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The Civil Rights Attorney's Fees Awards Act of 1976

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NOTES & COMMENTS

THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976

INTRODUCTION

Under the traditional American rule, each party litigant is required to absorb the cost of his own attorney's fees.[1] Although the judicially created "bad faith"[2] and "common benefit"[3] doctrines are exceptions to this rule,[4] the narrowness of their application often

[1] *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975); Hall v. Cole, 412 U.S. 1, 4 (1973); Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796). The general American rule which precludes fee recovery by successful litigants differs from the approach of many other nations, including Great Britain, where fees are automatically awarded to the prevailing parties in all lawsuits. Comment, *Court Awarded Attorneys' Fees and Equal Access to the Courts,* 122 U. PA. L. REV. 636, 639 (1974); *see* Hall v. Cole, 412 U.S. 1, 4 n.4. General distrust of lawyers has been identified as one possible source of the American rule. Comment, *Court Awarded Attorneys' Fees and Equal Access to the Courts,* 122 U. PA. L. REV. 636, 641 (1974). Other factors attributed to the American break with English tradition are the belief that automatic fee shifting would forestall meritorious litigation by persons of less than substantial means, *see* Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?,* 49 IOWA L. REV. 75, 81 (1963), notions of individualism peculiar to the United States, Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?,* 20 VAND. L. REV. 1216, 1220-21 (1967), the failure of early statutory fee schedules to be adjusted in accordance with cost of living expenses, Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society,* 54 CALIF. L. REV. 792, 798-99 (1966), and more recently, "blind adherence to a questionable precedent," Sands, *Attorneys' Fees as Recoverable Costs,* 63 A.B.A.J. 510, 513 (1977).

The American no-fee rule has been the subject of much debate in recent years. Its proponents argue that a mandatory fee shifting policy would operate to discourage impecunious litigants. *See, e.g.,* F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 129 (1974); Mause, *Winner Takes All: A Re-examination of the Indemnity System,* 55 IOWA L. REV. 26, 36 (1969). Critics of the rule, however, generally argue that a litigant is never fully compensated when legal fees are subtracted from a damage recovery. *See, e.g.,* Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society,* 54 CALIF. L. REV. 792 (1966); Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?,* 49 IOWA L. REV. 75 (1963); McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages,* 15 MINN. L. REV. 619 (1931); McLaughlin, *The Recovery of Attorney's Fees: A New Method of Financing Legal Services,* 40 FORDHAM L. REV. 761 (1972); Stoebuck, *Counsel Fees Included in Costs: A Logical Development,* 38 U. COLO. L. REV. 202 (1966). Moreover, it has been noted that the American rule may be particularly unjust where a civil rights litigant prevails in a nonpecuniary action. *See, e.g.,* Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) (per curiam); Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971); Note, *Allowance of Attorney Fees in Civil Rights Actions,* 7 COLUM. J.L. & SOC. PROB. 381 (1971).

[2] *See* notes 11-28 and accompanying text *infra.*

[3] *See* notes 29-37 and accompanying text *infra.*

[4] The "bad faith" and "common benefit" exceptions to the American rule are derived from the historical authority of the chancellor to do equity. *See* Hall v. Cole, 412 U.S. 1, 5 (1973); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 166 (1939).

gives rise to harsh results. In the past, the limitations of these exceptions were most vivid in instances where parties were seeking to enforce, at their own expense, constitutionally guaranteed rights and privileges.[5] In an effort to promote public interest litigation by private parties,[6] the lower federal courts developed the "private attorney general" doctrine under which fees were awarded to litigants who had vindicated important statutory rights of all citizens.[7]

There also exist numerous federal statutory exceptions to the American rule prohibiting fee shifting. Five basic categories may be used to classify these legislative schemes: (1) authorization of a mandatory award of reasonable fees to the prevailing plaintiff, *e.g.*, Packers and Stockyards Act § 309(f), 7 U.S.C. § 210(f) (1976); Perishable Agricultural Commodities Act § 7(b), 7 U.S.C. § 499g(b) (1976); Clayton Act § 4, 15 U.S.C. § 15 (1976); Truth-in-Lending Act § 130(a)(3), 15 U.S.C. § 1640(a)(3) (1976); Fair Labor Standards Act § 16(b), 29 U.S.C. § 216(b) (1976); Communications Act § 206, 47 U.S.C. § 206 (1976); Interstate Commerce Act § 16, 49 U.S.C. § 16(2) (1976); (2) authorization of a mandatory award of reasonable fees to the prevailing party, *e.g.*, Jewelers Hall-Mark Act § 294, 15 U.S.C. §§ 298(b)-298(d) (1976); Servicemen's Group Life Insurance Act, 38 U.S.C. § 784(g) (1976); (3) authorization of a discretionary award of reasonable fees to the prevailing plaintiff, *e.g.*, Freedom of Information Act § 1(b), 5 U.S.C. § 552(a)(4)(E) (1976); Magnuson-Moss Warranty Act § 2310, 15 U.S.C. § 2310(d)(2) (1976); Labor Management Reporting and Disclosure Act of 1959 § 201, 29 U.S.C. § 431(c) (1976); (4) authorization of a discretionary award of reasonable fees to the prevailing party, *e.g.*, Copyright Act § 101, 17 U.S.C. § 116 (1976); Education Amendments Act of 1972, tit. VII, § 718, 20 U.S.C. § 1617 (1976); Civil Rights Act of 1964, tit. II, § 204(b), 42 U.S.C. § 2000a-3(b) (1976); Civil Rights Act of 1964, tit. VII, § 706(k), 42 U.S.C. § 2000e-5(k) (1976); and (5) authorization of a discretionary award of reasonable fees to either party, *e.g.*, Securities Act of 1933 § 11, 15 U.S.C. § 77K(e) (1976); Trust Indenture Act § 323(a), 15 U.S.C. § 77WWW(a) (1976); Securities Exchange Act of 1934 § 9(e), 15 U.S.C. §§ 78i(e), 78r(a) (1976); Noise Control Act of 1972 § 12(d), 42 U.S.C. § 4911(d) (1976). For a list of 90 statutory fee award provisions, see SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE SENATE JUDICIARY COMMITTEE, CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976—SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS (1976) [hereinafter cited as SOURCE BOOK].

