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INTRODUCTION

Public interest lawyers are advocates of causes that historically have enjoyed limited legal representation. Their role rests on the premise that the legal system serves the public interest best when it provides able representation for all genuinely interested parties to a controversy.[1] Justice Thurgood Marshall recently offered this representative view of public interest lawyers:

> Public interest lawyers today provide representation to a broad range of relatively powerless minorities—for example, the mentally ill, children, and the poor of all races. They also represent neglected but widely diffuse interests that most of us share as

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[1] This concept permeates the literature on public interest representation. *See, e.g.*, *Awarding of Attorneys' Fees: Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 118 (Comm. Print 1975) (statement of Charles R. Halpern, Council for Public Interest Law) [hereinafter cited as *House Subcommittee Hearings*]; *Final Report of the American Assembly on Law and a Changing Society II*, 61 A.B.A.J. 931, 932-33 (1975); Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1071 n.3 (1970). However, attempts to define "public interest" have provoked disagreement. For some heterodox views on public interest practice, see Cahn & Cahn, *Power To the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005 (1970); Hegland, *Beyond Enthusiasm and Commitment*, 13 ARIZ. L. REV. 805 (1971).

> consumers and as individuals in need of privacy and a healthy environment.
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> . . . .
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> . . . [T]he decision maker should have the opportunity to assess the impact of any given administrative, legislative, or judicial decision in terms of all the people it will affect. This cannot be accomplished without a public interest presence whose function is to advocate, in the true sense, the needs and desires of the underrepresented and unrepresented segments of society.[2]

The justification for public interest lawyers is not that they are needed to represent positions that reflect the overall "public interest." Rather, their role is to represent parties that decisionmakers may not have fully heard, and to vindicate rights that decisionmakers have overlooked or illegitimately compromised. "Public interest law" thus refers not to a particular legal viewpoint but to a need within the representation process itself:

> In simple fact the term "public interest law" is used to cover loosely a number of things that seem to be different from one another and that have grown up at different points in time. The unifying factor in all of these enterprises is that they are attempts to provide legal representation for groups or interests that are not normally able to command legal services in the marketplace with their own resources. . . .
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> . . . [These] are all, in one way or another, attempts to give access to the decisionmaking processes to interests that would otherwise be unrepresented or poorly represented. The underlying assumption is that these are important interests and that the public at large will benefit if they are taken into consideration.[3]

Financing public interest law, always a formidable task,[4] became especially difficult in the wake of *Alyeska Pipeline Service Co. v. Wilderness Society*.[5] There the Supreme Court concluded that federal courts generally could not award attorneys' fees to public interest plaintiffs without express statutory authorization. Congress

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[2] Marshall, *Financing Public Interest Law Practice: The Role of the Organized Bar*, 61 A.B.A.J. 1487, 1487-88 (1975).

[3] J. Feuillan, Opening Up the Legal Process 2 (Oct. 6, 1976) (discussion paper prepared for the Conference on Public Interest Law sponsored by the New York State Bar Association Special Committee on Public Interest Law) (on file at the *Cornell Law Review*).

[4] For a discussion of the various means of financing public interest law, and the difficulties involved both before and after *Alyeska*, see COUNCIL FOR PUBLIC INTEREST LAW, BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA 219-337 (1976) [hereinafter cited as C.P.I.L. REPORT].

[5] 421 U.S. 240 (1975).

has already responded to the financial predicament posed by *Alyeska* for public interest lawyers,[6] but there has been no corresponding state action. We argue that state legislatures should pass broad fee-shifting statutes authorizing fee awards to public interest litigants. This reform will revitalize the fairness and enforcement goals blunted by *Alyeska*. In addition, it will facilitate institutionalization of public interest law and encourage use of state forums to resolve state-based disputes. Properly drafted state legislation will achieve these ends through familiar mechanisms proven workable in the pre-*Alyeska* period.[7]

I

Alyeska AND ITS IMPACT

A. *The "Private Attorney General" Concept Before Alyeska*

Under the traditional "American rule," courts cannot assess attorneys' fees against the losing party.[8] However, federal and state courts have developed expansive exceptions to the American rule. Thus, courts may award attorneys' fees to a party whose opponent acts in bad faith.[9] Likewise, courts may award attorneys' fees to plaintiffs whose efforts produce a common fund accruing to the benefit of an ascertainable class.[10] Prior to *Alyeska*, the "private attorney general" principle had made considerable headway toward joining the "bad faith" and "common fund" doctrines as exceptions to the American rule.[11]

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[6] *See, e.g.*, Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. § 1988 (Supp. 1977).

[7] This article has its roots in the work of the New York State Bar Association's Special Committee on Public Interest Law. Formed in 1975, this Committee has sought practical solutions to the problems posed by *Alyeska*.

[8] *See, e.g.*, Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967).

[9] For an example of a pre-*Alyeska* construction of the bad-faith exception, see Sims v. Amos, 340 F. Supp. 691 (M.D. Ala.) (per curiam) (three-judge court) (attorneys' fees awarded on "private attorney general" basis after showing of bad faith), *aff'd mem.*, 409 U.S. 942 (1972).

[10] Some courts, intent on continuing the "private attorney general" principle under a new guise, have expanded the common-fund and bad-faith exceptions. *See, e.g.*, Doe v. Poelker, 515 F.2d 541, 547-48 (8th Cir. 1975) (bad-faith exception), *rev'd per curiam*, 97 S. Ct. 2391 (1977). For a discussion of this trend, see notes 77-94 and accompanying text *infra*.

[11] For histories and summaries of cases construing the "private attorney general" principle, see M. DERFNER, ATTORNEYS' FEES IN PRO BONO PUBLICO CASES (Lawyers' Comm. for Civil Rights 1972 & Supp. 1974). For discussions of the theory's development, see Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849 (1975); King & Plater, *The Right to Counsel Fees in Public Interest Environmental Litigation*, 41 TENN. L. REV. 27 (1973); McLaughlin, *The Recovery of Attorney's Fees: A New Method of Financing Legal Services*, 40 FORDHAM L. REV. 761 (1972); Nussbaum, *Attorney's Fees in Public Interest*

The "private attorney general" concept grew out of the long-established common-fund exception, first applied by the Supreme Court in *Trustees v. Greenough*.[12] In *Greenough*, a bondholder won a judgment that preserved a fund in which he shared a common interest with other bondholders. The bondholders then made a considerable amount of money from management of the fund by court-appointed agents. Exercising equitable powers, the Court awarded attorneys' fees out of the fund in order to avoid undue hardship to the plaintiff and an unfair advantage to the other bondholders.[13]

In *Sprague v. Ticonic National Bank*,[14] a 1939 decision, the Supreme Court significantly expanded the common-fund exception. A depositor, by obtaining a judgment against an insolvent bank, established claims of other depositors against the bank. The Court approved a fee award to the plaintiff, even though the judgment did not create a fund for the other depositors.[15]

> Whether one professes to sue representatively or formally makes a fund available for others may, of course, be a relevant circumstance in making the fund liable for his costs in producing it. But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation—the absence of an avowed class suit or the creation of a fund, as it were, through *stare decisis* rather than through a decree—hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation.[16]

Thus *Sprague* shows the common-fund exception to be a flexible doctrine of equity, under which courts may award fees if the interests of justice so require.[17]

Litigation, 48 N.Y.U. L. REV. 301 (1973); Note, *Awarding Attorney and Expert Witness Fees in Environmental Litigation*, 58 CORNELL L. REV. 1222 (1973); Note, *Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest*, 24 HASTINGS L.J. 733 (1973); Note, *The Allocation of Attorney's Fees after Mills v. Electric Auto-Lite Co.*, 38 U. CHI. L. REV. 316 (1971); Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636 (1974).

[12] 105 U.S. 527 (1882).

[13] *Id.* at 532.

[14] 307 U.S. 161 (1939).

[15] *Id.* at 167.

[16] *Id.* The Court stated, however, that "such allowances are appropriate only in exceptional circumstances and for dominating reasons of justice." *Id.*

[17] In Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1966), the Court refused to extend *Sprague*, holding that, in statutory cases, attorneys' fees would not be awarded unless expressly authorized either by statute or by a longstanding equitable exception to the American rule. *Id.* at 719-20.

Greenough, *Sprague*, and other common-fund cases[18] articulated policies that laid the foundation for a "private attorney general" exception. The primary goal underlying common-fund fee awards was to avoid the unfairness inherent in forcing a plaintiff who bestows benefits on many to bear alone the expenses of litigation.[19] Later, the Supreme Court recognized that such fee awards also serve to encourage lawsuits that benefit deserving nonlitigants.[20] Lower federal courts extended the original common-fund doctrine, realizing that the same policy considerations apply even where the benefits of litigation are not in the form of a fund against which fees can be assessed.[21] Moreover, these courts came to see that private attorneys general, if given an incentive to sue, could protect important national interests not limited to a clearly definable class.[22]

New York has a well-developed common-fund exception. In Gerzof v. Sweeney, 22 N.Y.2d 297, 239 N.E.2d 521, 292 N.Y.S.2d 640 (1968), a taxpayer challenged a village's purchase of a generator. The seller, along with the mayor and certain trustees, had violated the state competitive bidding statute, and the Court of Appeals ordered a refund of the difference between the purchase price and the price of the generator the village should have bought. *Id.* at 307-08, 239 N.E.2d at 525, 292 N.Y.S.2d at 646-47. The court also awarded attorneys' fees: "[T]he plaintiff, having succeeded in the action for the benefit of the Village, is entitled to an allowance of counsel fees . . . out of the fund created by his efforts." *Id.* at 308, 239 N.E.2d at 526, 292 N.Y.S.2d at 647. *See also* Nance v. Town of Oyster Bay, 54 Misc. 2d 274, 282 N.Y.S.2d 324 (Sup. Ct. 1967), *aff'd mem.*, 30 App. Div. 2d 918, 293 N.Y.S.2d 704 (2d Dep't 1968).

