs brought suit against the Director of the Alabama Department of Public Safety and the Personnel Director of the Alabama Personnel Department under 42 U.S.C. § 1983, alleging the unconstitutional exclusion of blacks from employment in the Department of Public Service. In addition to ordering injunctive relief, the federal district court awarded plaintiffs attorneys' fees under the bad faith and private attorney general[149] exceptions. The finding of bad faith was based on evidence that "in the thirty-seven-year history of the Alabama Trooper organization there has never been a black trooper, and the only Negroes ever employed by the department have been nonmerit system laborers."[150] In response to defendants' argument that they had been unsuccessful in their good faith attempt to hire blacks, the court stated that in view of defendants' understanding that discriminatory acts were unconstitutional, their maintenance of a defense to the lawsuit amounted to unreasonable and obdurate conduct.[151] Thus, the *Allen* court based its award of attorneys' fees solely on bad faith nonlitigation conduct that had given rise to the cause of action. The court seems to have said that if one has erred, one has no right to defend a lawsuit relating to that error.

Although the Supreme Court later stated that a court may assess attorneys' fees "when the losing party has *'acted* in bad faith, vexatiously, wantonly, or for oppressive reasons,' "[152] this language does not encompass the rationale of *Bell*. An award of attorneys' fees against a defendant for acting in bad faith in causing the original dispute functions very differently from an award of fees for unjustifiably opposing a clear claim. The expansion of the bad faith exception to embrace bad faith inherent in the cause of action itself could open the door to fee shifting in the ordinary tort or contract case.

An award of fees for unjustifiably opposing an indisputable claim serves

147. Other courts have found bad faith in a pattern of violations of well-established constitutional rights, including resistance to redress. *See, e.g.*, Gates v. Collier, 522 F.2d 81, 82-83 (5th Cir. 1975) (Tuttle, J., dissenting); Monroe v. Board of Comm'rs, 453 F.2d 259 (6th Cir. 1972) (school desegregation), *cert. denied*, 406 U.S. 945 (1973); Gates v. Collier, 70 F.R.D. 341 (N.D. Miss. 1976) (awarding fees on remand) (prison conditions); Miller v. Carson, 401 F. Supp. 835, 853-57 (M.D. Fla. 1975) (prison conditions); Burnaman v. Bay City Indep. School Dist., 445 F. Supp. 927, 939 (S.D. Tex. 1978) (clear violation of procedural due process).

148. 340 F. Supp. 703 (M.D. Ala. 1972), *aff'd*, 493 F.2d 614 (5th Cir. 1974).

149. *Id.* at 708-10. *See supra* note 11 for a discussion of the private attorney general exception.

150. *Id.* at 708. For a discussion of *Allen* as it relates to the application of an objective standard for bad faith, see Walthall, *supra* note 136, at 384.

151. 340 F. Supp. at 708.

152. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59 (1975) (quoting F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 129 (1974)) (emphasis added).

to protect the judicial system as an institution against unwarranted expenditures of its resources. Such an award is a necessary exercise of the supervisory and equitable powers of the court. A fee award against the defendant for bad faith in provoking the original dispute, however, punishes the defendant for his role in the substance of the dispute. This is tantamount to an award of punitive damages.[153]

Although such an award arguably falls within the courts' equitable powers, the punishment inflicted presents a potentially confusing overlap with the law of punitive damages.[154] If attorneys' fees are appropriate under the bad faith exception any time a defendant causes a dispute by his bad faith conduct, attorneys' fees should be available in any case in which punitive damages are presently awarded.[155] In fact, if bad faith for purposes of awarding attorneys' fees to prevailing plaintiffs is judged by an objective standard, attorneys' fees should be awarded in any case in which a defendant *should* have known that he was violating the legally protected interests of another. Such an expansive application of the bad faith exception would amount to the judicially created authorization of the award of attorneys' fees to almost any prevailing party.

The Supreme Court clearly does not sanction such an expansive application of the bad faith exception. In *Fleischmann Distilling Corp. v. Maier Brewing Co.*[156] the Court held that defendant's deliberate violation of plaintiff's trademark did not fall within any of the recognized exceptions to the American rule.[157] In *Runyon v. McCrary*[158] plaintiffs argued that an award of attorneys' fees under the bad faith exception was warranted because defendant had denied that it had discriminated against plaintiffs.[159] The Court rejected this application of bad faith, stating that the mere determination of fact against a defendant did not prove the threshold of irresponsible conduct for which a penalty would be justified.[160] These cases and others from the lower federal courts suggest that the bad faith exception for prelitigation conduct should

153. *See* Straub v. Vaisman & Co., 540 F.2d 591, 599-600 (3rd Cir. 1976); Refino v. Feuer Transp., Inc., 480 F. Supp. 562, 568-69 (S.D.N.Y. 1979), *aff'd*, 633 F.2d 205 (1980).

154. *See* Oakes, *Introduction: A Brief Glance at Attorney's Fees After Alyeska*, 2 W. NEW ENG. L. REV. 169, 175-76 (1979) (Introduction to Symposium on Attorneys Fees).

155. Punitive damages are imposed for a broad range of conduct, ranging from " 'oppression, fraud, or malice' on the one extreme to 'rudeness' or 'mere caprice' on the other." Long, *Punitive Damages: An Unsettled Doctrine*, 25 DRAKE L. REV. 870, 881 (1976). The nearer a defendant's state of mind comes to a subjective perception of the risk of harm to another, the more likely it is that punitive damages will be awarded. See D. DOBBS, *supra* note 74, § 3.9, at 205-06. *See* Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 650-63 (1980).

156. 386 U.S. 714 (1967).

157. *Id.* at 720. The Ninth Circuit Court of Appeals had characterized defendants' infringing activities as deliberate. *Id.* at 715-16.

158. 427 U.S. 160 (1976).

159. *Id.* at 183.

160. *Id.* at 183-84. The Court quoted the court of appeals decision approvingly: "Faults in perception or memory often account for differing trial testimony, but that has not yet been thought a sufficient ground to shift the expense of litigation." *Id.* at 184. *See also* Anderson v. Thompson, 495 F. Supp. 1256, 1269 (E.D. Wis. 1980), *aff'd*, 658 F.2d 1205 (1981) (fact that school had not done all that it might to further interests of child with special educational interests not sufficient to establish bad faith).

require some type of misconduct beyond a determination of fault or error, or even malice, in the facts that give rise to the cause of action.[161] They suggest that courts should focus on whether the defendant had a reasonable basis—in fact or in law—for opposing the plaintiff's claim.[162]

The bad faith exception should not be applied to permit fee shifting in the garden variety tort or breach of contract case in which the only bad faith is that inherent in the cause of action itself. Adequate deterrence to such conduct and adequate incentive to sue already exist through the availability of compensatory and punitive damages.[163] Furthermore, even though a defend-

161. *See, e.g.*, Zarcone v. Perry, 581 F.2d 1039 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979) (although defendant's nonlitigation conduct "intolerable," there was no showing of bad faith in defending the suit); Straub v. Vaisman & Co., 540 F.2d 591, 599-600 (3d Cir. 1976) (reversing award of attorney's fees in 10b-5 action when bad faith existed solely in acts which gave rise to the cause of action); Cordeco Dev. Corp. v. Santiago Vasquez, 539 F.2d 256, 262-63 (1st Cir.) (conduct giving rise to lawsuit insufficient for bad faith), *cert. denied*, 429 U.S. 978 (1976); Wright v. Hezier Corp., 503 F. Supp. 802, 811-15 (N.D. Ill. 1980). *But see* Note, *Recovery of Attorney's Fees Under Rule 10b-5*, 53 NOTRE DAME LAW. 320, 336-42 (1977) (criticizing *Straub*).