[5] Since private enforcement was often the sole means of redressing unconstitutional practices, many improper activities went unchecked due to the reluctance of aggrieved parties to commence protracted and costly litigation. *See, e.g.*, S. REP. No. 1011, 94th Cong., 2d Sess. 2, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5908, 5910 [hereinafter cited as S. REP.]. The Senate Report states that "all of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." *Id. See also* H. REP. No. 1558, 94th Cong., 2d Sess. 3 (1976), *reprinted in* SOURCE BOOK, *supra* note 4, at 209-19 [hereinafter cited as H. REP.].

[6] Public interest litigation is often identified by three basic features. It is customarily seen as involving legal issues which, at the time of litigation, are of extreme importance. Consequently, the action's final disposition will ordinarily affect many individuals not a party to the lawsuit. Finally, public interest suits are customarily initiated by private plaintiffs rather than by governmental authorities. *See* Nussbaum, *Attorney's Fees in Public Interest Litigation*, 48 N.Y.U. L. REV. 301 (1973).

[7] *See, e.g.*, Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971); NAACP v. Allen, 340 F. Supp. 703 (M.D. Ala. 1972), *aff'd*, 493 F.2d 614 (5th Cir. 1974); La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972), *aff'd*, 488 F.2d 559 (9th Cir. 1973), *cert. denied*, 416 U.S. 968 (1974); notes 38-53 and accompanying text *infra*. For an analysis of the development of the private attorney general doctrine, as well as a discussion of the cases utilizing this

This attempt to create a third equitable exception to the American rule proved short lived, however, when the Supreme Court called for legislative rather than judicial justification for its use.[8]

The Civil Rights Attorney's Fees Awards Act of 1976[9] was enacted to fill the void created by the repudiation of the private attorney general doctrine. Although the legislative history of the Act reveals that "no startling new remedy" was intended,[10] recent judicial interpretations of the Act have raised several questions regarding the proper use of this new fee-shifting power. In suggesting guidelines for an application of the Act that are in harmony with the intent and purpose of its framers, this Note will examine and compare the policies underlying fee shifting pursuant to the traditional equitable doctrines, the considerations espoused by Congress in passing the Act and recent decisions which have both granted and denied attorney's fees under the Act.

NON-STATUTORY FEE SHIFTING IN THE FEDERAL COURTS

The Bad Faith Doctrine

The bad faith exception to the traditional American rule theoretically functions as a deterrent to the commencement of unfounded and administratively crippling lawsuits.[11] To this end, a party who is the object of an unfounded action or defense which is unreasonably brought or maintained may have the financial burden

equitable exception, see 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) [hereinafter cited as *Green Light*].

[8] *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975); notes 50-53 and accompanying text *infra*.

[9] Pub. L. No. 94-559, 90 Stat. 2641 (to be codified in 42 U.S.C.§ 1988); *see* notes 54-56 and accompanying text *infra*. The Act, the Senate and House Reports, relevant Congressional Record excerpts, and various appendices are reprinted in SOURCE BOOK, *supra* note 4.

The Senate Judiciary Committee declared that its purpose in drafting the Act was to "remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in *Alyeska* . . . , and to achieve consistency in our civil rights laws." S. REP., *supra* note 5, at 1. The report emphasized that the presence of fee award sections in some civil rights statutes, and the lack thereof in others, could no longer be justified. *Id.* at 4. *Compare, e.g.*, Fair Housing Act of 1968, 42 U.S.C. § 3612(c) (1976) (fee award allowed in housing discrimination suit), *with* 42 U.S.C. § 1982 (1976) (prior to Act, fee awards not authorized in housing and property discrimination suit).

[10] S. REP., *supra* note 5, at 6. The Senate Judiciary Committee intended that fees should be awarded under the Act in a manner consistent with the practice of federal courts prior to the decision in *Alyeska*. *Id.*; *see* notes 38-53 and accompanying text *infra*.