New York courts have also engaged in a rudimentary "substantial benefit" test. For example, in Murray v. Kelly, 14 App. Div. 2d 528, 217 N.Y.S.2d 146 (1st Dep't) (per curiam), *aff'd mem.*, 11 N.Y.2d 810, 182 N.E.2d 109, 227 N.Y.S.2d 435 (1961), the court stated:

> It is not essential, to justify the allowance of counsel fees in a class action such as this, that the applicants prove the creation of a fund for the benefit of the class through their efforts. It suffices that as a result of the litigation, various benefits were obtained for the members [of the class] . . . .

Id. at 528, 217 N.Y.S.2d at 147. Plaintiffs in *Murray* received attorneys' fees even though they did not prevail on the merits.

[18] *E.g.*, Ojeda v. Hackney, 452 F.2d 947 (5th Cir. 1972) (per curiam); Gibbs v. Blackwelder, 346 F.2d 943 (4th Cir. 1965).

[19] *See* Trustees v. Greenough, 105 U.S. at 532; Note, *supra* note 11, 24 HASTINGS L.J. at 736, 739-40.

[20] *See* Mills v. Electric Auto-Lite Co., 396 U.S. 375, 396 (1970); Note, *supra* note 11, 24 HASTINGS L.J. at 741. *See generally* Dawson, *supra* note 11, at 895; Nussbaum, *supra* note 11, at 318.

[21] *See, e.g.*, Stanford Daily v. Zurcher, 366 F. Supp. 18, 22 (N.D. Cal. 1973), *opinion supplemented*, 64 F.R.D. 680 (N.D. Cal. 1974), *aff'd per curiam*, 550 F.2d 464 (9th Cir. 1977), *cert. granted*, 46 U.S.L.W. 3182 (Oct. 3, 1977). *Cf.* Murray v. Kelly, 14 App. Div. 2d 528, 217 N.Y.S.2d 146 (1st Dep't 1961) (per curiam) (in New York creation of common fund not essential for fee award), *aff'd mem.*, 11 N.Y.2d 810, 182 N.E.2d 109, 227 N.Y.S.2d 435 (1962). *See also* Nussbaum, *supra* note 11, at 333-34.

[22] *See, e.g.*, Lee v. Southern Home Sites Corp., 444 F.2d 143, 145 (5th Cir. 1971); La

By acknowledging the vitality of these policies, the Supreme Court's 1968 decision in *Newman v. Piggie Park Enterprises*[23] sparked development of the "private attorney general" doctrine. Although *Piggie Park* involved a fee award authorized under Title II of the Civil Rights Act of 1964,[24] it set forth compelling policy arguments in support of fee awards even where not authorized by statute.

> When a plaintiff brings an action under [Title II], he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.[25]

The Court held that a party prevailing under Title II should ordinarily receive attorneys' fees "unless special circumstances would render such an award unjust."[26] No such circumstances existed in *Piggie Park*; therefore, the Court awarded "reasonable counsel fees as part of the costs to be assessed against the respondents."[27]

In *Mills v. Electric Auto-Lite Co.*,[28] decided in 1970, the Supreme Court significantly expanded the common-fund exception, and seemed to clear the way for a nonstatutory "private attorney general" doctrine. In *Mills*, the Court awarded attorneys' fees to plaintiffs who had brought an action under federal securities law to prevent use of misleading proxy statements. Unlike the remedies obtained in *Greenough* and *Sprague*, the judgment awarded in *Mills* did not create a monetary gain for either the plaintiff or the other shareholders. Justice Harlan, writing for an eight-man majority, relied on the concept of "corporate therapeutics":

> [A]ctions of this sort "involve corporate therapeutics," and furnish a benefit to all shareholders by providing an important

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Raza Unida v. Volpe, 57 F.R.D. 94, 99 (N.D. Cal. 1972) (supplementing 337 F. Supp. 221 (N.D. Cal. 1972)), *aff'd*, 488 F.2d 559 (9th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974).

[23] 390 U.S. 400 (1968) (per curiam).

[24] 42 U.S.C. §§ 2000a to 2000a-6 (1970).

[25] 390 U.S. at 402 (footnotes omitted).

[26] *Id.*

[27] *Id.* at 403.

[28] 396 U.S. 375 (1970). *See* notes 82-83 and accompanying text *infra*.

> means of enforcement of the proxy statute. To award attorneys' fees in such a suit to a plaintiff who has succeeded in establishing a cause of action is not to saddle the unsuccessful party with the expenses but to impose them on the class that has benefited from them and that would have had to pay them had it brought the suit.[29]

Mills was the first case in which the Court applied the common-fund exception to a situation where the plaintiff brought suit under a statute that did not specifically authorize attorneys' fees awards.[30] The *Mills* Court sanctioned a recovery "where the litigation has conferred a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them."[31] Although the corporation in *Mills* served as a conduit through which the attorneys' fees could be spread to other shareholders, the language used by the Court seemed to expand the common-fund theory into a "common benefit" exception.[32] The nonstatutory award granted in *Mills*, read in conjunction with *Piggie Park*,[33] apparently created a full-fledged, "private attorney general" principle of "legal therapeutics."[34]

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[29] 396 U.S. at 396-97 (footnotes omitted) (quoting Murphy v. North American Light & Power Co., 33 F. Supp. 567, 570 (S.D.N.Y. 1940)).

[30] Thus *Mills* undercut the strength of *Fleischmann*. *See* note 17 *supra*.

[31] 396 U.S. at 393-94. For an explanation of common-benefit cases, see F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 130 (1974).

[32] *See* Dawson, *supra* note 11, at 896-97.

[33] In Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971), the court sought to synthesize *Mills* and *Piggie Park*. It concluded that *Mills* rested primarily on the idea that "private suits are necessary to effectuate congressional policy and that awards of attorney's fees are necessary to encourage private litigants to initiate such suits." *Id.* at 145. The court also applied the reasoning of *Piggie Park*, holding that a plaintiff successful under 42 U.S.C. § 1982 (1970) is entitled to attorneys' fees absent special circumstances. *Id.* at 147. Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972) (per curiam), also involved an action brought under 42 U.S.C. § 1982; the court of appeals held that the trial court had abused its discretion by refusing to award attorneys' fees:

> The violation of an important public policy may involve little by way of actual damages, so far as a single individual is concerned, or little in comparison with the cost of vindication . . . . In such instances public policy may suggest an award of costs that will remove the burden from the shoulders of the plaintiff seeking to vindicate the public right.

Id. at 853. The Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C.A. § 1988 (Supp. 1977)) in effect codifies the results of these two cases. *See* note 55 *infra*.

[34] *House Subcommittee Hearings*, *supra* note 1, at 83 (prepared statement of Armand Derfner, Lawyers' Comm. for Civil Rights). Hall v. Cole, 412 U.S. 1 (1973), was the last major Supreme Court decision to enhance the prospects for an established "private attorney general" principle. The defendant union lost on the merits under the free speech

Before *Alyeska*, the "private attorney general" principle frequently worked in lower federal courts to encourage vindication of important rights held equally by all citizens. *Natural Resources Defense Council v. EPA*[35] (*NRDC*) is illustrative. The plaintiffs requested attorneys' fees "for their efforts in obtaining orders requiring EPA to comply with certain of its obligations under the Clean Air Amendments of 1970."[36] The Court of Appeals for the First Circuit granted plaintiffs' request:

> The public suit seems particularly instrumental to the statutory scheme when against the EPA itself, for only the public—certainly not the polluter—has the incentive to complain if the EPA falls short in one or another respect; yet the lack of measurable interest on the part of any individual member of the public, and the difficulties inherent in complex litigation in a rapidly developing field of law, make the economics of citizen suits a serious problem.
>
> In any event, petitioners have activated traditional adversary machinery for bringing issues before a court. As a result, policies of the EPA have been corrected and others, upheld, have been removed from the arena of dispute. Presumptively the public has benefitted—not only in Rhode Island and Massachusetts but nationally, as neither air pollution nor the movement of citizenry respect [*sic*] state boundaries, and some of the legal principles at issue have national as well as regional import. Petitioners have

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provision of the Labor-Management Reporting and Disclosure Act (29 U.S.C. §§ 412-531 (Supp. V 1975)). The Court affirmed an award of attorneys' fees to the plaintiff union member, concluding that the plaintiff, by vindicating his right to free speech, had conferred a benefit on the union and all of its members. 412 U.S. at 15. Thus the Court relied directly on the common-benefit rationale, indicating an even greater willingness to adopt openly a "private attorney general" doctrine.

One commentator has suggested that *Mills* and other federal cases are more in the nature of "private attorney general" litigation, although couched as common-benefit cases. Dawson, *supra* note 11, at 895. Common-benefit principles do not adequately explain the policy justifications behind "private attorney general" actions—namely, to encourage private enforcement actions that raise issues of public policy and to provide sufficient compensation to attract competent counsel. At least in theory, a common benefit to the public always results from this enforcement process. The common-benefit analysis in *Mills* creates too restrictive and result-oriented a test on which to base financing of public interest litigation.

One critic has observed that "[r]equiring a showing of both statutory vindication *and* a class wide benefit, would seem to entail a largely redundant demonstration. That is, in most cases the act of vindicating congressional policy will ipso facto confer a benefit upon plaintiff's class." Note, *supra* note 11, 24 HASTINGS L.J. at 749 (emphasis in original).

[35] 484 F.2d 1331 (1st Cir. 1973).

[36] *Id.* at 1332. The Clean Air Amendments of 1970 are codified in scattered sections of 42 U.S.C. §§ 1857c-5 to 1858a (1970 & Supp. V 1975).