162. *Compare* Gates v. Collier, 70 F.R.D. 341, 345 (N.D. Miss. 1976) ("It remains evident that, in view of the settled state of the law at the time of commencement of this action, *Gates v. Collier* was an action which need not have been brought; or if brought, most certainly need not have been prolonged to the extent that it was.") *with* Stokes v. Lecce, 384 F. Supp. 1039, 1051 (E.D. Pa. 1974) (defendant's defense not in bad faith because substantive issue a close one).

The finding of bad faith in "act complained of" conduct in *Allen* and other constitutional cases may be explained by the fact that prior to 1976, a gap existed in federal legislation authorizing fee shifting in civil rights cases. *See, e.g.*, Monroe v. Board of Comm'rs, 453 F.2d 259 (6th Cir.), *cert. denied*, 406 U.S. 945 (1972); Rolax v. Atlantic Coast Line R.R., 186 F.2d 473 (4th Cir. 1951); Lamb v. Sallee, 417 F. Supp. 282 (E.D. Ky. 1976). Fee awards were authorized for prevailing plaintiffs in actions brought under the modern civil rights acts, but not for actions brought under the Reconstruction civil rights act. Zarcone v. Perry, 438 F. Supp. 788, 792 (E.D.N.Y. 1977) (appendixing statement of purpose for Civil Rights Attorney's Fees Awards Act), *aff'd*, 581 F.2d 1039 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(b), 2000e-5(k) (1981); Civil Rights Act of 1968 tit. VIII, 42 U.S.C. § 3612(c) (1976 & Supp. V 1981); Emergency School Aid Act of 1972, 20 U.S.C. § 1617 (1978) (repealed 1978); Equal Employment Amendments of 1972, 42 U.S.C. § 2000e-16(d) (1981); Voting Rights Act Extension of 1975, 42 U.S.C. § 1973(l)(e) (1976).

The private attorney general exception and the bad faith exception provided the means of reducing financial barriers to private enforcement. *Zarcone*, 438 F. Supp. at 793-94. Fee shifting in such situations was of great importance, in view of the fact that nonmonetary relief was frequently sought. *Zarcone*, 581 F.2d at 1043. *See also* Walthall, *supra* note 136, at 370. Absent some sanction greater than injunctive relief, a defendant had every incentive to delay the redress of constitutional violations. *See Gates*, 70 F.R.D. at 345; Bradley v. School Bd., 345 F.2d 310, 324 (4th Cir. 1965) (Sobeloff & Bell, JJ., concurring in part & dissenting in part).

In light of these circumstances, judges had understandable incentive to expand the bad faith exception. *See, e.g.*, Lamb v. Sallee, 417 F. Supp. 282 (E.D. Ky. 1976) (§ 1982 case decided after *Alyeska* but several months before the effective date of the Civil Rights Attorney's Fees Awards Act). The case involved a clear instance of wrongful refusal to rent on the basis of race. The court awarded attorneys' fees in addition to compensatory and punitive damages, noting that "[b]ad faith may be found in the actions that led to the lawsuit." *Id.* at 288. Although there was no bad faith found in the conduct of the litigation, the court focused on the fact that the state of the law was well-established at the time of the act complained of. Defendant's violation of well-settled law established bad faith. *Id.* Significantly, the court remarked "of course, 42 U.S.C. § 1982 contains no provisions for attorney's fees, and the Fair Housing Act of 1968, which contains such a provision, 42 U.S.C. § 3612(e), does not apply here." *Id.* Since the passage of the Civil Rights Attorney's Fees Awards Act of 1976, which provides for the award of attorneys' fees to prevailing parties in suits to enforce civil rights laws enacted since 1866, extension of the bad faith exception should not be necessary to enforce constitutional rights. *See* 42 U.S.C. § 1988 (1981).

163. *See, e.g.*, *Zarcone*, 581 F.2d at 1044; Fort v. White, 530 F.2d 1113, 1118 (2d Cir. 1976).

At least one state court has awarded attorneys' fees as an explicit *measure* of punitive damages in a tort case. *See* Cox v. Stolworthy, 94 Idaho 683, 496 P.2d 682 (1972). Courts frequently

ant may have acted in bad faith or with malice in the original dispute, he may have a reasonable legal or factual basis for contesting the suit against him. At least one important issue—damages—ordinarily will not be clear before trial. He should not, therefore, be punished for merely defending the suit.

An even more worrisome expansion of the bad faith exception is found in cases in which attorneys' fees have been awarded under the bad faith exception when the plaintiff's rights have not been clearly defined by well-settled law at the time the lawsuit was filed. In *Fairley v. Patterson*[164] plaintiffs were awarded attorneys' fees under the bad faith exception and the private attorney general exception, despite the delayed resolution of the substantive issues of the case after extensive litigation, including a series of appeals.[165] Although *Fairley* and other cases of its kind[166] may be of limited authority because they predated statutory authorization for the award of attorneys' fees,[167] they form dangerous precedents to the extent that they authorize fee shifting when the plaintiff's rights have not been clearly established at the time the lawsuit was filed.

Such an extension of the bad faith exception, if applied generally, would amount to the abrogation of the American rule. As one writer has stated:

> If the justification for the no-fee rule partially lies in policies favoring allocation of litigation decisions (including the decision to sue or defend) to the parties, a decision to resist a claim based on indisputable legal authority may nevertheless lie outside the range of permissible decisions open to a party. Thus, the award of attorneys' fees where a defendant, as in *Vaughan* or in *Bell*, has resisted such claim would not run counter to the policies underlying the no-fee rule.[168]

By contrast, the imposition of attorneys' fees on a party who has opposed an unestablished and disputable claim would violate the policies underlying the American rule. Such fee awards would impair free access to the courts for that defendant by increasing the risk of litigation. This, in turn, would threaten the development and refinement of the substantive law.

Courts have a strong interest in promoting the efficient use of their resources by punishing and deterring unwarranted use of the courts. This interest militates for the imposition of sanctions whether the plaintiff has caused

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consider attorneys' fees as one factor in determining the amount of punitive damages to be awarded. Owen, *Punitive Damages in Product Liability Litigation*, 74 MICH. L. REV. 1257, 1315, 1319 (1976). The Supreme Court stated in an early case, however, that attorneys' fees could not be awarded as a measure of compensatory or punitive damages. Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851).

164. 493 F.2d 598 (5th Cir. 1974).

165. Walthall, *supra* note 136, at 377-78.

166. *See also* Dyer v. Love, 307 F. Supp. 974, 986 (N.D. Miss. 1969). *Cf.* Sims v. Amos, 340 F. Supp. 691, 693-94 (M.D. Ala. 1972) (legislature's failure to act would be bad faith, but fee award based on broader, equitable grounds), *aff'd mem.*, 409 U.S. 942 (1972). See Walthall, *supra* note 136, at 375-79 for a more detailed discussion of these cases. *But See* Lytle v. Commissioners of Election, 65 F.R.D. 699, 701-02 (D.S.C. 1975) (no evidence in malapportionment case to support finding that defendant litigated in bad faith or that defense was offered without any possible basis in law or fact).

167. Voting Rights Act Extension of 1975, 42 U.S.C. § 1973(l)(e) (1976).

168. Walthall, *supra* note 136, at 375.

unwarranted expenditures by filing a frivolous claim or whether the defendant has caused litigation by his obstinate refusal to accord the plaintiff clearly-owed rights. In fact, use of the bad faith exception to sanction a defendant's obstinacy is an indispensible weapon for the protection of judicial economy because there is no common law tort action akin to malicious prosecution that applies to specious defenses.[169]

If courts are committed to maintaining the American rule as a general principle, however, they must take care to contain the bad faith exception to prelitigation conduct that bears a close relationship to the unwarranted use of the courts' resources. The exception should apply only in cases in which the defendant's bad faith is shown by *unjustified* opposition or inaction in the face of a clearly established claim on the part of the plaintiff.[170]

2. Substantive Bad Faith: The Assertion of Frivolous Claims, Counterclaims, and Defenses

One criticism of the American rule frequently encountered is that the general no-fee rule fails to deter—and even encourages—frivolous litigation.[171] Not only does the assertion of a groundless claim cause financial and emotional harm to the target of that claim,[172] it wastes judicial resources and threatens the prestige of the judicial system as well.[173] As one court stated, "Sufficient abuse of the judicial process could overwhelm the courts and destroy the judicial system as an effective branch of government. This . . . the courts have a constitutional duty to prevent."[174]

Like the common-law causes of action for malicious prosecution[175] and wrongful civil proceedings,[176] the application of this branch of the bad faith exception is designed to compensate, punish, and deter the harm done to

169. *See* Note, *supra* note 6, at 79.