[11] Note, *The Civil Rights Attorneys' Fees Awards Act of 1976*, 34 WASH. & LEE L. REV. 205, 209 (1977). The traditional rationale underlying the implementation of the bad faith fee award is often identified as one of punishment. Hall v. Cole, 412 U.S. 1, 5 (1973); Nussbaum, *supra* note 6, at 317.

of his fees transferred to his opponent through a court's use of its equitable powers.[12] This fee shifting most commonly occurs where a litigant has purposefully utilized dilatory tactics at trial.[13] For example, in *Bond v. Stanton,*[14] the plaintiffs brought a class action suit against Indiana state officials seeking to compel compliance with Title XIX of the Social Security Act.[15] In granting injunctive relief, the trial court noted that the state disregarded its clear legal duty for 2 years and, throughout the unnecessarily protracted litigation, " 'uncontinually asserted compliance with [the statutory] requirements in the face of documentation to the contrary.' "[16] The trial court's award of attorney's fees to the plaintiff was affirmed by the seventh circuit which found that the stringent bad faith standard had been satisfied.[17]

Traditionally, a shifting of fees would also arise where a defendant's oppressive conduct, or "obdurate obstinacy," necessitated the commencement of a lawsuit.[18] Such an application of the bad faith doctrine, and its subsequent liberalization, is well illustrated

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[12] *See, e.g.,* F.D. Rich v. Industrial Lumber Co., 417 U.S. 116, 129 (1974); Vaughan v. Atkinson, 369 U.S. 527, 530-31 (1962); 6 MOORE'S FEDERAL PRACTICE ¶ 54.77 [2], at 1709 (2d ed. 1976).

[13] *See* Straub v. Vaisman & Co., 540 F.2d 591 (3d Cir. 1976); 6 MOORE'S FEDERAL PRACTICE ¶ 54.77, at 1709 n.17 (2d ed. 1976 & Supp. 1977-1978).

[14] 528 F.2d 688 (7th Cir.), *vacated on other grounds,* 429 U.S. 973 (1976).

[15] 528 F.2d at 690; *see* 42 U.S.C. §§ 1396-1396i (1976). Title XIX of the Social Security Act prescribes timetables for the states' adoption of an early and periodic screening, diagnosis, and treatment program for all children eligible for Medicaid benefits. Social Security Amendments of 1967, Pub. L. No. 90-248, § 302(a), 81 Stat. 929 (amending 42 U.S.C. § 1396d (1965)). Upon finding that Indiana state officials had failed to meet these deadlines, the district court ordered compliance. 372 F. Supp. 872 (N.D. Ind.), *aff'd,* 504 F.2d 1246 (7th Cir. 1974).

[16] 528 F.2d at 690. Support for the court's shifting of fees based upon the defendant's use of dilatory trial tactics may be found in Hall v. Cole, 412 U.S. 1 (1973), where the Supreme Court declared that a fee award could be premised on the bad faith of a party "in the conduct of the litigation." *Id.* at 15.

[17] 528 F.2d at 690. The Supreme Court remanded the issue of attorney's fees for reconsideration under the Act. 429 U.S. 973 (1976). Subsequently, the plaintiffs were granted a fee award. Bond v. Stanton, 555 F.2d 172 (7th Cir. 1977). In Doe v. Poelker, 515 F.2d 541 (8th Cir. 1975), *rev'd on other grounds,* 429 U.S. 881 (1977), the abortion policies of a municipal hospital were challenged as violative of the equal protection clause of the fourteenth amendment. 515 F.2d at 544. Throughout the litigation, the city asserted that the plaintiff had lost her standing to sue since she was no longer pregnant. *Id.* at 547-48. In light of the Supreme Court's rejection of this argument, *see* Roe v. Wade, 410 U.S. 113 (1973), the city's defense was deemed totally frivolous, thus justifying a fee award pursuant to the bad faith doctrine. 515 F.2d at 547-48; *see* Note, 8 CONN. L. REV. 551 (1976).

[18] With respect to fee awards based on a defendant's pre-trial conduct, the fourth circuit, in Bradley v. School Bd., 345 F.2d 310, 321 (4th Cir.), *vacated,* 382 U.S. 103 (1965), noted that "attorneys' fees are appropriate only when it is found that the bringing of the action should have been unnecessary and was compelled by . . . unreasonable, obdurate obstinacy." 345 F.2d at 321.

by a line of desegregation decisions. In *Bell v. School Board,*[19] the plaintiff obtained injunctive relief enjoining defendant's practice of racial discrimination in its school district.[20] A fourth circuit panel affirmed a fee award to the plaintiff pointing to the school board's "long continued pattern of evasion and obstruction which . . . [cast] a heavy burden on the children and their parents."[21] In addition, the court noted that the defendant had interposed "a variety of administrative obstacles to thwart the valid wishes of the plaintiff for a desegregated education."[22]

This notion of justifying fee awards on the basis of a defendant's reproachable pre-trial conduct was more broadly pronounced by the eighth circuit in *Clark v. Board of Education.*[23] Expressing deep concern over the necessity of costly private vindication of clearly defined rights, the court stated that "[i]f well known constitutional guarantees continue to be ignored or abridged . . . , the time is fast approaching when the additional sanction of substantial attorney fees should be seriously considered."[24] With this language, *Clark* implicitly endorsed a view of the bad faith doctrine which recognized a need for a greater flexibility in the exercise of the court's equitable fee-shifting powers.[25] This type of liberal approach was evident in *Cato v. Parham,*[26] wherein the plaintiff's request for attorney's fees was granted although the court did not appear to be thoroughly convinced that the school board had functioned or litigated in bad faith.[27] In this respect, the *Cato* decision was indicative of a trend whereby some federal courts utilized the bad faith doctrine to neutralize the sometimes inequitable financial results of private enforcement of constitutionally guaranteed rights.[28] Despite this expansion of the bad faith rationale, however, potential public interest litigants still could not be certain that a court would shift

[19] 321 F.2d 494 (4th Cir. 1963).