> thus helped to enforce, refine and clarify the law. They can be said to have assisted the EPA in achieving its statutory goals.[37]

Eight weeks after the First Circuit decided *NRDC*, the Ninth Circuit affirmed in *La Raza Unida v. Volpe*.[38] There, plaintiffs had succeeded in enjoining at the district-court level a California highway project on the grounds that defendants had failed to comply with the Department of Transportation Act and federal housing relocation provisions.[39] *La Raza Unida*'s importance lies in District Judge Peckham's list of factors that influence application of the "private attorney general" principle:

> a) The effectuation of strong Congressional policies . . . .
> . . . .
> b) The number of people who have benefited from plaintiffs' efforts . . . .
> . . . .
> c) The necessity, and financial burden, of private enforcement . . . .[40]

In elaborating on the third criterion, the court stated:

> Responsible representatives of the public should be encouraged to sue, particularly where governmental entities are involved as defendants. As the amicus brief points out, only private citizens can be expected to "guard the guardians."
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> However, these exhortations towards citizen participation can sound somewhat hollow against the background of the economic realities of vigorous litigation. In many "public interest" cases only injunctive relief is sought, and the average attorney or litigant must hesitate, if not shudder, at the thought of "taking on" an entity such as the California Department of Highways, with no prospect of financial compensation for the efforts and expenses rendered. The expense of litigation in such a case poses a formidable, if not insurmountable, obstacle.

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[37] 484 F.2d at 1334. The court also had little difficulty in skirting the general prohibition of sovereign immunity. Congress has waived the government's sovereign immunity from "a judgment for costs," but this waiver does not extend to attorneys' fees awards "[e]xcept as otherwise specifically provided by statute." 28 U.S.C. § 2412 (1970). The court of appeals held that the section of the Clean Air Act authorizing attorneys' fees awards in district courts (42 U.S.C. § 1857h-2(d) (1970)) applied to the section under which plaintiffs sued, which provides for review in the courts of appeals "of the Administrator's action in approving or promulgating any implementation plan" (*id.* § 1857h-5(b)(1)). 484 F.2d at 1338.

[38] 57 F.R.D. 94 (N.D. Cal. 1972) (supplementing 337 F. Supp. 221 (N.D. Cal. 1972)), *aff'd*, 488 F.2d 559 (9th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974).

[39] 337 F. Supp. at 233-34.

[40] 57 F.R.D. at 99-100.

> . . . Hence, the fact that only a private party could be reasonably expected to bring this action is one additional factor supporting the awarding of attorneys' fees in this case.[41]

By 1975, lower federal courts had transformed goals of enforcement and fairness into the "private attorney general" doctrine. *Mills* and *Piggie Park* all but ensured that the Supreme Court would bless this new exception to the American rule. Then came *Alyeska*.

B. *The Alyeska Decision*

On March 20, 1970, the United States Department of the Interior submitted to the Council on Environmental Quality a study recommending construction of the Alaskan pipeline.[42] Three environmental groups[43] sued to enjoin construction of the pipeline on the theory that it violated the National Environmental Policy Act of 1969[44] (NEPA). The court of appeals never ruled on this contention, but instead held that the Secretary of the Interior's grant to Alyeska of a special land-use permit violated the Mineral Lands Leasing Act.[45] The court of appeals decision, however, acknowledged congressional authority to dispose of public lands.[46] Congress in turn quickly authorized construction of the pipeline,[47] dispensing with the need for further compliance with NEPA.[48]

Following these developments, the court of appeals granted plaintiffs' request for expenses and attorneys' fees:

> [T]he equities of this particular case support an award of attorneys' fees to the successful plaintiffs-appellants. Acting as private attorneys general, not only have they ensured the proper functioning of our system of government, but they have advanced and protected in a very concrete manner substantial public in-

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[41] *Id.* at 100-01 (footnote omitted).

[42] For a summary of events leading up to the litigation in *Alyeska*, see Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 241-44 (1975).

[43] These groups were The Wilderness Society, The Environmental Defense Fund, Inc., and Friends of the Earth.

[44] 42 U.S.C. §§ 4321-4347 (1970).

[45] Wilderness Soc'y v. Morton, 479 F.2d 842, 847 (D.C. Cir.), *cert. denied*, 411 U.S. 917 (1973). The Mineral Lands Leasing Act is codified at 30 U.S.C. § 185 (1970) (amended 1973).

[46] 479 F.2d at 891.

[47] Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, 87 Stat. 576, 584 (1973) (codified at 30 U.S.C. § 185 (Supp. V 1975) & 43 U.S.C. §§ 1651-1655 (Supp. V 1975)).

[48] 43 U.S.C. § 1652(d) (Supp. V 1975).

> terests. An award of fees would not have unjustly discouraged appellee Alyeska from defending its case in court. And denying fees might well have deterred appellants from undertaking the heavy burden of this litigation.[49]

Relying on the successor to an 1853 statutory limit on attorneys' fees,[50] the Supreme Court reversed:

> Since the approach taken by Congress to this issue has been to carve out specific exceptions to a general rule that federal courts cannot award attorneys' fees beyond the limits of 28 U.S.C. § 1923, those courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases.[51]

Thus, on May 12, 1975, ended one of the longest public interest cases in American history, and along with it, the development of a court-created "private attorney general" principle.

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[49] Wilderness Soc'y v. Morton, 495 F.2d 1026, 1036 (D.C. Cir. 1974), *rev'd sub nom.* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).

[50] 28 U.S.C. § 1923 (1970).

[51] Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 269 (1975). The Court, however, did not disturb

> the historic power of equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund or property itself or directly from the other parties enjoying the benefit.

Id. at 257 (footnote omitted). Further, courts could continue to award fees where a party willfully disobeyed a court order or where the losing party "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* at 258-59. After *Alyeska*, two of these theories, the common-fund and the bad-faith exceptions, received renewed attention from lower federal courts. *See* notes 77-94 and accompanying text *infra*.

Mr. Justice Marshall, dissenting in *Alyeska*, observed that the majority failed to consider the breadth of previously accepted fee-shifting theories. 421 U.S. at 277-78. Mr. Justice Marshall also argued that instead of rejecting the "private attorney general" principle, the Court should place

> [t]he reasonable cost of the plaintiff's representation . . . upon the defendant if (1) the important right being protected is one actually or necessarily shared by the general public or some class thereof; (2) the plaintiff's pecuniary interest in the outcome, if any, would not normally justify incurring the cost of counsel; and (3) shifting that cost to the defendant would effectively place it on a class that benefits from the litigation.

Id. at 284-85. Mr. Justice Marshall did not, however, consider whether the propriety of attorneys' fees awards should depend solely on the "importance" of the statutory right.

C. *The Impact of Alyeska on Public Interest Practice*

The *Alyeska* decision came at a particularly difficult time for public interest law firms. From their inception, public interest law firms, such as the Center for Law and Social Policy and the Puerto Rican Legal Defense and Education Fund, have relied on foundation grants for a significant portion of their budgets. Before *Alyeska*, major foundation donors had signaled their intent to phase out financial support for these enterprises.[52] Because of increased funding from court-awarded attorneys' fees, however, public interest law firms stood on the verge of becoming significant legal institutions. Today, with decreases in foundation support and in fee awards, the funding problems of many firms have become critical.

Individual practitioners of public interest law have also felt the impact of *Alyeska*. The Council for Public Interest Law[53] recently described the experiences of a Seattle lawyer who estimated devoting over one thousand hours to represent four hundred indigent clients threatened with the loss of their homes because of a planned new freeway. This attorney took the case expecting a fee award; indeed, the trial court invited the lawyer to submit a fee application after he had won on the merits. The Supreme Court decided *Alyeska* shortly thereafter, and the lawyer found his small public interest firm $56,000 poorer than expected. He explained his decision to cut back on future public interest work:

> I just spent two years of my life fighting a freeway. As a result of that case, the right of citizens to participate in decisions that critically affect their lives was established. The homes of thousands of people were saved. The taxpayers were saved millions of dollars. And I was paid less than three dollars an hour. I can't afford to do it again.[54]

Alyeska has had an even greater impact on private attorneys who take on some public interest or pro bono cases each year. Eric

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[52] C.P.I.L. REPORT, *supra* note 4, at 238-40.

[53] As a safeguard against decreased funding, the American Bar Association joined with three large foundations to fund a major new organization, the Council for Public Interest Law in Washington, D.C. The Council is charged with developing stable sources of financial support for public interest law groups. For an account of the Council's activities, see 61 A.B.A.J. 769 (1975).

[54] C.P.I.L. REPORT, *supra* note 4, at 315. Public interest lawyers across the nation tell the same story. A survey conducted by the Council for Public Interest Law found that *Alyeska* adversely affected pending claims held by 34 out of 44 responding private firms with a substantial public interest practice. *Id.* at 318.

Schnapper, an attorney with the NAACP Legal Defense and Education Fund, discussed the aftermath of *Alyeska* in this context:

> The real impact of the ruling will be in terms of our work with private attorneys in the South. Awarded fees have never been a significant part of our budget. . . . In most cases we work with private lawyers, and it matters to them in terms of the amount of civil rights work they are willing to take on.
>
> When we go to a guy now in the South, and ask him to take on a prison case, most of which are brought under these older laws, he'll say he can't do it. He'll have to put thousands of hours into it without any hope of getting paid. It will be different if we ask him to take an employment case under the 1964 Civil Rights Act because he can anticipate some fee award if he wins it.[55]

Alyeska, it seems, has discouraged all but the most public-spirited private practitioners from accepting public interest cases. Yet because they comprise the overwhelming majority of practicing attorneys, private practitioners hold the key to providing adequate public interest representation.

D. *Alyeska's Direct Impact*

With *Alyeska*, the Supreme Court stopped the "private attorney general" concept dead in its tracks. Since that decision, a new rule has quickly taken hold: Absent statutory authorization, "federal courts have the power to award fees only in cases of bad faith or of benefit to a limited class of special beneficiaries against whom the award is taxed."[56] Thus *Alyeska* has effectively limited "private attorney general" recoveries to cases involving the bad-faith[57] or common-fund[58] exception.