170. In almost every instance in which fees have been awarded under the prelitigation branch of the bad faith exception, the existence of bad faith on the part of the defendant has been determined by the use of an *objective* standard. Walthall, *supra* note 136, at 383-84. Courts inquire whether the plaintiff's claim was well-established in law so as to render the defendant's opposition specious, but do not inquire into the existence of an improper motive on the part of the defendant. The standard for determining bad faith shifts to a subjective one when the conduct complained of is the assertion of a frivolous claim. *See infra* text accompanying notes 171-213.

171. Ehrenzweig, *supra* note 4, at 797; Kuenzel, *supra* note 4, at 78. *See also* J. LIEBERMAN, *supra* note 15, at 176-78.

172. *See* Comment, *Nemeroff v. Abelson, Bad Faith, and Awards of Attorneys' Fees*, 128 U. PA. L. REV. 468, 485 n.100 (1979) (comparing the damage caused by a groundless lawsuit to the damage caused by slander).

173. Note, *supra* note 18, at 798.

174. Copeland v. Martinez, 603 F.2d 981, 992 n.69 (D.C. Cir. 1979) (awarding fees to United States as prevailing defendant under common-law bad faith exception for groundless Title VII case), *cert. denied*, 444 U.S. 1044 (1980).

175. *See* RESTATEMENT (SECOND) OF TORTS § 653 (1977). *See generally* W. PROSSER, LAW OF TORTS § 119 (4th ed. 1971); Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 YALE L.J. 1218 (1979).

176. *See generally* RESTATEMENT (SECOND) OF TORTS § 674 (1977); W. PROSSER, *supra* note 175, § 120. While the torts of malicious prosecution and wrongful civil proceedings are distinguishable—the first involves the instigation of criminal proceedings and the second involves the instigation of civil proceedings—courts frequently use the term "malicious prosecution" to refer to both. The term will be used in this generic manner for the remainder of this article.

courts and private parties by the assertion of frivolous claims.[177] The bad faith exception theoretically decreases the risks of groundless litigation, in that one who files a groundless claim can be held responsible for the portion of the opponent's expenses attributable to his defense of the bad faith claim,[178] or even for all of the expenses of the defense of the lawsuit if bad faith pervades the entire suit.[179]

The common-law substantive branch of the bad faith exception walks the same tightrope between conflicting social policies as does the tort of malicious prosecution. Both attempt to remedy and discourage abuse of the judicial system without impeding free access to the courts for meritorious claims.[180] Accommodating these two goals is difficult and results in a weakening of both branches as potential deterrents to frivolous claims.

The major challenge facing courts in their application of this branch of the bad faith exception is to develop a workable standard for determining the existence of bad faith. A review of the relevant cases indicates that although courts apply an objective standard for the bad faith exception to defendants' prelitigation conduct,[181] they require much more to establish bad faith on the part of a party (usually a plaintiff) for his assertion of a substantive claim or defense. Although there is a mountain of authority supporting the power of courts to impose attorneys' fees for substantive bad faith,[182] there is a veritable dearth of appellate cases in which fees have actually been imposed on a party for his assertion of a groundless claim.[183]

One of these rare cases is *Ellingson v. Burlington Northern, Inc.*,[184] in which the Ninth Circuit Court of Appeals affirmed an award of attorneys' fees against plaintiff based on the district court's finding that plaintiff had abused the judicial process and harassed defendants.[185] Plaintiff's bad faith was shown by his filing of a new suit against defendants, based on sham pleadings that contained false allegations, some twenty years after the issue had been

177. Note, *Prevailing Defendant Fee Awards in Civil Rights Litigation: A Growing Threat to Private Enforcement*, 60 WASH. U.L.Q. 75, 111 (1982). *See* Mallen, *An Attorney's Liability for Malicious Prosecution, A Misunderstood Tort*, 46 INS. COUNS. J. 407, 409 (1979). For a discussion of the analogy between the bad faith exception and malicious prosecution, see Comment, *Awards of Attorneys' Fees Against Attorneys: Roadway Express, Inc. v. Piper*, 60 B.U.L. REV. 950, 962 n.107 (1980); Comment, *supra* note 172, at 481-83.

178. Lipsig v. National Student Mktg. Corp., 663 F.2d 178, 181 n.21 (D.C. Cir. 1980); Browning Debenture Holders' Comm. v. DASA Corp., 560 F.2d 1078, 1088-89 (2d Cir. 1977).

179. *See, e.g.*, Ellingson v. Burlington N., Inc., 653 F.2d 1327 (9th Cir. 1981) (awarding fees for defense of main action and appeal); Fisher v. Fashion Inst. of Technology, 87 F.R.D. 485 (S.D.N.Y. 1980); Scheriff v. Beck, 452 F. Supp. 1254, 1257-58 (D. Colo. 1978).

180. *See* authorities cited *supra* at note 177.

181. *See supra* note 170 and accompanying text.

182. *See, e.g.*, Roadway Express Co. v. Piper, 447 U.S. 752 (1980); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975); F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116 (1974); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967). *See also* authorities collected at 6 J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE § 54.77[2] (2d ed. 1982).

183. These cases are to be distinguished from those involving statutory attorneys' fee awards for prevailing defendants. *See infra* note 210 and accompanying text.

184. 653 F.2d 1327 (9th Cir. 1981).

185. *Id.* at 1331-32.

resolved against him in a proceeding before the Interstate Commerce Commission.[186]

This unusual case leaves unanswered the question of what conduct, short of filing sham pleadings and relitigating an issue that is res judicata, will attract an award of attorneys' fees for a plaintiff's substantive bad faith. The weight of authority indicates that a claim will not be found to have been so meritless as to justify an award of fees if it was colorable when instituted.[187]

An award of fees may not be justified even if the party's claim appears to lack factual merit at the time the case is filed. In *Nemeroff v. Abelson*[188] the Second Circuit Court of Appeals overturned an award of fees that had been imposed on plaintiff and his law firm[189] for having filed a lawsuit when the evidence gathered by the attorneys before they filed suit consisted of inadmissible and irrelevant evidence that the district court had characterized as "only rumor and gossip."[190] In reversing the fee award, the court of appeals stated:

> A claim is colorable for purposes of the bad faith exception, when it has some legal and factual support, considered in light of the reasonable beliefs of the individual making the claim. The question is whether a reasonable attorney could have concluded that facts supporting the claim *might* be established, not whether such facts actually *had been established*.[191]

This standard for bad faith appears to validate a "fishing expedition" in which the plaintiff files suit first, and later determines the facts. In *Health-Chem Corp. v. Hyman*[192] the court commented that failing to investigate before trial would not in itself constitute bad faith, since the questioning of opposing parties probably could not be accomplished without the aid of compulsory process.[193]

Even the assertion of claims that appear to be without reasonable legal

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186. Although plaintiff was held to have waived the issue of the award of attorneys' fees on appeal by failing to raise it in his brief, the court stated that the lower court's award of fees was proper. *Id.* The court also imposed fees on plaintiff for his prosecution of a meritless appeal, stating that "[a] frivolous lawsuit does not become meritorious when appealed." *Id.* at 1332.