[20] *Id.* at 497.

[21] *Id.* at 500. The court noted that the school district's policy of school segregation remained unchanged despite the Supreme Court's holding in Brown v. Board of Educ., 347 U.S. 483 (1954). 321 F.2d at 495.

[22] 321 F.2d at 500. Illustrative of the defendant's purposeful denial of the plaintiff's constitutional rights was the pretextuous fabrication of rules which, in practice, were inapplicable to white students. *Id.* at 497. For example, the school board required black children to apply for a change of schools without properly publicizing the application deadline. *Id.* at 498. Moreover, the board interposed "captious objections," contending that the applications were sent to the improper office. *Id.*

[23] 369 F.2d 661 (8th Cir. 1966).

[24] *Id.* at 671.

[25] *See Green Light, supra* note 7, at 737-38.

[26] 293 F. Supp. 1375 (E.D. Ark.), *aff'd,* 403 F.2d 12 (8th Cir. 1968).

[27] 293 F. Supp. at 1378.

[28] *See Green Light, supra* note 7, at 738.

fees in all instances where a defendant's conduct had necessitated private enforcement of public rights.

The Common Benefit Doctrine

The common benefit doctrine also permits courts to shift the expense of counsel fees. This theory originally was designed to prevent unjust enrichment when a successful plaintiff, through maintenance of a lawsuit at his own expense, had recovered damages or preserved a monetary fund in which an ascertainable class of persons shared a common interest.[29] Under this view, litigants who had vindicated far-reaching legal rights of the public at large by obtaining injunctive relief were foreclosed from receiving fee awards.[30] The Supreme Court, however, expanded equitable fee-shifting powers under this rule in *Mills v. Electric Auto-Lite Co.*,[31] when it held that the absence of relief pecuniary in nature should not prove fatal to the recovery of attorney's fees under the common benefit doctrine.[32] *Mills* was a shareholder derivative action in which the plaintiff, seeking to dissolve a corporate merger, alleged that the vote in its favor was precipitated by the defendant corporation's use of materially misleading proxy statements.[33] Although the Court granted the requested relief, the nonpecuniary nature of the action seemingly precluded a shifting of attorney's fees.[34] Identifying serious new pol-

[29] Prior to Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), *see* notes 31-34 and accompanying text *infra*, the traditional rule was that fee shifting under the common benefit doctrine could occur only in those actions which resulted in the recovery of damages or monetary funds capable of financing the fee award. *See* 6 MOORE'S FEDERAL PRACTICE ¶ 54.77[2], at 1705-07 (2d ed. 1976). Additionally, the action must have benefited a class of persons who are similarly situated to the party litigating the claim. *Id.* These prerequisites stemmed from the landmark case of Trustees v. Greenough, 105 U.S. 527 (1882), where the plaintiff, a railway company bondholder, secured and saved a large portion of a trust fund which was being wasted by defendants. *Id.* at 529. The suit resulted in payments to bondholders of previously unrealized dividends from which the plaintiff was able to draw a fee award. *Id.* at 531. *See also* Hall v. Cole, 412 U.S. 1, 5-6 n.7 (1973); *Green Light, supra* note 7, at 736.

[30] *See* note 29 *supra.*

[31] 396 U.S. 375 (1970).

[32] *Id.* at 392.

[33] *Id.* at 377-78. The action was founded on allegations that inclusion of the misleading information in the proxy statements was violative of § 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a) (1976). 396 U.S. at 378.

[34] *See* 396 U.S. at 392. In discussing the early decisions which had employed the common benefit doctrine, the Court noted that "nothing in these cases indicates that the suit must actually bring money into the court as a prerequisite to the court's power to order reimbursement of expenses." *Id.* (footnote omitted). Initially, it was necessary for the Court to distinguish its holding in Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967). *See* 396 U.S. at 391. *Fleischmann* involved a trademark infringement action brought under the Lanham Act, 15 U.S.C. §§ 1051-1127 (1976). 386 U.S. at 714-15 & n.1. Although this

icy considerations, however, the Court awarded the plaintiff attorney's fees and stated that *"in vindicating the statutory policy,* petitioners have rendered a substantial service to the corporation and its shareholders."[35] The implementation of fee shifting as a means of assisting and encouraging legal action by litigants whose suits result in significant benefits to a class was further justified by the Court when it noted that "regardless of the relief granted, private stockholders' actions of this sort 'involve corporate therapeutics,' and furnish a benefit to all shareholders by providing an important means of enforcement of the proxy statute."[36] Despite the broadening of the common benefit doctrine by the *Mills* Court, public interest litigants faced a formidable barrier to recovery in that it was still necessary to meet the requirements that a court be able to exact fees from an ascertainable class of persons, within its jurisdiction, whose situations had been improved by the underlying litigation.[37]

The Rise and Fall of the Private Attorney General Doctrine

Given the limitations of the bad faith and common benefit doctrines, as well as the inconsistant manner in which the courts exercised their equitable powers,[38] these exceptions proved to be inadequate incentives for the public interest litigant. Responding to the perceived recalcitrance of potential public interest litigants to bring civil rights suits, the lower federal courts developed the "private attorney general" doctrine.[39] If litigants "benefitted their

statutory scheme detailed the compensatory and injunctive remedies which were available to a litigant who had prevailed under its provisions, no mention was made of attorney's fees. *See id.* at 720-21. From this structure the Court gleaned a congressional intent to place fee awards outside the purview of the judiciary while exercising remedial powers pursuant to the Act. *Id.* The *Mills* Court, however, distinguished the shareholder derivative suit before it on the grounds that the express remedies of the Securities and Exchange Act were relatively minimal. *Id.*

[35] 396 U.S. at 396 (emphasis added).