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[55] *Id.* at 316 (quoting Witt, *After Alyeska: Can the Contender Survive?*, JURIS DOCTOR, Oct. 1975, at 34, 40). The enactment of the Civil Rights Attorney's Fees Awards Act of 1976 (Pub. L. No. 94-559, 90 Stat. 2641 (codified at 42 U.S.C.A. § 1988 (Supp. 1977))) now encourages representation of civil rights claims. *See* notes 66-76 and accompanying text *infra*. The House Committee considering the bill stated that it had "received evidence that private lawyers were refusing to take certain types of civil rights cases because the civil rights bar, already short of resources, could not afford to do so." H.R. REP. No. 1558, 94th Cong., 2d Sess. 3 (1976). Although necessarily limited to the civil rights legislation before the House, the Committee's conclusion that attorneys' fees legislation would "insure that reasonable fees are awarded to attract competent counsel" (*id.* at 9) states a principle of general application.

[56] Committee on Civic Rights v. Romney, 518 F.2d 71, 72 (1st Cir. 1975). *See* North Carolina Prisoners' Labor Union, Inc. v. Jones, 409 F. Supp. 937, 940 (E.D.N.C.), *prob. juris. noted*, 429 U.S. 976 (1976).

[57] *See* note 9 and accompanying text *supra*.

[58] *See* notes 12-19 and accompanying text *supra*.

Although *Alyeska* applies only to federal courts, it has had a far broader impact. Most importantly, *Alyeska* has checked further judicial development of the "private attorney general" doctrine at the state level.[59] In California, for example, the Court of Appeals for the Second District recently cited *Alyeska* in refusing to award attorneys' fees:[60]

> In light of the rejection by the United States Supreme Court of the "private attorney general" concept, and of the reluctance of our own Supreme Court to approve it, it would be highly inappropriate for this court to pioneer to the extent plaintiffs ask us. If California is to adopt the broad rule, it must either be by legislative action or by a decision of the Supreme Court.[61]

Alyeska has even influenced administrative agencies. Before *Alyeska*, the Federal Communications Commission had edged toward a "private attorney general" theory in favor of intervenors in administrative proceedings;[62] *Alyeska* brought this exploratory activity to a halt:

> The reasoning of the Supreme Court in Alyeska Pipeline Co. v. Wildnerness Society is fully applicable to litigation before the Federal Communications Commission. Congress has no more extended a "roving commission" to the FCC than it has to the Judiciary "to allow counsel fees as costs or otherwise whenever the . . . [Commission] might deem them warranted."[63]

E. *The Response to Alyeska*

1. *Legislation*

Alyeska has triggered two major legislative responses. The first came as an amendment to section 14 of the Voting Rights Act of

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[59] *See, e.g.*, Chicago v. Illinois Fair Employment Practices Comm'n, 34 Ill. App. 3d 114, 339 N.E.2d 260 (1975), *aff'd*, 65 Ill. 2d 108, 357 N.E.2d 1154 (1976).

[60] The "private attorney general" theory has struggled for three years in California. For examples of the California courts' refusal to employ the "private attorney general" theory, see D'Amico v. Board of Medical Examiners, 11 Cal. 3d 1, 520 P.2d 10, 112 Cal. Rptr. 786 (1974); Mandel v. Hodges, 54 Cal. App. 3d 987, 127 Cal. Rptr. 244 (1976); Douglas v. Los Angeles Herald-Examiner, 50 Cal. App. 3d 449, 123 Cal. Rptr. 683 (1975).

[61] Menge v. Farmers Ins. Group, 50 Cal. App. 3d 143, 148, 123 Cal. Rptr. 265, 268 (1976). The California Supreme Court has recently moved towards adoption of a broad rule. In Serrano v. Priest, 46 U.S.L.W. 2188 (Cal. Sup. Ct. Oct. 18, 1977), the court upheld a fee award based squarely on a "private attorney general" theory. *Id.* at 2189. For a discussion of *Serrano*, see note 95 *infra*.

[62] *See, e.g.*, Office of Communication of the United Church of Christ v. FCC, 465 F.2d 519 (D.C. Cir. 1972), *rev'g* KCMC, Inc., 25 F.C.C.2d 603 (1970).

[63] Turner v. FCC, 514 F.2d 1354, 1356 (D.C. Cir. 1975) (footnote omitted) (quoting Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. at 260). *See* Greene County Planning Bd. v. FPC, 559 F.2d 1227, 1239-40 (2d Cir. 1977) (rehearing denied en banc).

1965: "In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."[64] The Report of the Senate Committee on the Judiciary discusses the amendment's underlying purpose:

> Such a provision is appropriate in voting rights cases because there, as in employment and public accommodations cases, and other civil rights cases, Congress depends heavily upon private citizens to enforce the fundamental rights involved. Fee awards are a necessary means of enabling private citizens to vindicate these Federal rights.[65]

The second response came shortly before the close of congressional business for 1976, when the House and Senate passed almost identical versions of a Civil Rights Attorney's Fees Awards Act.[66] Senator Tunney, the chief sponsor of the act, described the Senate version as follows:

> The purpose and effect of this bill is [*sic*] simple—it is to allow the courts to provide the traditional remedy of reasonable counsel fee awards to private citizens who must go to court to vindicate their rights under our civil rights statutes. The Supreme Court's recent Alyeska decision has required specific statutory authorization if Federal courts are to continue previous policies of awarding fees under all Federal civil rights statutes . . . .
>
> In the typical case that arises under these statutes the citizen whose rights have been violated has little or no money with which to hire a lawyer, and there is often no damage claim from which an attorney could draw his fee. If private citizens are to be able to assert their rights under these laws—if those who violate these most basic human freedoms are not to proceed with impunity—then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.[67]

The Civil Rights Attorney's Fees Awards Act of 1976[68] will have an enormous practical effect on civil rights litigation. The act, a major inroad on *Alyeska*, authorizes attorneys' fees awards in all

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[64] Voting Rights Act of 1965—Extension, Pub. L. No. 94-73, § 402(e), 89 Stat. 494 (1975) (codified at 42 U.S.C. § 1973*l*(e) (Supp. V 1975)).

[65] S. REP. No. 295, 94th Cong., 1st Sess. 40, *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 774, 807.

[66] S. 2778, H.R. 15460, 94th Cong., 1st Sess. (1975).

[67] 121 CONG. REC. S14,975 (daily ed. Aug. 1, 1975).

[68] Pub. L. No. 94-559, 90 Stat. 2641 (codified at 42 U.S.C.A. § 1988 (Supp. 1977)).

civil rights actions arising out of federal statutes enacted since 1866.[69] It therefore covers the oldest and most-used civil rights acts,[70] as well as statutes barring discrimination in federally funded programs,[71] in employment practices,[72] and in certain property transactions.[73] Modeled on previous civil rights attorneys' fees legislation,[74] the act allows a court to award a prevailing party "reasonable" attorneys' fees in accordance with existing case-law standards.[75] In a recent employment discrimination decision, a Manhattan district judge applying the act awarded fees to a public interest law firm at the rate of $100-110 per "partner hour" and $60 per "associate hour"; the total award, including a "premium" above costs, came to $375,000.[76] Such substantial awards will have a considerable impact on lawyers' willingness to undertake public interest litigation and on defendants' willingness to delay or prolong litigation for purely strategic reasons.

2. *Trend Toward Judicial Circumvention of Alyeska*

To counteract the inhibitory effects of *Alyeska*, some courts have moved toward an expanded construction of the bad-faith[77] and common-fund[78] exceptions. *Miller v. Carson*[79] typifies this

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[69] An amendment from the Senate floor added a provision authorizing the award of attorneys' fees to taxpayers who successfully defend frivolous or vexatious I.R.S. suits. 122 CONG. REC. S17,050 (daily ed. Sept. 29, 1976).

[70] 42 U.S.C. §§ 1981 (originally enacted as Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27, *reenacted by* Act of May 31, 1870, ch. 114, § 16, 16 Stat. 144), 1983 (originally enacted as Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13), & 1985 (originally enacted as Act of Apr. 20, 1871, ch. 22, § 2, 17 Stat. 13-14) (1970).

[71] Education Amendments of 1972, 20 U.S.C. §§ 1681-1686 (Supp. V 1975); Civil Rights Act of 1964, tit. VI, 42 U.S.C. §§ 2000d to 2000d-4 (1970).

[72] Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e-1 to 2000e-17 (1970 & Supp. V 1975).

[73] 42 U.S.C. § 1982 (1970) (originally enacted as Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27).

[74] For a legislative history of the act, see SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 94TH CONG. 2D SESS., THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976, SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS 8 (Comm. Print 1976) [hereinafter cited as SOURCE BOOK]; Larson, *The Civil Rights Attorneys Fees Awards Act of 1976*, 10 CLEARINGHOUSE REV. 778, 779-80 (1977).

[75] SOURCE BOOK, *supra* note 74, at 12 (Senate Comm. Report), 216-17 (House Comm. Report). The act will probably permit attorneys' fees awards in many welfare cases (*see* Note, *1976 Developments in Welfare Law—Aid to Families with Dependent Children*, 62 CORNELL L. REV. 1050, 1060-76 (1977)), but even this result is unclear (*see id.* at 1072 n.163).

[76] Transcript of Hearing on Attorneys' Fees Award at 177-81, Beazer v. New York City Transit Auth., 414 F. Supp. 277 (S.D.N.Y. 1976) (Griesa, J.), *modified*, 558 F.2d 97 (2d Cir. 1977) (eliminating premium).

[77] *See* note 9 and accompanying text *supra*.

[78] *See* notes 12-19 and accompanying text *supra*.