187. *See, e.g.*, Lipsig v. National Student Mktg. Corp., 663 F.2d 178, 182 (D.C. Cir. 1980); Nemeroff v. Abelson, 620 F.2d 339, 350 (2d Cir. 1980); Browning Debenture Holders Comm. v. DASA Corp., 560 F.2d 1078, 1088 (2d Cir. 1977); Americana Indus. v. Wometco de P.R., Inc., 556 F.2d 625, 628 (1st Cir. 1977); Lichtenstein v. Lichtenstein, 481 F.2d 682 (3d Cir. 1973), *cert. denied*, 414 U.S. 1144 (1974); Health-Chem Corp. v. Hyman, 523 F. Supp. 27 (S.D.N.Y. 1981); Cambridge Fund, Inc. v. Abella, 501 F. Supp. 598, 632-33 (S.D.N.Y. 1980); Driscoll v. Oppenheimer & Co., 500 F. Supp. 174 (N.D. Ill. 1980); Medtronics, Inc. v. Mine Safety Appliances Co., 468 F. Supp. 1132, 1149 (D. Minn. 1979).

Certainly, if the party asserting the defense or claim prevails on the merits, there can be no finding of substantive bad faith. Foley v. Devaney, 528 F.2d 888 (3d Cir. 1976). Procedural bad faith can still be found on the part of a prevailing party, however. *See Lipsig*, 663 F.2d at 182 ("[E]ven a winner may have to pay obstinacy fees.").

188. 620 F.2d 339 (2d Cir. 1980). *See generally* Comment, *supra* note 172.

189. See *infra* notes 223-73 and accompanying text for a discussion of the imposition of attorneys' fees on attorneys.

190. Nemeroff v. Abelson, 469 F. Supp. 630, 640 (S.D.N.Y. 1979), *aff'd in part, rev'd in part and remanded*, 620 F.2d 339 (2d Cir. 1980).

191. 620 F.2d at 348. *Accord* Health-Chem Corp. v. Hyman, 523 F. Supp. 27 (S.D.N.Y. 1981).

192. 523 F. Supp. 27 (S.D.N.Y. 1981).

193. *Id.* at 31.

merit is apparently insufficient to justify the imposition of fees for substantive bad faith. In *Miracle Mile Associates v. City of Rochester*[194] the lessees and developers of a proposed shopping area brought an antitrust suit against the City of Rochester, city officials, and a commercial competitor. Plaintiffs had brought a similar action against other competitors based on the same theory of recovery and had lost. The district court awarded attorneys' fees to the current defendants, finding that plaintiffs' claim was frivolous and made in bad faith.[195] Despite the appellate court's conclusion that plaintiffs' legal claim was even weaker against the current defendants, the Court of Appeals for the Second Circuit reversed the district court's award of fees.[196] The court of appeals rejected the contention that plaintiffs' bad faith was shown by the fact that the merits of its case were even weaker than were the merits of its other suit in which ultimate recovery was barred.[197] The court stated that "[t]he mere fact that an action is without merit does not amount to bad faith."[198] Even though plaintiffs had been unsuccessful in the previous case when represented by the same counsel, the court pointed out that the instant action involved a different project and different proceedings.[199]

This case illustrates the contrast between the standard for bad faith applied to defendants for their prelitigation conduct and that applied to plaintiffs for substantive bad faith. A defendant charged with obstinacy in unjustifiably opposing a clear claim surely could not defeat the imposition of fees by arguing that although the law was well-settled by existing precedents, he might be successful in a different proceeding. *Miracle Mile* stands for the proposition that "bad faith" is not synonymous with "meritless." It suggests that some bad intent is required for a finding of bad faith, and furthermore, that the intent component cannot be inferred from the absence of merit in the party's claim. In a frequently cited case, *Browning Debenture Holders' Committee v. DASA Corporation*,[200] the Second Circuit Court of Appeals stated that substantive bad faith required clear evidence that the claim was entirely without color *and* that it was made for reasons of harassment, delay, or for some other improper purpose.[201]

Thus, the finding of substantive bad faith requires a two-step analysis of the claimant's conduct. First, an objective analysis is made to determine whether the claim had any legal or factual merit.[202] If the claim is found to have been colorable, the inquiry ends and the assertion of the substantive

194. 617 F.2d 18 (2d Cir. 1980).
195. *Id.* at 19.
196. *Id.* at 21.
197. *Id.*
198. *Id.*
199. *Id.*
200. 560 F.2d 1078 (2d Cir. 1977).
201. *Id.* at 1088.
202. This inquiry would parallel the element of lack of probable cause in malicious prosecution actions. In malicious prosecution, lack of probable cause is a matter of law to be determined by an objective standard. Mallen, *supra* note 177, at 419; Note, *Liability for Proceeding with Unfounded Litigation*, 33 VAND. L. REV. 743, 748 (1980).

claim or defense cannot have been made in bad faith.[203] If the claim is found to have been without merit, a court would use a subjective standard to determine whether there was evidence of improper purpose on the part of the litigant.[204] Because the confluence of objective lack of merit and subjective improper purpose is difficult to establish,[205] one must conclude that the standard for bad faith is rigorous and will be exercised only in extreme cases.[206]

Several courts have indicated that the rigorous subjective standard is necessary to ensure that plaintiffs with meritorious or colorable but novel claims are not deterred from bringing suit.[207] The underlying theory is that since "[t]oday's frivolity may be tomorrow's law,"[208] it is very difficult, particularly for a layman, to evaluate in advance whether his claim has merit. Lest those who have meritorious claims be chilled in their access to the judicial process, courts must confine the sanction of imposing attorneys' fees to those who *should* know, because of their improper motives, that the suit is impermissible. The use of a less restrictive standard in some statutory cases might be necessary to protect defendants and the courts, especially when the incentive to file frivolous lawsuits is made greater by the availability of almost automatic statutory awards of attorneys' fees to prevailing plaintiffs.[209] Although in nonstatutory cases there is no disincentive to filing a wholly groundless suit on the outside chance that one might prevail or at least extract a favorable settlement, the incentive created by the automatic statutory award is absent.

The operation of the subjective standard has restricted the application of

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203. *See, e.g.*, Lipsig v. National Student Mktg. Corp., 663 F.2d 178, 182 (D.C. Cir. 1980). If a justifiable claim were asserted for a wrongful purpose, however, the claimant could be liable for the tort of abuse of process. *See* Note, *supra* note 202, at 751; Note, *supra* note 177, at 112.

204. This inquiry is analogous to the "malice" element of malicious prosecution, which is determined through the application of a subjective standard. Mallen, *supra* note 177, at 419; Note, *supra* note 202, at 748. Although some courts will permit malice to be inferred from the absence of probable cause, "the logical viability of the inference depends on the extent of the absence of probable cause." Mallen, *supra* note 177, at 419.

Harassment has been mentioned by courts as one possible improper purpose. *See, e.g.*, *Browning Debenture Holders' Comm.*, 560 F.2d at 1088. If the improper purpose test is applied like the malice test in malicious prosecution, other improper purposes might include the desire to seek revenge or to do any other unjustified harm to the other party, or indeed, any purpose other than the recovery and adjudication of a claim. Mallen, *supra* note 177, at 418-19. One court stated that it would be possible for a case to be so frivolous as to reflect impermissible conduct for purposes of the bad faith exception. Americana Indus. v. Wometco de P.R., Inc., 556 F.2d 625, 628 (1st Cir. 1977).

205. An example of this extreme type of conduct is seen in Scheriff v. Beck, 425 F. Supp. 1254 (D. Colo. 1978), in which attorneys' fees were levied against plaintiff for his maintenance of a bad faith civil rights action against one of the defendants. Plaintiff admitted a plan to harass defendant through litigation and engaged in outrageous conduct toward defendant, both in and out of court.

206. Health-Chem Corp. v. Hyman, 523 F. Supp. 27, 30 (S.D.N.Y. 1981) (following *Nemeroff*, 620 F.2d at 348).

207. *Nemeroff*, 620 F.2d at 349-50; *Browning Debenture Holders' Comm.*, 560 F.2d at 1088.

208. Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 57 (1976).

209. Certain classes of prevailing plaintiffs may recover attorneys' fees absent special circumstances making such an award unjust. *See* Newman v. Piggie Park Enter., 390 U.S. 400, 402 (1968) (standard applied to plaintiffs who obtained injunctive relief under Title II of the Civil Rights Act of 1964); Northcross v. Memphis Bd. of Educ., 412 U.S. 427, 428 (1973) (*Newman* standard applicable to Title VII plaintiffs).

the bad faith exception for substantive bad faith to "nut cases." Since people who bring groundless lawsuits for purposes of harassment or revenge are not likely to be proceeding on rational bases anyway, it would seem that they are not likely to be deterred by the possibility that they may be liable for their opponents attorneys' fees. In short, the substantive branch of the bad faith exception is impotent as a deterrent to the bringing of groundless cases so long as a subjective standard is applied.[210]

The balance between maintaining free access to the courts and deterring groundless claims is difficult, and perhaps impossible, to strike. The formulation of a standard is made more difficult by the inability of litigants to assess accurately the merit or lack of merit of their claims. Requiring proof of improper motive as a prerequisite to the imposition of sanctions merely serves as a proxy for the concern that a litigant with a meritorious claim might be deterred from asserting it because he feared liability for counsel fees. If this is the case, it would seem preferable to test directly for good faith belief in the merits of the case rather than using a more indirect test that scrutinized the claimant's subjective, underlying motive.

If courts desire to accord more weight to the deterrent goal of the bad faith exception, they could employ a procedural device that would more efficiently fulfill their objective.[211] The determination of bad faith would take the form of a two-step process very different from the one currently used. First, the court would scrutinize the claim on an objective basis to determine whether it was colorable. If it was, the inquiry would end there and no finding

210. The subjective standard employed in the common-law bad faith exception exists in sharp contrast to the objective test for bad faith applied to unsuccessful plaintiffs under the statutory authorization of fee awards to prevailing parties in civil rights actions. 42 U.S.C. § 2000e-5(k) (Supp. V 1981). In Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978), the Supreme Court rejected the unsuccessful plaintiff's contention that Congress had intended that fees be awarded to prevailing defendants only on a showing that the plaintiff had been motivated by bad faith in bringing the action. The Court stated that if bad faith had been the intent of Congress, the statutory provision would have been unnecessary, "for it has long been established that even under the American common-law rule attorney's fees may be awarded against a party who has proceeded in bad faith." *Id.* at 419.

The Court found the subjective standard for bad faith inappropriate in Title VII actions because the legislative history of the statute indicated that the purpose of permitting fee awards to prevailing defendants was to discourage frivolous lawsuits and protect defendants from burdensome litigation that had no factual or legal basis. *Id.* at 420-21. The Court concluded that a district court may award attorneys' fees to a prevailing defendant in a Title VII case on a finding that the plaintiff's action was "frivolous, unreasonable or without foundation, even though it was not brought in subjective bad faith." *Id.* at 421; *see also* Runyon v. McCrary, 427 U.S. 160, 183 (1976). In applying this objective standard, the Court cautioned trial courts not to engage in "*post hoc* reasoning" and conclude that a plaintiff's action must have been unreasonable simply because he did not prevail, for this would discourage all but the most airtight of cases. *Id.* at 421-22. This objective standard of bad faith has been employed as a basis for awarding fees to prevailing defendants in a number of cases. *See, e.g.*, Fisher v. Fashion Inst. of Technology, 87 F.R.D. 485 (S.D.N.Y. 1980); Flora v. Moore, 461 F. Supp. 1104 (N.D. Miss. 1978) (fees assessed against Legal Services Corporation for procedural bad faith); Scheriff v. Beck, 452 F. Sup. 1254 (D. Colo. 1978) (ordinarily intent irrelevant, but here plaintiff admitted bad intent). *See also* Note, *supra* note 177, 103-18 (discussing the prevailing defendant cases and criticizing the objective standard as being a threat to private enforcement).

211. This procedural device has been suggested in two related contexts. *See* Comment, *supra* note 177, at 966-67 (regarding attorneys' liability); Comment, *supra* note 172, at 482-84 (regarding the demonstration of good intent on the part of a party).

of bad faith would be made. If the court found as a matter of law that the claim lacked any reasonable merit, however, this finding would give rise to a prima facie case or rebuttable presumption of bad faith on the part of the party asserting that claim.[212] The party asserting the claim would then be permitted to rebut the presumption with articulable reasons for his belief that the claim had merit at the time he asserted the claim or at the time he continued to press the claim after the lack of merit should have become apparent.[213] If the person could demonstrate a good faith belief in the merits of his claim, based on articulable reasons in fact and law, attorneys' fees should not be levied against him. If the claim was objectively groundless and the claimant could demonstrate no basis for having believed it to be meritorious, the court would find that he acted in bad faith.

The scheme would imbue the bad faith exception with greater power to deter groundless suits without chilling the potentially meritorious suit. A claimant would not be subject to sanction so long as he had an articulable basis in law and fact for believing in the merits of the claim, regardless of whether he had been objectively correct in his assessment. The redistribution of the burden of proof would not only make it more feasible to establish the existence of bad faith, it would also encourage a higher standard of care in prelitigation research and investigation.

3. Procedural Bad Faith

The last branch of the bad faith exception is insensitive to the merits of the case in chief and focuses instead on the "methodology of its prosecution."[214] A party whose vexatious conduct during the course of litigation has caused unnecessary expenditures by his opponent and the court can be required to pay the amount of the attorneys' fees attributable to his bad faith procedural manuevers.[215] Like Federal Rule of Civil Procedure 37, which permits the imposition of attorneys' fees as a sanction for abuse of the discovery process, and federal rule 41(d), which provides for the discretionary imposition of costs of a previously dismissed complaint, the purpose of this branch of the bad faith exception is to protect the efficient and orderly administration of the legal process.[216]

Procedural rules and practices provide unlimited opportunity for delay and harrassment, and any procedure can be misused. Examples of procedural abuse that have warranted the imposition of sanctions for bad faith include

212. *See* Comment, *supra* note 172, at 482-84, suggesting the use of summary proceedings modeled on the practice presently used in motions for summary judgment.

213. Bad faith might consist of continuing to press a meritless case after discovery had shown it to be factually unfounded. One court indicated that this might be shown when a party has the opportunity to settle a disputed point through discovery, but refuses to do so. *See* Snyder v. Leake, 87 F.R.D. 362, 364-65 (N.D. Miss. 1980).

214. Lipsig v. National Student Mktg. Corp., 663 F.2d 178, 182 (D.C. Cir. 1980).

215. *Id. See also* Browning Debenture Holders' Comm. v. DASA Corp., 560 F.2d 1078, 1088-89 (2d Cir. 1977).

216. *See* Roadway Express, Inc. v. Piper, 447 U.S. 752, 764-66 (1980).

the concealment of assets and falsification of records,[217] the refusal to produce documents ordered by the court,[218] the frivolous removal of a case to federal courts,[219] and the launching of extensive discovery aimed at making out a class action after the court has denied the maintainability of a class action.[220]

Although courts have not stated that the standard to be applied in cases of procedural abuse is different from the subjective standard applied to substantive bad faith,[221] they do seem much more willing to make a finding of bad faith on an objective basis when procedural abuse is alleged. The line to be drawn between aggressive advocacy and abuse is a fine one. One court commented:

> Vigorous advocacy involves conflict and is a natural and expected byproduct of litigation in our judicial system. It is only conduct that clearly goes beyond generally accepted vigor and persistence commonly employed in our adversary system that may be considered in determining whether sanctions should be imposed.[222]

The use of an objective standard that would permit a judge to infer bad faith from an observation that a procedural maneuver was unduly dilatory or without reasonable foundation would be justifiable in cases concerning procedural abuse. In cases of procedural abuse judges are in a better position to observe the parties' conduct first hand. Being experienced in procedural matters, they readily can compare the litigants' procedural conduct with the norm. In addition, procedural practices are likely to be governed by more clearly ascertainable rules and time limits than are substantive principles of law. A more restrictive test that required proof of subjective improper motive would not be mandated by the free access policy, since only the parties' procedural maneuvers, not their substantive claims, are being evaluated. A procedural maneuver that has some reasonable legal basis will not be sanctioned. Be-

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217. First Nat'l Bank v. Dunham, 471 F.2d 712 (8th Cir. 1973) (fee award not explicitly based on bad faith exception, but facts would justify fees under both bad faith and prior litigation exceptions).