[36] *Id.* (quoting Murphy v. North Am. Light & Power Co., 33 F. Supp. 567, 570 (S.D.N.Y. 1940)).

[37] *See* Mills v. Electric Auto-Lite Co., 396 U.S. at 396-97; 6 MOORE'S FEDERAL PRACTICE ¶ 54.77[2], at 1707-08 (2d ed. 1976).

[38] With respect to the frequency of awards under the bad faith doctrine, one commentator has stated that "only in exceptional cases and for dominating reasons of justice can the exercise of the power by the district court be justified." 6 MOORE'S FEDERAL PRACTICE ¶ 54.77[2], at 1709-11 (2d ed. 1976); *see, e.g.,* Rude v. Buchhalter, 286 U.S. 451 (1932); Rolax v. Atlantic Coast Line R. Co., 186 F.2d 473 (4th Cir. 1951); RFC v. J.G. Menihan Corp., 42 F. Supp. 244 (W.D.N.Y. 1941). For a discussion of the subjectivity and arbitrariness which permeate court awards of fees under the bad faith doctrine, see Falcon, *Award of Attorneys' Fees in Civil Rights and Constitutional Litigation,* 33 MD. L. REV. 379 (1973).

[39] *See, e.g.,* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 270 n.46 (1975); Watt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972); NAACP v. Allen, 340 F. Supp. 703

class," and "effectuated a strong congressional policy,"[40] they were deemed to be private attorneys general and thus entitled to a fee award. This new fee shifting rationale received strong support when the *Mills* decision was read against the language of the Supreme Court in *Newman v. Piggie Park Enterprises, Inc.*[41] The plaintiff in *Newman* sought injunctive relief under Title II of the Civil Rights Act of 1964 which prohibits racial discrimination in private accommodations.[42] While fee awards are specifically authorized under the statute, the grant of such an award is entirely within the discretion of the court.[43] Although the fourth circuit had interpreted this fee shifting provision to be only a minimal supplement to the equitable powers generally exercised by the courts,[44] the Supreme Court viewed the statute as an attempt to assist and promote private litigation under statutes evincing high congressional priorities:

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, 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.
>
> It follows that one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee *unless special circumstances would render such an award unjust.*[45]

(M.D. Ala. 1972); La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972), *aff'd*, 488 F.2d 559 (9th Cir. 1973), *cert. denied*, 416 U.S. 968 (1974). *See generally* Derfner, *One Giant Step: The Civil Rights Attorney's Fees Awards Act of 1976*, 21 ST. LOUIS L.J. 441, 441-45 (1977); Nussbaum, *supra* note 6, at 331-37; Comment, *Liability for Attorneys' Fees in the Federal Courts—The Private Attorney General Exception*, 16 B.C. IND. & COM. L. REV. 201 (1975); *Green Light*, *supra* note 7.

[40] Sims v. Amos, 340 F. Supp. 691, 694 (M.D. Ala. 1972).

[41] 390 U.S. 400 (1968) (per curiam).

[42] *See* 42 U.S.C. § 2000a-3(b) (1976).

[43] The fee award provision of Title II is virtually identical to that of the Act. *Compare id. with* Pub. L. No. 94-559, 90 Stat. 2641 (to be codified in 42 U.S.C. § 1988).

[44] Newman v. Piggie Park Enterprises, Inc., 377 F.2d 433, 437 (4th Cir. 1967).

[45] 390 U.S. at 401-02 (emphasis added) (footnotes omitted).

Notwithstanding the existence of specific statutory authorization for the granting of fee awards under Title II, many lower federal courts viewed *Newman* as introducing a pervasive new fee shifting exception.[46] The ensuant application of this doctrine was foreshadowed in *Sims v. Amos*,[47] where the plaintiffs successfully achieved reapportionment of the state legislature. In affirmatively resolving the question whether the plaintiffs were entitled to an award of attorney's fees absent any statutory authority, the court stated:

> If, pursuant to this action, plaintiffs have benefitted their class and effectuated a strong congressional policy, they are entitled to attorneys' fees regardless of defendants' good or bad faith. . . . Indeed, under such circumstances, the award loses much of its discretionary character and becomes a part of the effective remedy a court should fashion to encourage public-minded suits, and to carry out congressional policy.[48]

Subsequent to *Sims*, a vast growth in the use of the private attorney general doctrine occurred in the lower federal courts.[49] This development was quashed in *Aleyska Pipeline Service Inc. v. Wilderness Society*,[50] however, where use of the private attorney general doctrine as an equitable means of fee shifting was emphatically rejected by the Supreme Court.[51] Despite reaffirmation of the common benefit and bad faith doctrines,[52] the Court concluded that only Congress could determine which federal rights were of such overriding importance that fee awards for successful plaintiffs were merited.[53]

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[46] *See Green Light, supra* note 7, at 742-48; note 39 *supra*.

[47] 340 F. Supp. 691 (M.D. Ala. 1972).

[48] *Id.* at 694 (citations omitted). Although the *Sims* court found that circumstances would have justified a fee award under the bad faith doctrine, it chose to predicate the award on the private attorney general doctrine. *Id.* at 695. As such, this holding appears to represent the first clear instance where judicial preference for the private attorney general fee shifting theory was indicated.