[79] 401 F. Supp. 835 (M.D. Fla. 1975).

trend. A group of pretrial detainees brought a civil rights class action, seeking a declaration that prison conditions were constitutionally unacceptable. The plaintiffs won on the merits, but a considerable delay ensued before the jail authorities began to correct the conditions. Plaintiffs returned to the district court to seek enforcement, and were granted attorneys' fees on both bad-faith and common-fund rationales. The district court, noting that *Alyeska* preserved these two exceptions,[80] concluded that the common-fund theory applied despite the absence of a monetary recovery.[81]

The *Miller* court based its reasoning on *Mills v. Electric Auto-Lite Co.*,[82] where the Supreme Court held that the absence of a "common fund" in a shareholder derivative suit did not preclude the award of attorneys' fees to plaintiffs' counsel. The *Miller* court interpreted *Mills* to mean "that where a substantial benefit is conferred upon members of an ascertainable class, recovery of such a fund is not an absolute prerequisite to the applicability of the 'common benefit' doctrine."[83] In *Miller*, plaintiffs rendered a substantial benefit "not only to themselves but to all citizens of Duval County. Conditions in a jail which resulted in cruel and unusual punishment and a denial of equal protection and due process disserve the entire public by fostering recidivism and perpetuating antisocial behavior."[84] The *Miller* court thus attempted to blunt the thrust of *Alyeska* by liberally applying the common-fund rationale of *Mills*.

But a glance at another post-*Alyeska* decision reveals that the fee award in *Miller*, although couched in common-fund language, actually rests on the "private attorney general" theory outlawed by *Alyeska*. In *Burbank v. Twomey*,[85] state prisoners challenging prison disciplinary procedures lost both on the merits and in their application for attorneys' fees. Rejecting arguments analogous to those that convinced the *Miller* court, the Seventh Circuit stated:

> [T]he "class" which was purportedly benefited by this lawsuit is, according to the plaintiff, composed of all Illinois prisoners. This class and the benefit to each member is clearly too indefinite to permit recovery under the "common fund" theory. . . . [T]he rationale of the "common fund" theory is to distribute the costs

[80] *Id.* at 849.

[81] *Id.* at 851.

[82] 396 U.S. 375 (1970). For a discussion of the impact *Mills* had on the development of the "private attorney general" doctrine, see Dawson, *supra* note 11, at 895; notes 28-34 and accompanying text *supra*.

[83] 401 F. Supp. at 851.

[84] *Id.* at 853.

[85] 520 F.2d 744 (7th Cir. 1975).

> of litigation among those benefiting from the judgment and not to shift the costs between adverse parties.[86]

The class involved in *Miller* was likewise not "ascertainable," and therefore the common-fund rationale invoked in that case dissolves into a "private attorney general" theory. We sympathize with the result in *Miller*, but we believe that the *Burbank* court more accurately perceived the state of the law after *Alyeska*.[87]

The *Miller* court also based its award of attorneys' fees on the bad-faith exception. In *Miller*, the defendant delayed in obeying the original court order and deliberately left jail conditions as they existed before the litigation commenced. Describing these actions as "unreasonable and obdurately obstinate,"[88] the court found that the defendant's bad faith justified the fee award to the plaintiffs.[89] The court's application of this theory, unlike its application of the common-fund exception, reflects a legitimate reading of precedent.[90]

As *Miller* illustrates, courts have made frequent use of the bad-faith exception.[91] The recent Supreme Court decision in

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[86] *Id.* at 749.

[87] Samuel v. University of Pittsburgh, 395 F. Supp. 1275 (W.D. Pa. 1975), reinforces this conclusion. In *Samuel*, the court stated:

> To my thinking, previous cases which have awarded fees using a "common benefit" rationale—that is, awarded fees in the absence of monetarily quantifiable benefit—have in reality involved the less-than-precise application of the private attorney general rationale, for without a fund, out of which it can apportion fees, the Court is left to justify the very shifting of fees to the unsuccessful party expressly disapproved in *Alyeska*.

Id. at 1283. For a post-*Alyeska* decision correctly applying the common-benefit rationale, see Cox v. International Alliance of Theatrical Stage Employees, 398 F. Supp. 239 (N.D. Ga. 1975) (class benefited comprised all members of union).

[88] 401 F. Supp. at 857.

[89] *Id.*

[90] In F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116 (1974), the Supreme Court noted that the bad-faith doctrine applies when an opponent acts "vexatiously, wantonly, or for oppressive reasons." *Id.* at 129. *See also* Hall v. Cole, 412 U.S. 1, 15 (1973) ("It is clear . . . that 'bad faith' may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation.").

To avoid abuse of this standard, the court of appeals in Adams v. Carlson, 521 F.2d 168 (7th Cir. 1975), noted that

> [v]igorous litigation in an area in which the law is so unsettled should not be equated with obduracy, wantonness, vexatiousness, or oppression. . . . Our reading of the record is not inconsistent with a finding that the defendants as public servants were engaged in good faith litigation to the end of hammering out the extent to which constitutional rights were to be accorded to prisoners. That some of their contentions were not upheld is no basis for the entry of an award on a punitive basis.

Id. at 170.

[91] *See, e.g.*, Richardson v. Communications Workers, 530 F.2d 126 (8th Cir.) (attorneys'

Runyon v. McCrary,[92] however, may make it more difficult for civil rights litigants to escape *Alyeska* by use of this exception:

> By stubbornly contesting the facts, the petitioners assert, the [respondents] attempted to deceive the court and, in any event, needlessly prolonged the litigation.
>
> We cannot accept this argument. . . . [I]n this case the factual predicate to a finding of bad faith is absent. Simply because the facts were found against the [respondents] does not by itself prove that threshold of irresponsible conduct for which a penalty assessment would be justified. Whenever the facts in a case are disputed, a court perforce must decide that one party's version is inaccurate. Yet it would be untenable to conclude *ipso facto* that that party had acted in bad faith.[93]

This restrictive language indicates that litigants will not easily be able to evade *Alyeska* by invoking the bad-fath exception. Moreover, even expansive interpretation of the common-fund exception cannot address all the policies underlying the "private attorney general" theory.[94]

Only broad-based fee-shifting legislation can solve the funding problems left in the wake of *Alyeska*. Because attorneys' fees awards, when soundly based, implement important social goals, we believe it is necessary not simply to restore the pre-*Alyeska* law in its application to state courts, but to improve upon it by clarifying uncertain language.[95]

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fees awarded where defendant intentionally failed to perform fiduciary duty), *cert. denied*, 429 U.S. 824 (1976); Carter v. Noble, 526 F.2d 677 (5th Cir. 1976) (attorneys' fees awarded because defendant's sole defense patently frivolous); Parker v. Shonfeld, 409 F. Supp. 876 (N.D. Cal. 1976) (attorneys' fees awarded in light of jury finding that defendants acted maliciously, wantonly, or oppressively). *But see, e.g.*, Shannon v. HUD, 409 F. Supp. 1189 (E.D. Pa. 1976) (bureaucratic delay during litigation not evidence of defendant's bad faith).

[92] 427 U.S. 160 (1976).

[93] *Id.* at 183-84.

[94] The common-fund requirement of an identifiable class will preclude recovery when it is most desirable—*i.e.*, when the benefits of the litigation accrue to society at large.

[95] In so doing, however, we must address the Supreme Court's fundamental concern that "it would be difficult, indeed, for the courts, without legislative guidance, to consider some statutes important and others unimportant and to allow attorneys' fees only in connection with the former." Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. at 263-64. Serrano v. Priest, 46 U.S.L.W. 2188 (Cal. Sup. Ct. Oct. 18, 1977), illustrates the need for such legislative guidance. At an earlier stage of the litigation (18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976)), two legal aid groups had shown California's public school financing system to be in violation of the equal protection provisions of that state's constitution (*id.* at 768-69, 557 P.2d at 953, 135 Cal. Rptr. at 369). Despite a statutory provision that left attorneys' fees "to the agreement . . . of the parties" unless "specifically provided for by statute" (CAL. CIV. PROC. CODE § 1021 (West 1955)), the court upheld a

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A Legislative Proposal for Awarding Attorneys' Fees

Even before *Alyeska*, Congress encouraged enforcement of federal policies by lifting the burden of compensating counsel from those who brought suits under important statutes. The highly publicized environmental field is but one of the many areas in which Congress encouraged private enforcement with fee awards.[96] The "private attorney general" theory that underlies these statutes is not merely a product of recent social legislation; numerous federal statutes over the years have contained fee provisions similar to modern enactments.[97]

Although there has been substantial federal legislation, states have done very little to encourage public interest litigation through attorneys' fees awards. Only four states—Alaska, Georgia, Nevada, and Oregon—have enacted general fee-shifting legislation.[98] Most states have been cautious in their approach:

> [T]he pattern is generally that of providing for recovery of attorney's fees as discrete remedial measures for effectuating specific, narrowly conceived, policy objectives. For this purpose, sometimes legislation calls for the inclusion of fees as costs on behalf of "the prevailing party", irrespective of whether the plaintiff or the defendant prevails. In some instances, on the

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fee award of $400,000, basing its decision squarely on a "private attorney general" theory (46 U.S.L.W. at 2189). A broad-based fee-shifting statute would allow courts to encourage meritorious litigation without straining for equitable exceptions in the face of restrictive statutory language or common-law prohibitions.

[96] Section 12(a) of the Clean Air Amendments of 1970 (42 U.S.C. § 1857h-2 (1970)) is a good example of an environmental "private attorney general" provision. In discussing the attorneys' fees provision of the act (*id.* § 1857h-2(d)), the Senate Report states: "The Courts should recognize that in bringing legitimate actions under this section citizens would be performing a public service and in such instances the courts should award costs of litigation to such party [*sic*]." S. Rep. No. 1196, 91st Cong., 2d Sess. 38 (1970). There are at least 90 federal statutes that contain provisions for attorneys' fees. For a list of these statutory provisions, see Source Book, *supra* note 74, at 303-13.

[97] *See, e.g.*, Fair Labor Standards Act § 16(b), 29 U.S.C. § 216(b) (1970); Interstate Commerce Act § 8, 49 U.S.C. § 8 (1970); Packers and Stockyards Act § 309(f), 7 U.S.C. § 210(f) (1970).