218. Red School House, Inc. v. OEO, 386 F. Supp. 1177, 1193 (D. Minn. 1974).

219. Baas v. Elliott, 71 F.R.D. 693 (E.D.N.Y. 1976). *Compare* Cornwall v. Robinson, 654 F.2d 685 (10th Cir. 1981) [*and*] Baldwin v. Burger Chef Systems, 507 F.2d 841 (6th Cir. 1974) (denying attorneys' fees for removal because no bad faith was found) *with* Grinnell Bros. v. Touche, Ross & Co., 655 F.2d 725 (6th Cir. 1981) (awarding attorneys' fees for removal when case remanded to state court, holding that a finding of bad faith was not necessary to justify award because "overriding considerations indicate the need for such recovery," and interpreting *Baldwin* as holding that no bad faith was necessary) [*and*] Kasprowicz v. Capital Credit Corp., 524 F. Supp. 105 (E.D. Mich. 1981).

220. Flora v. Moore, 461 F. Supp. 1104 (N.D. Miss. 1978); *see also*, City of Nat'l Bank & Trust Co. v. Owen, 565 P.2d 4 (Okla. 1977) (plaintiff's bad faith shown by its moving to dismiss its case without prejudice after it had taken the matter through trial and both parties had rested, allegedly for the purpose of testing its case); Lipsig v. National Student Mktg. Corp., 663 F.2d 178, 181 (D.C. Cir. 1980) (defendant's bad faith shown by its dilatory tactics during discovery and court hearings, which included consistent failure to meet scheduled filing deadlines, misuse of discovery, and misleading the court by the misquotation and omission of documentary evidence).

221. One court spoke of the "intent-laden terminology" of the bad faith exception in a case dealing with an allegedly frivolous removal to federal court and rejected the application of a negligence standard. Cornwall v. Robinson, 654 F.2d 685, 687 (10th Cir. 1981).

222. Tenants and Owners in Opposition to Redevelopment v. HUD, 406 F. Supp. 960, 964 (N.D. Cal. 1975).

cause it is easier to assess whether a procedural move is justifiable than whether a substantive claim is colorable, there would be little reason to fear the chilling of potentially meritorious motions or practices. Moreover, dilatory litigation practices constitute such an extensive and unwarranted use of judicial resources that it is justifiable to accord judges additional latitude to deter procedural abuse.

4. Attorneys' Personal Liability for Opponents' Attorney's Fees

In years past, some courts assumed that a lawyer could not be held personally responsible for harm caused by groundless litigation, since he was acting in a purely representative capacity.[223] The malpractice "crisis" of the 1970s prompted increased interest in the possibility of suing attorneys personally for their role in facilitating groundless litigation.[224] Most courts now permit causes of action against attorneys for malicious prosecution and abuse of process,[225] but very few recoveries against attorneys under these theories have been affirmed at the appellate level.[226] Courts have uniformly refused to recognize any cause of action by opposing parties grounded in negligence.[227]

In the 1980 case of *Roadway Express, Inc. v. Piper*,[228] however, the Supreme Court cleared the way for an additional avenue of personal liability for attorneys. In *Roadway* two former employees and an unsuccessful job applicant commenced a civil rights class action against Roadway Express. After plaintiffs' interrogatories had been answered and defendant's interrogatories had been served, plaintiffs' attorneys engaged in a pattern of uncooperative behavior, including failing to appear at a hearing and depositions at scheduled times, failing to answer interrogatories, and failing to file briefs that had been ordered, even after the time for filing had been extended by more than seven weeks.[229] The district court dismissed the lawsuit pursuant to a rule 37[230] motion filed by defendant, and ordered plaintiffs' attorneys to pay Roadway's

223. *See* Mallen, *supra* note 177, at 409.

224. The possible use of common-law tort to stem the flow of malpractice litigation has prompted a great deal of commentary. *See, e.g.*, Birnbaum, *Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions*, 45 FORDHAM L. REV. 1003 (1977); Note, *Malicious Prosecution: An Effective Attack on Spurious Medical Malpractice Claims?*, 26 CASE W. RES. L. REV. 653 (1976); Note, *Physician Countersuits: Malicious Prosecution, Defamation and Abuse of Process as Remedies for Meritless Medical Malpractice Suits*, 45 U. CINN. L. REV. 604 (1976).

At least one state has enacted a statute permitting fee awards to prevailing parties in medical malpractice cases. *See* FLA. STAT. § 768.56(1) (Supp. 1980). The statute contains, however, no authorization for the imposition of fees directly against an attorney. *See generally* Spence & Roth, *Closing the Courthouse Door: Florida's Spurious Claims Statute*, 10 STETSON L. REV. 397 (1981).

225. *See, e.g.*, Ferraris v. Levy, 223 Cal. App. 2d 408, 36 Cal. Rptr. 30 (1963); Berlin v. Nathan, 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978). *See also* Mallen, *supra* note 177, at 409.

226. Mallen, *supra* note 177, at 408; Note, *supra* note 18, at 775, 781.

227. *See, e.g.*, Bird v. Rothman, 128 Ariz. 599, 627 P.2d 1097 (1981); Lyddon v. Shaw, 56 Ill. App. 3d 815, 372 N.E.2d 685 (1978).

228. 447 U.S. 752 (1980).

229. *Id.* at 755.

230. FED. R. CIV. P. 37(b)(2)(c) permits a district court to dismiss an action as one of the possible sanctions for abuse of the discovery process.

costs and attorneys' fees. The total assessment exceeded $17,000.[231] The district court justified the fee award by reading together the civil rights attorneys' fees statutes, which permit the award of fees to prevailing parties,[232] and 28 U.S.C. § 1927, which authorizes district courts to tax excess "costs" of a proceeding against a lawyer who "so multiplies the proceedings . . . as to increase costs unreasonably and vexatiously."[233]

The Supreme Court rejected the district court's contention that the confluence of these two statutes provided statutory authority for the assessment of fees against counsel,[234] but it approved in principle such an assessment as an exercise of the court's inherent powers.[235] These inherent powers, which "are necessary for the exercise of all others,"[236] have been expressed in the contempt sanction, sanctions for abusive litigation practices such as dismissal for failure to prosecute, and the imposition of attorneys' fees on a party for bad faith litigation.[237] The Court concluded that the power of a court over members of the bar is at least as great as its power over litigants, and "[i]f a court may tax counsel fees against a party who has litigated in bad faith, it certainly may assess those expenses against counsel who willfully abuse judicial process."[238] It remanded the case to the district court for a specific finding that counsel's misconduct constituted bad faith, which the Court stated would be necessary for a sanction based on the courts' inherent powers.[239]

The language of *Roadway* clearly authorizes the assessment of fees against an attorney for substantive or procedural bad faith.[240] The Court did not, however, specify the standard of bad faith to be applied to an attorney. As in the formulation of standards to be applied to party litigants, the standard selected must accommodate the twin goals of deterrence and free access.[241] Indeed, the conflict between these goals is heightened when the person sanc-

231. Monk v. Roadway Express, Inc., 73 F.R.D. 411 (W.D. La. 1977), *vacated* 599 F.2d 1378 (1979), *aff'd sub. nom.* Roadway Express, Inc. v. Piper, 447 U.S. 761 (1980).