[49] *See, e.g.*, Souza v. Travisono, 512 F.2d 1137, (1st Cir.), *vacated*, 423 U.S. 809 (1975); Incarcerated Men v. Fair, 507 F.2d 281 (6th Cir. 1974); Taylor v. Perini, 503 F.2d 899 (6th Cir. 1974), *vacated*, 421 U.S. 982 (1975); Fowler v. Schwarzwalder, 498 F.2d 143 (8th Cir. 1974); Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974); Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974); Morales v. Haines, 486 F.2d 880 (7th Cir. 1973). *See generally* 6 MOORE'S FEDERAL PRACTICE ¶ 54.77, at 40-45 (2d ed. Supp. 1977-1978); Derfner, *supra* note 39, at 443 & nn.9-22; Nussbaum, *supra* note 6, at 321-31.

[50] 421 U.S. 240 (1975).

[51] *Id.* at 262.

[52] *Id.* at 257-59. The Court stated that the bad faith and common benefit doctrines "are unquestionably assertions of inherent power in the courts to allow attorneys' fees in particular situations, unless forbidden by Congress." *Id.* at 259.

[53] 421 U.S. at 269-71. *Alyeska* involved a suit brought by three environmental interest groups seeking to enjoin the issuance of construction permits for the Alaska pipeline. The

THE 1976 ACT: CONGRESSIONAL STANDARDS AND JUDICIAL INTERPRETATION

Enacted by Congress as "an appropriate response" to the *Alyeska* decision,[54] the Civil Rights Attorney's Fees Awards Act of 1976[55] provides:

> In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.[56]

While any doubts as to the Act's constitutionality have been dispelled,[57] there is an ever-increasing divergence of opinion among

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District Court for the District of Columbia first granted a preliminary injunction. Wilderness Soc'y v. Hickel, 325 F. Supp. 422 (D.D.C. 1970). The injunction was, however, subsequently dissolved and the complaint was dismissed by the district court in an unreported decision. *See* Wilderness Soc'y v. Morton, 479 F.2d 842, 851 (D.C. Cir.), *cert. denied,* 411 U.S. 917 (1973). This decision was reversed by the court of appeals which held that the pipeline construction would violate the Mineral Leasing Act of 1920, 30 U.S.C. § 185 (1976). 479 F.2d at 842. In granting the plaintiffs' request for attorney's fees pursuant to the private attorney general doctrine, the court declared that the plaintiffs had vindicated "important statutory rights of all citizens." Wilderness Soc'y v. Morton, 495 F.2d 1026 (D.C. Cir. 1974). In reversing, the Supreme Court flatly rejected the private attorney general theory of fee shifting. 421 U.S. at 260-63. With respect to the Court's repudiation of the private attorney general doctrine and its reaffirmation of the common benefit and bad faith rationales, Justice Marshall, in a dissenting opinion, concluded "that the Court is willing to tolerate the 'equitable' exceptions to its analysis, not because they can be squared with it, but because they are by now too well established to be casually dispensed with." 421 U.S. at 278 (Marshall, J., dissenting). The negative reaction to *Alyeska* is reflected in one commentator's opinion that it is "an extremely confused and intellectually dishonest opinion." Derfner, *supra* note 39, at 446 n.31; *accord,* Special Project, *Recent Developments in Attorney's Fees,* 29 VAND. L. REV. 685, 729-33 (1976).

[54] S. REP., *supra* note 5, at 4; *see* H. REP., *supra* note 5, at 2-3.

[55] Act of Oct. 19, 1976, Pub. L. No. 94-559, 90 Stat. 2641 (to be codified in 42 U.S.C. § 1988).

[56] Sections 1977 to 1981 of the Revised Statutes include the following provisions: 42 U.S.C. § 1981 (1976) (equal rights of citizens under the law); 42 U.S.C. § 1982 (1976) (property rights of citizens); 42 U.S.C. § 1983 (1976) (civil action for deprivation of rights); 42 U.S.C. § 1985 (1976) (conspiracy to interfere with civil rights or preventing officer from performing duty); 42 U.S.C. § 1986 (1976) (action for neglecting to prevent conspiracy to interfere with civil rights).

Title IX of Public Law 92-318 is codified at 20 U.S.C. §§ 1681-1686 (1976) and prohibits discrimination in federally assisted educational programs on the grounds of sex or blindness.

Title VI is codified at 42 U.S.C. §§ 2000d to 2000d-4 (1976) and has similar prohibitions with respect to federally assisted programs on grounds of race, color, or national origin.

[57] Subsequent to its passage, the constitutionality of the Act was challenged on the ground that it abrogated the sovereign immunity held by the states. *See, e.g.,* Seals v.

Quarterly County Ct., 562 F.2d 390 (6th Cir. 1977); Bond v. Stanton, 555 F.2d 172 (7th Cir. 1977); White v. Beal, 447 F. Supp. 788 (E.D. Pa. 1978). Recently, however, in Hutto v. Finney, 98 S. Ct. 2565, 2575 (1978), the Supreme Court upheld the constitutional propriety of a court order which, in effect, required that fees be paid under the Act from public funds. This was clearly the result intended by Congress when it stated "that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party)." S. REP., *supra* note 5, at 5 (footnotes omitted); *see* H. REP., *supra* note 5, at 7. As the *Hutto* Court observed, Congress "rejected at least two attempts to amend the Act and immunize state and local governments from awards." 98 S. Ct. at 2576 (footnote omitted).