[98] Alaska is the only state that has enacted legislation completely reversing the American rule. *See* Alaska Stat. § 09.60.010 (1973). Georgia's legislation codifies the bad-faith exception to the American rule. *See* Ga. Code Ann. § 20-1404 (1977). The Nevada statute provides for discretionary awards of fees in civil actions involving less than $10,000. Nev. Rev. Stat. § 18.010(3) (1975). In the Oregon attorneys' fees provision, the amount in controversy may not be greater than $1,000. The statute also lists a limited number of seemingly unrelated types of civil actions in which fees are recoverable. *See* Ore. Rev. Stat. §§ 20.080-.098 (1975).

> other hand, only one-way fee shifting is provided for by having fees included as costs only when a specified type of claim is successfully vindicated in court. Such provisions reflect a legislative judgment that with respect to a given kind of interest, the parties who are characteristically in position to have their rights violated would ordinarily be in a weak economic position as contrasted with that of those who would be in position to violate the rights in question. Another type of statute, allowing two-way fee shifting only if the amount at stake is relatively small, indicates a policy judgment that fee shifting is an element of justice in such cases.[99]

Although there are many possible solutions to the problem of financing public interest litigation,[100] we focus on attorneys' fees legislation for two reasons. First, legislative action would relieve the immediate financial burden on public interest litigants by using well-understood mechanisms and established institutions. Second, only a legislative solution would ensure that private firms remain a major source of public interest representation. As the following pre-*Alyeska* observation indicates, only the involvement of the private bar can truly institutionalize public interest law:

> [E]conomic factors are the most serious obstacle to the continued growth of public interest litigation. Such lawsuits are complex and time consuming, yet offer the attorney little prospect of financial remuneration. This dilemma can be solved, however, by awarding attorney's fees, as a matter of course, to private plaintiffs who successfully litigate important public issues that affect a substantial segment of the population. The award of attorney's

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[99] C.D. Sands, Influence of Denying Successful Litigants the Right to Recover Attorneys' Fees from the Losing Parties 7 (Feb. 22, 1975) (unpublished paper submitted to ABA Special Comm. on Delivery of Legal Services) (on file at the *Cornell Law Review*).

[100] For example, one solution would require that public interest firms charge fees in accordance with their clients' abilities to pay. The tax impact of this scheme, however, militates against its adoption. In 1975, the I.R.S. stated that although court-awarded fees might not jeopardize a tax-exempt status (Rev. Rul. 75-75, 1975-1 C.B. 154), if a public interest law firm "charges or accepts attorneys' fees from its clients, it is not distinguishable from a private law firm and is not operating exclusively for charitable purposes. Accordingly, the organization does not qualify for exemption from Federal income tax under section 501(c)(3) of the Code." *Id.*

Some solutions do not use private law firms to provide legal representation in public interest cases. For example, New Jersey has established the Division of Public Interest in the Department of the Public Advocate. The Division functions as a special prosecutor with broad powers to bring civil suits against state agencies and private parties whose actions affect the public interest. *See* C.P.I.L. REPORT, *supra* note 4, at 150-51. New York has a small utility rate intervenor program, with a "public counsel" operating under the auspices of the Consumer Protection Board. *Id.* at 160 n.15.

> fees will enable the newly established public interest law firms to become self-supporting, thereby institutionalizing the career lines of public interest lawyers. But more importantly, the award of attorney's fees will make it financially possible for all attorneys—whether sole practitioners or members of large law firms—to include public interest cases as a regular part of their practice. Only such wide-scale involvement by the private bar can insure that all important public issues will be litigated.[101]

State legislatures should move promptly to enact broad fee-shifting statutes. Public interest litigants tend to submit their disputes to federal courts, instead of local tribunals, whenever any arguable basis for federal jurisdiction exists. In part, this is attributable to factors that have nothing to do with the availability of fee awards, such as more favorable substantive law or more competent and sympathetic judges. However, today more than ever before the prospect of recouping attorneys' fees also influences litigants to choose the federal forum.[102] Unless states adopt broad fee-shifting legislation, federal courts will make further inroads into resolution of state disputes.

Prompted by the diversity of approaches at the state level, combined with the hesitancy and inertia of state legislatures in enacting such legislation, the authors have drafted the following fee-shifting statute.

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[101] Nussbaum, *supra* note 11, at 311. This message emerged repeatedly during the 1975 hearings of the California Senate Committee on Judiciary chaired by State Senator Song. Armando Menocal of Public Advocates, Inc., testified:

> [P]ublic interest litigation is likely to involve matters that are legally or factually complex, and, to many lawyers, even esoteric. Normally, neither private attorneys nor the vast majority of clients can afford the investment of money and time that such representation requires. For reasons that may be obvious, neither government nor private philanthropy alone can or should finance such legal representation; experience has shown that government funds are either explicitly or implicitly conditioned in ways that limit effective advocacy. Foundations or other philanthropic sources of support, on the other hand, do not individually or even collectively possess the means to adequately finance the work that is necessary, even indulging the unwarranted assumption that most are inclined to do so. Moreover, and perhaps most important, the vindication of important legal rights should not depend upon the beneficense of private philanthropy or be subject to the whim of government. Nor should it be made to depend upon the noblesse oblige of the occasional attorney who may be willing to provide representation without fee.

Private Attorneys General: Hearings on SB 664 Before the Comm. on Judiciary of the California Senate 148-49 (Comm. Transcript 1975) (prepared statement of Armando Menocal, Public Advocates, Inc., San Francisco) [hereinafter cited as *California Hearings*].

[102] In reaction to *Alyeska*, Congress has passed several new attorneys' fees provisions; this makes the federal forum even more attractive to litigants. *See* notes 64-76 and accompanying text *supra*.

A. *The Statutory Text*

§ 1 *Legislative Purpose*

Because every citizen has an interest in the proper enforcement of the state's laws and public policies, this legislation seeks to encourage the private enforcement of public rights by allowing the courts to award reasonable attorneys' fees and costs in civil actions.

§ 2 *Definitions*

(a) "eligible party" means:
  (1) a nongovernmental plaintiff in a civil action, or
  (2) an intervenor in a civil action on the side of the nongovernmental plaintiff.

(b) "reasonable attorneys' fees" means an amount for services of counsel equal to the prevailing market value of similar services rendered by one of comparable skill for a comparable duration.

(c) Within the meaning of this statute,
  (1) a party's "economic interest in the outcome of the action would normally justify the expenses of litigation" if a reasonable person with sufficient resources to bear the expenses of litigation would find pursuing that litigation financially justifiable.
  (2) a party or group of parties does not have "sufficient resources to bear the expenses of litigation" if that party or group of parties is not able, or under the circumstances cannot reasonably be considered able, to pay counsel fees and other litigation expenses in light of his financial obligations and needs.

§ 3 *Attorneys' Fees Awards*

Unless substantial injustice would result thereby, the court in a civil action shall award reasonable attorneys' fees and costs (including expert witness fees) to any eligible party whose efforts in the litigation have produced a substantial public benefit if (1) the eligible party's economic interest in the outcome of the action would not normally justify the expenses of litigation, or (2) the eligible party's economic interest in the outcome of the action would normally justify the expenses of litigation, but the eligible party does not have sufficient resources to bear the expenses of litigation and the party represents an interest that would probably otherwise have gone unrepresented. The court may limit the size and number of fee awards in order to prevent substantial injustice.

§ 4 *Findings of Fact*

In ruling upon an application for an award of attorneys' fees, the court shall make written findings of fact, including a statement of the reasons why it believes the applicant's efforts in the litigation have or have not produced a substantial public benefit.

§ 5 *Bad Faith*

The court may award a defendant reasonable attorneys' fees from any party who has brought or conducted the action in bad faith.

§ 6 *Preliminary Determinations Regarding Awards*

At the commencement of any civil action or at any stage of the proceedings, any party may move for a preliminary finding that the court is likely to award reasonable attorneys' fees under this statute. The court may make or refuse to make such a finding, limit its finding to then existing circumstances, or find that it will likely refuse to award reasonable attorneys' fees.

§ 7 *Interim Relief*

To serve the interests of justice, the court may award reasonable attorneys' fees pendente lite.

§ 8 *Awards Against the State*

A court may award reasonable attorneys' fees under this statute against the State, its agencies, officers, and employees.

B. *Policies Behind the Statute*

Our model legislation resolves nine basic policy issues that state legislatures must consider when drafting an effective fee-shifting statute.[103]

1. *Will an Attorneys' Fees Statute Encourage Nonmeritorious Litigation?*

The fear of frivolous litigation concerns critics of attorneys' fees legislation more than any other problem.[104] This is an under-

[103] This discussion deliberately does not deal with attorneys' fees awards in agency proceedings. Administrative and judicial proceedings differ so fundamentally that separate legislation should govern each type of action. It makes no sense to entangle debate over agency fee awards with discussion of a "private attorney general" statute, a concept justified by both legislative and judicial precedent.

[104] *See, e.g.*, SOURCE BOOK, *supra* note 74, at 62-63 (testimony of Senator Long concern-

standable but exaggerated concern. Critics feel that if a question should arise about the wisdom or necessity of a proposed lawsuit, the availability of attorneys' fees may tip the balance in favor of proceeding with the litigation. They prefer the restraint imposed on would-be public interest litigants by the scarcity of legal resources. This argument merely endorses continued underrepresentation of positions that go unrepresented in the governmental decisionmaking process. It is precisely this underrepresentation that creates the need for attorneys' fees legislation. The proposed act would indeed expand access to the legal system, but one cannot fault the law for producing a needed reform. Actions brought by those formerly denied free access to the legal process will not be more likely than other suits to involve frivolous or ill-conceived claims.