232. 42 U.S.C. §§ 1988, 2000e-5(k) (Supp. V 1981).

233. 28 U.S.C. § 1927 (1976). See *infra* note 234 for the text of this statute as amended in 1980.

234. 447 U.S. at 761. Congress promptly amended § 1927 to provide for the levying of costs *and* attorneys' fees against recalcitrant lawyers. Act of Sept. 12, 1980, Pub. L. No. 96-349, § 3, 94 Stat. 1156 (codified at 29 U.S.C. § 1927 (Supp. V 1981)). Section 1927 now provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

29 U.S.C. § 1927 (Supp. V 1981).

235. 447 U.S. at 764. The Court also directed the district court to reconsider on remand Roadway's Rule 37 motion. *Id.* at 763-64. FED. R. CIV. P. 37(b)(2)(e) specifies the award of attorneys' fees as one possible sanction for abuse of discovery.

236. 447 U.S. at 764.

237. *Id.* at 764-65.

238. *Id.* at 766.

239. *Id.* at 767.

240. "The bad-faith exception for the award of attorney's fees is not restricted to cases where the action is filed in bad faith. '[B]ad faith may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation.'" *Id.* at 766 (quoting Hall v. Cole, 412 U.S. 1, 15 (1973)).

241. Comment, *supra* note 177, at 962.

tioned is a lawyer. Imposing personal liability on the person who determines litigation tactics and who is most likely to be informed about his legal vulnerability greatly increases the deterrent capabilities of the bad faith exception. At the same time, a lawyer who is fearful of personal liability may be a "timid champion" indeed, contrary to his ethical duty of zealous advocacy.[242] If an attorney fears being held the guarantor of the merits of a client's claim, the attorney might refuse to prosecute difficult or controversial claims.[243] The potential chill on free access to the courts is apparent, for a claimant might not be able to obtain a competent lawyer to press a close claim.

A negligence standard for determining bad faith on the part of an attorney would not properly accommodate these competing interests. Holding a lawyer to the standard of a reasonable attorney in evaluating the merits of a case or a procedural maneuver might lead to such uncertainty that the attorney would prefer to be on the safe side and decline to take the case.[244] Such a standard would increase deterrence at the expense of free access.[245] Furthermore, the Supreme Court may have foreclosed the application of a negligence standard. In *Roadway* the Court noted that New York courts impose costs and fines on attorneys for mere negligence, but "this opinion addresses only bad-faith conduct."[246] It further stated that a finding of bad faith would have to precede any sanction under the court's inherent powers,[247] and spoke of an attorney "willfully" abusing the judicial process.[248]

Conversely, a "malice" or subjective improper purpose standard would unduly exalt the free access policy at the cost of severely limiting any deterrent force behind the bad faith exception.[249] This is particularly true for lawyers because the usual unsavory motivations that a lawyer would have for pressing meritless suits or engaging in vexatious procedural maneuvers—procuring a fee at any cost, extracting a favorable settlement in a groundless "nuisance" suit, or even simple incompetence—are not considered to be improper motives, at least in the analogous areas of malicious prosecution and abuse of process.[250] Furthermore, a malice standard would have a divisive effect on the

242. Thode, *The Groundless Case—The Lawyer's Tort Duty to His Client and to the Adverse Party*, 11 ST. MARY'S L.J. 59, 74 (1979).

243. *See* Mallen, *supra* note 177, at 409.

244. Comment, *supra* note 177, at 964-65.

245. *Id.*

246. 447 U.S. at 767 n.13.

247. *Id.* It should be noted that 28 U.S.C. § 1927, as amended, permits the imposition of attorneys' fees on counsel who have "unreasonably" extended the proceedings. *See supra* note 234. This language can be construed to permit imposition of fees in federal courts for procedural bad faith through the use of a negligence standard. *But see* Chrysler Corp. v. Lakeshore Commercial Fin. Corp., 389 F. Supp. 1216, 1224 (E.D. Wis. 1975) (suggesting that an attorney could not be taxed with costs under 28 U.S.C. § 1927 absent proof that a vexatious claim had been prompted by counsel rather than by the client), *aff'd mem.*, 549 F.2d 804 (7th Cir. 1976).

248. 447 U.S. at 766.

249. Comment, *supra* note 177, at 964. *See also* Thode, *supra* note 242, at 70-71 (arguing for a higher standard of care for attorneys in malicious prosecution suits on the ground that a subjective malice standard protects incompetent lawyers).

250. *See* Bird v. Rothman, 128 Ariz. 599, 627 P.2d 1097, 1101 (1981). *See also* Mallen, *supra* note 177, at 418-19.

attorney-client relationship. In an attempt to refute improper motive, an attorney might be inclined to present evidence that his client had lied to him or that he had filed the claim upon his client's insistence.[251] This would create an inherent conflict of interest and could cause the divulgence of privileged communication.[252]

An intermediate standard similar to the one proposed for party litigants[253] holds out the promise of the best compromise between the deterrence and free access policies. Under this intermediate standard, which has been termed the "intentional abuse" standard,[254] a claim or procedural maneuver would be found to have been in bad faith if the claim were objectively meritless and, taking into account the lawyer's expertise,[255] direct or circumstantial evidence indicated that the lawyer knew it was meritless.[256] In other words, a court could infer bad faith if the absence of merit were so pronounced that the attorney must have appreciated the speciousness of the claim or procedure and deliberately proceeded with it.[257] The attorney could rebut this presumption with evidence that showed his good faith belief that the claim had some validity.[258]

Such a rule would not deter the attorney from prosecuting a difficult claim, so long as the attorney could articulate reasons for belief in its merit. Indeed, it might encourage a higher standard of care in the preparation and prosecution of cases. It would also discourage the institution of "nuisance" suits.

Even if courts maintain the subjective standard of bad faith for litigants, they would be justified in applying a less restrictive standard to attorneys. Attorneys are knowledgeable about the law and in control of most of the procedural steps that are taken; therefore, they are in a better position than their clients to be aware of the merits of their position.[259]

A more difficult issue facing courts after *Roadway* is how the sanction of attorneys' fees awarded to an opponent should be allocated between the offending attorney and client. Prior to *Roadway*, most courts that awarded fees pursuant to the bad faith exception imposed the fees only against the party litigant for both substantive and procedural bad faith.[260] In *Roadway* the Court approved the imposition of attorneys' fees on attorneys for their bad

251. Comment, *supra* note 177, at 964.

252. *See* Sundby, *supra* note 125, at 21.

253. *See supra* notes 211-12 and accompanying text. *See also* Comment, *supra* note 177, at 967.

254. Comment, *supra* note 177, at 966.

255. *Id.* at 966-67. *See* Driscoll v. Oppenheimer & Co., Inc., 500 F. Supp. 174, 176 (N.D. Ill. 1980) (difficulty of pleading securities matters taken into account).

256. Comment, *supra* note 177, at 966-97.

257. *Id. See also* Thode, *supra* note 242, at 79 (arguing for a "recklessness" or "manifestly erroneous" test for torts involving groundless litigation).

258. Comment, *supra* note 177, at 967.

259. *Id.* at 963.

260. *See, e.g.*, Vaughan v. Atkinson, 369 U.S. 527 (1962); Gates v. Collier, 70 F.R.D. 341 (N.D. Miss. 1976); Scheriff v. Beck, 452 F. Supp. 1254 (D. Colo. 1978).

faith conduct, but did not address the issue of the clients' responsibility, if any, for their lawyers' dilatory conduct.[261] If *Roadway* authorizes fee awards against attorneys for both substantive and procedural bad faith, as its language suggests,[262] cases will certainly arise in which courts will be required to decide who should bear the attorneys' fees imposed for bad faith conduct—the attorney, the client, or both.