Despite the eleventh amendment's grant to the states of sovereign immunity, a doctrine which generally forbids the courts from assessing monetary penalties against state treasuries, *see, e.g.*, Edelman v. Jordan, 415 U.S. 651 (1974); Hans v. Louisiana, 134 U.S. 1 (1890), the Court stated that

> Congress has plenary power to set aside the States' immunity from retroactive relief in order to enforce the Fourteenth Amendment. When it passed the Act, Congress undoubtedly intended to exercise that power and to authorize fee awards payable by the States when their officials are sued in their official capacities. The Act itself could not be broader. It applies to "any" action brought to enforce certain civil rights laws.

98 S. Ct. at 2575 (citing Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)). *Fitzpatrick* was a class action suit alleging that Connecticut's statutory retirement benefit plans were sexually discriminatory in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-5 (1976). Although the district court held that the state's statutory scheme was violative of Title VII, it refused to award either backpay or attorney's fees reasoning that such a recovery would be violative of the eleventh amendment and the principle of sovereign immunity. Fitzpatrick v. Bitzer, 390 F. Supp. 278, 285-88 (D. Conn. 1974). Although the second circuit affirmed the denial of backpay, it reversed with respect to attorney's fees. The court noted that such an award would have only an ancillary effect on the state treasury and thus was permissible under Edelman v. Jordan, 415 U.S. 651 (1974). 519 F.2d 559, 571 (2d Cir. 1975). The Supreme Court reversed that part of the decision which denied the backpay, and stated further that the fee award would be justified despite its having more than an ancillary effect on the state treasury. 427 U.S. at 457. Noting that Title VII had recently been amended to bring state and local government employees within its terms, *id.* at 448 n.1, the Court concluded that through Congress' power under the enabling clause of the fourteenth amendment, the fee award provision of Title VII would withstand all tests of sovereign immunity:

> When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.

Id. at 456.

The *Hutto* defendants did not question the rule enunciated in *Fitzpatrick*. Rather, it was argued that "Congress must enact express statutory language making the States liable if it wishes to abrogate their immunity." 98 S. Ct. at 2576 (footnote omitted). The Court rejected this position by noting that unlike laws which would give rise to "retroactive liability for prelitigation conduct," thereby requiring "an extraordinarily explicit statutory mandate," the Act imposes attorney's fees as part of costs. *Id.* As such, the fee award "does not compensate the plaintiff for the injury that first brought him into court. Instead, the award reimburses him for a portion of the expenses he incurred in seeking prospective relief." *Id.* at 2576 n.24. The Court was thus able to rely on the legislative history of the Act as evidence of a congressional intent to assess fees as costs against the states. *Id.* at 2577. The judicial power to make such an assessment derives in part from the " 'inherent authority of the Court in

the federal courts concerning its proper application. Problems have arisen, for example, in determining whether a party has in fact "prevailed" within the meaning of the Act, whether fees may be shifted in actions where a party prevails on non-statutory grounds which have been joined with a statutory claim covered by the Act, whether a damage recovery obviates the need for awarding counsel fees, whether defendants may recover under circumstances less egregious than bad faith, and whether a plaintiff in a simple tax refund suit may seek the benefit of the Act. Finally, assuming an award is proper, the court must determine what constitutes a reasonable amount. The remaining portion of this Note will consider these issues.

Notion of the "Prevailing Party"

Faced with a request for fees under the Act, a court first must determine if a party has "prevailed" within the meaning of the statute. The framers of the Act made clear that a final decree by a court should not be a prerequisite to a finding of entitlement. As stated in the Senate Report, "parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief."[58] *Buckton v. National Collegiate Athletic Association*[59] (NCAA), illustrates a determination of "prevailing party" consistent with this legislative intent. In *Buckton*, the plaintiffs sought to maintain their eligibility to play intercollegiate hockey.[60] The NCAA, the Eastern Collegiate Athletic Association and Boston University had declared the plaintiffs ineligible because of their participation in a Canadian Junior hockey

the orderly administration of justice as between all parties litigant.' " *Id.* (quoting Fairmont Creamery Co. v. Minnesota, 275 U.S. 70, 74 (1927)). In fact, it has been argued that pursuant to their traditional equitable powers, courts should be permitted to assess attorney's fees against the states in the absence of any statutory authority. Note, *Attorneys' Fees and the Eleventh Amendment*, 88 HARV. L. REV. 1875 (1975).

[58] S. REP., *supra* note 5, at 5. The propriety of fee awards *pendente lite* was also recognized by both the Senate and House Judiciary Committees. *See id.*; H. REP., *supra* note 5, at 8. Both reports made specific reference to Bradley v. School Bd., 416 U.S. 696 (1974), where the Supreme Court noted that to "delay a fee award until the entire litigation is concluded would work substantial hardship on plaintiffs and their counsel, and discourage the institution of actions." *Id.* at 723. These awards are especially necessary in civil rights actions which are often characterized by protracted litigation. With respect to the proper instance for an award *pendente lite*, the *Bradley* Court reasoned that "the entry of any order that determines substantial rights of the parties may be an appropriate occasion upon which to consider the propriety of an award of counsel fees." *Id.* at 722 n.28. The *Bradley* approach has been uniformly adopted by courts awarding fees under the Act. *See, e.g.*, Betts v. Coltes, 449 F. Supp. 751 (D. Haw. 1978); Howard v. Phelps, 443 F. Supp. 374 (E.D. La. 1978).