However, to deter nonmeritorious litigation, the proposed statute includes the following safeguards. First, it allows the courts to award the *defendant* attorneys' fees when they find that the plaintiff has sued in bad faith. Second, it provides for early judicial assessment of the likelihood that either party will receive attorneys' fees. This will deter litigious "gamblers" from abusing the availability of fee awards; a defendant who feels threatened or harassed by nonmeritorious litigation may establish at the outset that a victory by the plaintiff will not bring with it an attorneys' fees award. A plaintiff motivated more by the hope of obtaining fees than by the merits of his case would probably not proceed in the face of such a determination—especially if the determination allowed for a fee award against the plaintiff.[105] Finally, it limits judicial discretion in awarding fees.[106] Litigious public interest lawyers could no longer rely on the personal inclinations of a few liberal judges.

Those who fear that fee legislation would encourage nonmeritorious litigation underestimate the difficulty of bringing a major "private attorney general" lawsuit. As Robert Wallach, President of the San Francisco Bar Association, pointed out,

> [i]t is simply inconceivable that a private attorney general concept would encourage frivolous or nonmeritorious or spuri-

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ing Civil Rights Attorney's Fees Awards Act of 1976); *California Hearings*, *supra* note 101, at 37 (statement of William L. Berry, Jr., County Supervisors Association of California).

[105] For a proposal with this safeguard, see S. 2715, 94th Cong., 1st Sess., § 2(a), 121 CONG. REC. S20,542 (daily ed. Nov. 20, 1975) (Public Participation in Government Act of 1976, sponsored by Senators Kennedy and Mathias).

[106] *See* note 111 and accompanying text *infra*. To help implement this safeguard, the statute requires specific factual findings concerning the "substantial public benefit" conferred.

> ous litigation. There is just too much involved, too much undertaken, too much work, too much creative effort to simply believe that for lack of anything better to do or as an attempt to expound the political or socio-economic philosophy the courts are going to become an avenue of that type of litigation, and I think that in looking at the types of cases which have been involved in this field which have made the major mark upon our society that they have, all of them have in common an overwhelming complexity which simply belies their nonmeritorious state. They may be new, they may be innovative, they may be challenging, but they're certainly not nonmeritorious.[107]

Public officials commonly argue that an increase in public interest litigation would upset governmental decisionmaking processes: "[T]here are usually two sides to a question when a decision is made and . . . the typical public agency serves not one public interest but a number of public interests."[108] This argument misses the point. Governmental decisionmakers sometimes consider all relevant issues before resolving a social policy question, but they are not always so omniscient. Moreover, even when they do consider all the issues, governmental decisionmakers may make the wrong decision, or even a decision contrary to the law. In representing those formerly denied access to the legal process, public interest lawyers do not seek to impinge upon the decisionmaking processes of government; they simply seek to keep the decisionmaking process open and the decisionmaker well-informed.[109]

2. *Should a Legislature Enact a General Attorneys' Fees Statute or Add Attorneys' Fees Provisions to Existing Statutes?*

Historically, Congress has added attorneys' fees provisions to existing statutes.[110] The different needs and interests covered by state legislation, however, make it inappropriate to use the federal approach as a model for the states. Whatever the merits of selective fee-shifting at the federal level, states should adopt a general, uniform attorneys' fees statute incorporating the lessons learned before *Alyeska*.

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[107] *California Hearings*, *supra* note 101, at 30-31.

[108] *Id.* at 36 (testimony of William L. Berry, Jr., County Supervisors Association of California).

[109] For a summary of the arguments on selective versus general fee-shifting legislation, see Senate Committee on Judiciary of the California Legislature, Private Attorneys General 4-5 (1975) (Committee Paper).

[110] *E.g.*, Voting Rights Act of 1965—Extension, Pub. L. No. 94-73, § 402, 89 Stat. 400 (codified at 42 U.S.C. § 1973*l*(e) (Supp. V 1975)).

By providing standards applicable to every lawsuit, the proposed statute acknowledges the impossibility of eliminating judicial discretion in awarding attorneys' fees. To minimize the possibility that discretion will become capriciousness, our proposal embodies a fee-award scheme that is uniform, circumscribed, and rational. Any across-the-board approach, however, could inadvertently subsidize unworthy causes. Yet the risk is minimal. The proposed statute shifts the focus of attention from the importance of the right asserted to the value of the service the plaintiffs have performed; this eliminates much of the subjectivity that characterized pre-*Alyeska* cases.[111]

Selective fee-shifting requires legislatures to predict which statutes will need attorneys' fees provisions to encourage private enforcement. A general statute, on the other hand, requires less legislative prophesy. No one can predict which rights will require private enforcement tomorrow, next year, or ten years from now.[112] As times and social conditions change, new problems and new rights will inevitably emerge, and areas previously unlitigated will require exploration. A general statute will encourage skilled advocacy of such rights, and will allow courts to respond flexibly to tomorrow's problems.[113]

3. *What Criteria Should Courts Use in Deciding Whether To Award Attorneys' Fees?*

Our model statute entrusts courts with the development of these legislative goals:

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[111] The importance of the right asserted was a major factor in the pre-*Alyeska* period. In Donahue v. Staunton, 471 F.2d 475 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973), the importance of the First Amendment rights asserted by plaintiffs particularly influenced the court: "The benefit to the general public, *i.e.*, of encouraging free and robust public discussion, is substantial in this case and should not depend for its protection upon the financial status of the individual who is deprived of his constitutional rights." *Id.* at 483. *See also* Stolberg v. Board of Trustees, 474 F.2d 485 (2d Cir. 1973); Ross v. Goshi, 351 F. Supp. 949 (D. Hawaii 1972); Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). However, as pre-*Alyeska* case law indicates, one can never single out with certainty those rights and public policies that are significant enough to merit encouragement by attorneys' fees awards.

[112] The social "importance" of litigation does not depend on the statute under which the suit was brought. Furthermore, astute lawyers can manipulate their clients' complaints to capitalize on fee-award provisions. Less foresightful parties, in failing to seek relief under a statute allowing fee awards, may be denied attorneys' fees even if they accomplish precisely the same result.

[113] Unlike selective fee-shifting provisions, a general statute with specific procedural criteria and definitions would ensure uniformity among fee awards because it would resolve at the outset such policy questions as how to calculate the award and how to define "substantial public benefit."

(1) to encourage private enforcement of public policies;
(2) to permit legal representation of interests that might otherwise go unrepresented;
(3) to take account of differences in the economic circumstances of litigants as they affect access to the courts without making those differences controlling; and
(4) to avoid conferring public benefits solely at the expense of litigants who have brought them about.

The statute tries to achieve these goals without defining the limits of "public interest law"; rather, the statute recognizes that litigation advances the "public interest" whenever those asserting important rights obtain representation that they would not have obtained through normal dealings in the legal services marketplace. The statute's structure reflects this philosophy.

To receive fees under section 3, an eligible party must "confer a substantial public benefit."[114] An eligible party must also satisfy one of two procedural prerequisites: (1) the party's economic interest must be such that another party in his position would normally not bring suit, *or* (2) if the party's economic interest would normally justify a lawsuit, but financial circumstances prevent him from suing, the plaintiff must represent a position that would normally otherwise go unrepresented. This approach recognizes that conferring a "substantial public benefit" alone should not automatically entitle a party to receive attorneys' fees from his adversary.[115]

Our "substantial public benefit" approach answers many of the criticisms aimed at attorneys' fees legislation. First, it should reassure those who fear "that the Legislature could [n]ever adequately define all of the areas in which this kind of bill might provoke a public benefit by encouraging private attorney general litigation."[116] The statute does not place that impossible burden on legis-

[114] Terms such as "substantial public benefit" and "public interest" are generally so broadly defined that they offer little help in delimiting statutory coverage. *See, e.g.*, N.J. STAT. ANN. § 52:27E-32 (West Supp. 1977). However, courts should have ample room to shape the substance of these terms. By granting them discretion guided by uniform standards, the proposed statute may lead courts to more consistent and precise definitions of "substantial public benefit." This, in turn, might help usefully define the scope of "public interest." *See* note 113 *supra*.

[115] For example, the award should depend not only on the nature of the right itself, but also on the economic self-interest of the party asserting it. Thus, our proposed statute might allow attorneys' fees in favor of a group of concerned citizens that brought an action to stop pollution of a lake, but would deny an award to a real estate speculator who stood to gain from a development on the lake front.

[116] *California Hearings*, *supra* note 101, at 91 (testimony of Malcolm A. Misuraca).

latures. Second, this approach heeds the Supreme Court's warning that courts should not be given a blank check to fill in whenever they believe that the litigation before them involves an important policy.[117] Under the statute we propose, the court's assessment of a policy's importance would begin, not end, the inquiry.

4. *Who Should Be Eligible for an Award of Attorneys' Fees?*

Under sections 2 and 3, there are two types of eligible parties: (1) the nongovernmental plaintiff in a civil action, and (2) the intervenor who sides with the plaintiff. The statute permits multiple fee awards in order to encourage legitimate public interest intervenors. However, to discourage "ambulance chasing" intervenors, and to guard against overburdening defendants with oppressive fee assessments, the statute gives courts the discretion to "limit the size and number of fee awards in order to prevent substantial injustice."

An applicant for attorneys' fees need not prevail on the merits to qualify for an award under the statute; as long as the eligible party's actions provide a substantial public benefit, the outcome of the litigation is not dispositive.[118] Moreover, the applicant need not show that the suit caused in fact the dispute's settlement, mootness, or other disposition. Requiring the applicant to show that the suit was the direct cause of the corrective action would ask too much in

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[117] *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. at 263.

[118] This codifies the holding of the court of appeals decision in *Alyeska*. *See* Wilderness Soc'y v. Morton, 495 F.2d at 1034-36. *See also* Vermont Low Income Advocacy Council, Inc. v. Usery, 546 F.2d 509, 513 (2d Cir. 1976).