The few relevant cases are devoid of analysis and offer few clear conclusions. In *Reed v. Sisters of Charity of the Incarnate Word of Louisiana, Inc.*,[263] a pre-*Roadway* case, attorneys' fees were imposed against a lawyer and his clients for the filing of a frivolous civil rights action.[264] Fees of $2000 were assessed against the clients *in solido* for filing the frivolous claim and an additional $2000 was assessed against the attorney for making an inflammatory speech one month before the litigation commenced, which was instrumental in fomenting the litigation.[265] In another pre-*Roadway* case, the court suggested that an attorney could not be taxed with costs under 28 U.S.C. § 1927 absent proof that a vexatious claim had been prompted by counsel rather than by the client.[266] In a post-*Roadway* case involving both substantive and procedural bad faith, the court explicitly found bad faith on the part of both attorney and client, but assessed fees against the client alone, reading *Roadway* to hold that fees could not be assessed against the attorney.[267]

In cases involving extensive or solely procedural abuse, however, courts have been much less willing to hold clients responsible for their attorneys' misconduct. A number of courts have stated that clients cannot be held personally liable for their lawyers' procedural abuses unless they were aware of or otherwise responsible for their lawyers' actions.[268] In *Flora v. Moore*,[269] a groundless civil rights action in which the court found extensive procedural bad faith, fees were imposed solely against a legal services agency. The court reasoned that liability solely against the agency was appropriate because the clients were indigents who had left the entire litigation to their attorneys and were personally unaware of the attorneys' vexatious misconduct.[270] In *Acevedo v. Immigration and Naturalization Service*[271] the court found the cli-

261. In its statement of the facts of the case, the Court noted that the lawyers had not advised their clients that the suit was being prosecuted as a class action. 447 U.S. at 755-56. It made no further reference to the clients' role in the lawyers' bad faith conduct.

262. *See supra* note 40.

263. 447 F. Supp. 309 (W.D. La. 1978).

264. *Id.* at 320.

265. *Id.*

266. Chrysler Corp. v. Lakeshore Commercial Fin. Corp., 389 F. Supp. 1216, 1224 (E.D. Wis. 1976), *aff'd mem.*, 549 F.2d 804 (7th Cir. 1977).

267. Fisher v. Fashion Inst. of Technology, 87 F.R.D. 485, 486 (S.D.N.Y. 1980).

268. Browning Debenture Holders' Comm. v. DASA Corp., 560 F.2d 1078, 1089 (2d Cir. 1977). *Accord* Robinson v. Ritchie, 646 F.2d 147, 149 (4th Cir. 1981) (remanding to district court to determine whether plaintiff had acted in bad faith and whether plaintiff's attorney was liable under *Roadway*).

269. 461 F. Supp. 1104 (N.D. Miss. 1978).

270. *Id.* at 1122.

271. 538 F.2d 918 (2d Cir. 1976).

ent's petition for rehearing of an immigration matter to be so goundless that her lawyer must have been aware of its lack of merit. It imposed attorneys' fees against the attorney, citing the client's modest education as proof that she could not have been aware of the groundlessness of her petition.[272]

If a conclusion is to be drawn from this sparse authority, it is that courts seem to focus on personal fault in allocating responsibility for an opponent's fees between lawyer and client. Therefore, a logical starting point may be to inquire which party, the lawyer or the client, acted in bad faith.

Normally the lawyer manages the procedural aspects of a case. The client, being ignorant of the norm, will have little basis for evaluating the lawyer's conduct. Indeed, the client has little opportunity to control or even observe the procedural aspects of the case. Imposing sole responsibility for fees against the lawyer for procedural abuses makes sense in light of the deterrent goal of the bad faith exception. An exception would occur when the client has caused or participated in the abuse.

Personal fault is less clear in situations involving substantive bad faith, however. In formulating a cause of action, the lawyer relies on the client to relate the facts of the dispute correctly. The lawyer assesses the cause of action and advises the client of its merits. The lawyer may be unaware of factual misstatements or the existence of improper motives on the part of the client. Therefore, in some instances, a lawyer will be blameless for pressing a groundless claim. In other cases, a lawyer may have appreciated the frivolity of a claim, yet failed to have duly advised his client. In these cases, only the lawyer is at fault. In many situations, both lawyer and client may realize that the claim is groundless but decide to pursue it anyway. In these situations, both are at fault.

A personal fault test may be logical in view of the deterrent objective of the bad faith exception, but such a test does not bode well for the attorney-client relationship. A test focusing on personal fault in the individual case would give rise to an inherent conflict of interest in any case in which the bad faith exception is raised, as both lawyer and client scramble to establish fault on the part of the other.

One way to avoid this problem would be to establish a presumption allocating responsibility for fees under the bad faith exception according to the usual litigation circumstances that one would expect to encounter. Such a presumption would hold attorneys personally responsible for procedural bad faith, contemplating the usual situation in which the attorney takes charge of the procedural aspects of the case. The rule would hold the client personally responsible for substantive or prelitigation bad faith, contemplating the usual situation in which a client has been apprised of the weakness of his position.[273] Such a rule might fail to do justice and deter frivolous litigation in unusual

272. *Id.* at 921.

273. A lawyer who fails to advise his client that the case is groundless might be liable under the prior litigation exception for the attorneys' fees imposed on his client.

situations, but it would serve to prevent protracted litigation over personal fault and the resulting disintegration of the attorney-client relationship.

5. The Bad Faith Exception and the American Rule

Of the three punitive exceptions to the American rule designed to deter abuses of the judicial system, the bad faith exception has the greatest potential for deterring the broadest range of abuses. Because it is sensitive to the merits of an action or practice, it also has the greatest potential for offending the judicial system's interest in fostering free access to the courts. The struggle to formulate and apply standards for determining bad faith reflects the courts' desire to protect the judicial system without sacrificing its accessibility to those who may present meritorious actions. In formulating standards to deter the unnecessary and groundless case or practice without deterring the meritorious, courts should be more circumspect in applying the bad faith exception to prelitigation conduct and more aggressive in applying the exception to the assertion of groundless claims.

The normal objections to fee shifting—increased time burdens on courts, remoteness of the injury, and threat to independent advocacy—are not compelling when one of the litigants has acted in bad faith. When a litigant has wrongfully caused or extended litigation, the additional expenditures incurred by the opposing party to meet the bad faith endeavor are a highly foreseeable result. Courts will be forced to expend time to hear the fee motion, determine bad faith, and compute the amount of reasonable attorneys' fees, but this additional burden is outweighed by the important objective of preserving the integrity of the judicial process. The bad faith exception does not pose a threat to independent advocacy. The party seeking to apply the bad faith exception normally must have prevailed on the merits under the prelitigation and substantive branches of the exception, so there will be no division of loyalties on the part of counsel in these situations. Although one need not have prevailed on the merits for recovery of fees for procedural bad faith, the courts' interest and the partys' interest will be the same: to punish, deter, and compensate for the additional burdens caused by the abuses of the opposing party.

III. Conclusion

One of the greatest challenges facing courts in an increasingly litigious society is to allocate fairly their finite resources in order to preserve the authority and effectiveness of the judicial system. In meeting this challenge, it is within the inherent power of the courts to design doctrines that discourage the institution of the cases that constitute an unwarranted use of their resources. The use of doctrines providing for the recovery of attorneys' fees provides a valuable means of controlling the use of judicial resources by encouraging circumspection on the part of those who contemplate using the courts and voluntary compliance with the substantive law.

Awarding attorneys' fees under the contempt exception, for example, encourages private individuals to play an instrumental role in the enforcement of

the law and the preservation of the authority of the courts. The prior litigation exception indirectly protects judicial resources by deterring conduct that has a high probability of exposing an innocent person to litigation. The bad faith exception directly discourages misuse of judicial resources by imposing sanctions on those who engage in abusive litigation or litigation practices. The factor that unifies all of these exceptions is that they promote the preservation of judicial authority, integrity, and efficiency.