Sierra Club v. Lynn, 364 F. Supp. 834 (W.D. Tex. 1973), *rev'd in part*, 502 F.2d 43 (5th Cir. 1974), an environmental lawsuit against HUD and San Antonio Ranch, Ltd., also involved this issue. During the course of this litigation, HUD thoroughly revised its planned environmental safeguards, brought itself into compliance with the applicable acts, and was permitted to proceed with the challenged housing development. The district court agreed to consider awarding attorneys' fees, even though the plaintiffs did not prevail on the merits: "This Court is firmly convinced that even though the plaintiffs may have, at this stage, technically lost this lawsuit, nevertheless, a very important service has been performed in creating a greater public awareness of the dangers of pollution threatening this very valuable natural resource . . . ." *Id.* at 847. The court later awarded attorneys' fees against San Antonio Ranch, emphasizing the importance of plaintiffs' actions in assuring compliance with the law, and pointing to refinements in defendants' environmental studies as evidence of plaintiffs' achievement. *Id.* at 848-49. HUD was immune from liability for attorneys' fees. 28 U.S.C. § 2412 (1970).

The court of appeals, however, reversed on the question of attorneys' fees. After dismissing the applicability of both the bad-faith and common-fund exceptions (502 F.2d at 65), the court declined to follow the District of Columbia Circuit's opinion in *Alyeska*, refusing to assess fees "against a party innocent of any wrongdoing." *Id.* at 65-66. The court did intimate, however, that it would have assessed fees against HUD were it not for its immunity. *See id.* at 66.

light of predictable allegations by a defendant that his change in course resulted from unilateral decisions rather than from the litigation originated by the plaintiff.

Under section 5, defendants who must answer suits brought or pursued in bad faith may also receive attorneys' fees. Some have argued that defendants should receive fees if they can satisfy the same test applied to plaintiffs.[119] But by abolishing the American rule completely in public interest cases, this approach would deter meritorious litigation and thereby undermine one purpose of our proposed statute. A party that successfully defends a "private attorney general" suit stands on the same ground as a defendant in any lawsuit; generally, such a party has neither acted from public-minded disinterest nor significantly enforced public policy. As one witness before a committee of the California Senate testified, "[e]ven if a private party sues to vindicate an important public right and loses, at best the person was wrong, it doesn't necessarily mean that the defendant by winning the case has in any way enhanced or preserved or protected important public rights or public policy."[120] Not surprisingly, therefore, courts have generally denied attorneys' fees awards to defendants absent bad faith on the part of the plaintiff.[121] In our view, the policy reasons underlying this rule remain valid.

5. *Should a Court Have Discretion To Deny Fees Even Though the Applicant Has Fully Complied with the Statute?*

The statute recognizes that cases may arise where totally unpredictable circumstances make it unjust to assess fees against the defendant. Therefore, section 3(a) provides that "[u]nless substantial injustice would result thereby, the court . . . shall allow reasonable attorneys' fees." This language in effect codifies the "unless . . . unjust" standard enunciated in *Piggie Park*.[122] Although this provision permits judicial discretion, it imposes an important restriction by requiring a showing of "*substantial* injustice." The need to avoid unduly harsh results in special cases fully justifies this minor concession to unpredictability.

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[119] This issue is currently before the Supreme Court in the context of fee-shifting under the Civil Rights Act of 1964, tit. VII, § 706(k), 42 U.S.C. § 2000e-5(k) (1970). Equal Employment Opportunity Comm'n v. Christianburg Garment Co., 550 F.2d 949, 951 (4th Cir.), *cert. granted*, 97 S. Ct. 2948 (1977). *See also* Carrion v. Yeshiva Univ., 535 F.2d 722, 726-29 (2d Cir. 1976).

[120] *California Hearings*, *supra* note 101, at 85 (testimony of Armando Menocal, Public Advocates, Inc., San Francisco).

[121] *See* United States Steel Corp. v. United States, 519 F.2d 359, 364 (3d Cir. 1975).

[122] 390 U.S. at 402. *See* notes 23-27 and accompanying text *supra*.

6. *How Should Courts Set the Amount of the Fee Award?*

Modeled on the Freedom of Information Act Amendments of 1974,[123] section 3(a) of the proposed statute allows courts to award expert witness fees and other costs. This provision reflects the statute's overriding intent to encourage public interest litigation. Many public interest suits, especially those involving environmental or employment discrimination law, cannot proceed without the use of experts.

Section 2(b) employs a "prevailing market value" formula to measure "reasonable attorneys' fees." The use of this formula accomplishes three goals. First, it minimizes the time that courts must spend determining the amount of the fee award.[124] Second, because courts need not regard recent decisions as having controlling precedential value, an unduly low award in one decision will not

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[123] Freedom of Information Act Amendments of 1974, § 1(b)(4)(E), 5 U.S.C. § 552(a)(4)(E) (Supp. V 1975) (allowing "reasonable attorneys fees and other litigation costs reasonably incurred").

[124] New York's *quantum meruit* standard illustrates how time-consuming computation of fee awards can be. McAvoy v. Harron, 26 App. Div. 2d 452, 275 N.Y.S.2d 348 (4th Dep't 1966), *aff'd mem.*, 21 N.Y.2d 821, 235 N.E.2d 910, 288 N.Y.S.2d 906 (1968), provides this description:

> [T]he court is itself an expert on the question and may consider its own knowledge and experience concerning reasonable and proper fees and in the light of such knowledge and experience the court may form an independent judgment from the facts and evidence before it as to the nature and extent of the services rendered, make an appraisal of such services, and determine the reasonable value thereof.

Id. at 454, 275 N.Y.S.2d at 350-51. Jordan v. Freeman, 40 App. Div. 2d 656, 336 N.Y.S.2d 671 (1st Dep't 1972), lists "the nature and extent of the services, the actual time spent, the necessity therefor, the nature of the issues involved, the professional standing of counsel, and the results achieved" as factors a court must consider when determining the value of legal services. *Id.* at 656, 336 N.Y.S.2d at 671. Similarly, when the legislature enacted the New York Class Actions Act (N.Y. CIV. PRAC. §§ 901-909 (McKinney 1976)), it used a "reasonable value" standard for granting attorneys' fees without providing any criteria for its application. *Id.* § 909. The Practice Commentary to § 909 addresses this lack of guidance:

> It should be noted that the attorney's fee will be "based on the reasonable value of legal services rendered." The Association of the Bar of the City of New York has recommended that the New York Courts "follow the federal practice of basing any such award on the lawyer's time involved, the quality of his service to the class and the extent of the benefit received by class members."

Id. § 909 note (Practice Commentaries) (quoting Special Comm. on Consumer Affairs of the Ass'n of the Bar of the City of New York, *Committee Report: Proposed Class Action Legislation in New York*, 28 REC. 481, 490 (1973)).

Unlike *quantum meruit* and similar standards, a market-value formula does not require the court to make a valuation analysis. Instead, the court may simply call on experts to inform it of going rates for legal services. Although some of the factors cited in *McAvoy* and *Jordan* will still determine the amount of the award, valuation will take place in the market, rather than in the courtroom.

necessarily discourage future public interest litigation. Third, a market-value rule encourages involvement of the private bar, particularly the general practice bar, because it grants fees competitive with those earned in ordinary private litigation.[125]

7. *Should Courts Have the Power To Grant Attorneys' Fees Before Final Judgment?*

Section 6 of our statute answers this question affirmatively. Most of the litigation affected by this statute involves vast amounts of time and expense. Therefore, absent a mechanism to provide interim grants of partial fees and costs, the litigation might be forced to a halt.[126] However, a court should award attorneys' fees on an interim basis only upon a clear showing that the plaintiff or intervenor cannot otherwise continue the litigation, and will likely qualify for fees after final judgment.

8. *Should Courts Have the Power To Assess Reasonable Attorneys' Fees Against the State?*

Although the state will not frequently be the defendant in public interest suits, a fee award is particularly appropriate when it is. The state is not only able to marshal great resources against litigants who challenge it, but can spread the costs of public interest litigation better than any other defendant.[127] More importantly, when the state itself violates the law, its citizens need most the vigorous efforts of a "private attorney general."[128]

9. *Should Courts Have the Power To Award Reasonable Attorneys' Fees in Favor of the State?*

Fee-shifting makes it possible for private parties to enter the courtroom whenever the state cannot or will not represent a particular viewpoint on a public policy issue. The state already has full

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[125] Involvement of the private bar is particularly important to the well-being of public interest litigation. *See* note 101 and accompanying text *supra*.

[126] *See* H.R. REP. No. 94-1558, 94th Cong., 2d Sess. 8 ("Such awards *pendente lite* are particularly important in protracted litigation, where it is difficult to predicate with any certainty the date upon which a final order will be entered.").

[127] In this sense, a recovery against the state is similar to the recovery in Mills v. Electric Auto-Lite Co., 396 U.S. 735 (1970). The corporation in *Mills* could spread the costs among its shareholders, in the same manner that a state can spread the costs among its citizens. For a discussion of *Mills*, see notes 28-34, 82-83, and accompanying text *supra*.

[128] By providing a specific statutory waiver, section 7 of our proposed statute precludes the state's use of sovereign immunity as a shield against fee awards. *Cf.* 28 U.S.C. § 2412 (1970) (federal government immune from assessment of attorneys' fees absent specific statutory authorization).

access to public funds, and therefore does not need fee awards as an encouragement to defend its own policies. Moreover, the fear of being required to pay the state's attorney might discourage private parties from bringing into question state actions that will otherwise go unchallenged. For these reasons, we reject entirely fee awards to the state.

CONCLUSION

The *Alyeska* decision, although perhaps analytically sound, produced an undesirable result: it discouraged public interest litigation. Well-drawn legislation built on the "private attorney general" concept would virtually eliminate this problem. Indeed, as the history of the concept shows, the "private attorney general" theory opens courtroom doors to full representation of important public interests. States should promptly authorize attorneys' fees awards to deserving private litigants who confer significant public benefits by seeking judicial enforcement of important policies. If enacted, broad-based fee-shifting legislation would wisely expand public participation in the governmental processes that daily touch our lives.