[59] 436 F. Supp. 1258 (D. Mass. 1977).

[60] *Id.* at 1259.

program.[61] Alleging that this disqualification was violative of the due process and equal protection clauses of the fourteenth amendment, the plaintiffs obtained a preliminary injunction in district court.[62] Subsequent trials gave rise to a consent decree joined in by all parties except the NCAA.[63] Although the NCAA did agree to reevaluate and restructure its posture with respect to eligibility requirements,[64] it nonetheless moved to vacate the preliminary injunction. When this motion was denied,[65] the plaintiffs were permitted to complete their third year of intercollegiate hockey.[66] In granting the plaintiffs' request for attorney's fees, the *Buckton* court rejected the NCAA's argument that the plaintiffs had not prevailed within the meaning of the Act.[67] It was noted that the NCAA's failure to appeal the issuance of the preliminary injunction contributed to the plaintiffs' success in completing the entire college hockey program.[68] Since eligibility standards of the NCAA were refashioned as a direct result of the injunction and consent decree, the court concluded that the plaintiffs had prevailed "in a very practical and meaningful sense."[69]

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[61] *Id.*

[62] *See* Buckton v. National Collegiate Athletic Ass'n, 366 F. Supp. 1152, 1157-60 (D. Mass. 1973).

[63] 436 F. Supp. at 1260. Defendant Eastern Collegiate Athletic Association reinstated the plaintiffs while urging the NCAA to do the same. Similarly, Boston University requested the NCAA to reconsider its position. *Id.*

[64] *Id.* In an affidavit, the Assistant Director of the NCAA stated that, as a result of the underlying litigation, the NCAA had reevaluated and revised its constitution "in order to eliminate any discrimination either in favor of or against Canadian hockey players or in favor of or against American student-athletes or aliens." *Id.* (quoting June 11, 1976, affidavit of Warren Brown, at 4).

[65] 436 F. Supp. at 1260.

[66] *Id.* at 1265.

[67] *Id.*

[68] *Id.* In addition to its failure to appeal the preliminary injunction, the NCAA began to effectuate reinstatement of plaintiff Buckton after the litigation was substantially completed. *Id.* at n.14.

[69] *Id.* The court premised much of its analysis on Parker v. Matthews, 411 F. Supp. 1059, 1063 (D.D.C. 1976), *aff'd sub nom.* Parker v. Califano, 561 F.2d 320 (D.C. Cir. 1977), a case in which the plaintiff brought a Title VII race and sex discrimination suit against the Department of Health, Education, and Welfare (HEW). Some months after commencement of the action, HEW unexpectedly reversed its position. 411 F. Supp. at 1061. The district court approved the proffered settlement and awarded attorney's fees to the plaintiff as the "prevailing party" pursuant to the Title VII fee award provision found in 42 U.S.C. § 2000e-5(k) (1976). 411 F. Supp. at 1065. The *Parker* holding is relevant to a determination whether a party has prevailed under the Act since Congress "intended that the standards for awarding fees [under the Act] be generally the same as under the fee provisions of the 1964 Civil Rights Act." S. REP., *supra* note 5, at 4. Moreover, *Parker* was specifically cited in the House Report as a case exemplifying the broad reading to be ascribed to the term "prevailing party." H. REP., *supra* note 5, at 7.

Buckton appears to be consistent with the liberal application of the Act that Congress envisioned when it suggested guidelines for ascertaining whether a party had in fact prevailed. The spirit of the Act dictates that "the operative factor is success, not at which stage or how that success is achieved."[70] Viewed in this fashion, the eventual resolution of the dispute in *Buckton* did not differ in practical effect from a settlement. This is certainly tantamount to a victory within the meaning of the Act.[71] As one court has noted, a denial of fees in cases similar to *Buckton* would often compel litigants to proceed to final judgment in an effort to receive formally docketed relief.[72] This clearly would be "an extravagant waste of judicial resources. . . . Moreover, a denial of fees . . . would detrimentally affect the ability of future litigants . . . to secure the services of qualified counsel."[73]

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[70] Parker v. Matthews, 411 F. Supp. 1059, 1063 (D.D.C. 1976), *aff'd sub nom.* Parker v. Califano, 561 F.2d 320 (D.C. Cir. 1977); *see* note 69 *supra.*

[71] As recognized in the Senate Report, "parties may be considered to have prevailed when they vindicate rights through a consent judgment or *without formally obtaining relief.*" S. REP., *supra* note 5, at 5 (emphasis added). Similarly, the House Report, in discussing the term "prevailing party," stated that it was "not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits." H. REP., *supra* note 5, at 7. Thus, the Act may be applied to shift fees where litigation has terminated by consent decree. *Id.; see, e.g.,* Kopet v. Esquire Realty Co., 523 F.2d 1005 (2d Cir. 1975); Incarcerated Men v. Fair, 507 F.2d 281 (6th Cir. 1974); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970); Thomas v. Honeybrook Mines, Inc., 428 F.2d 981 (3d Cir. 1970). Moreover, fee awards would be proper where a litigant has obtained an out-of-court settlement, "thus helping to lessen docket congestion." H. REP., *supra* note 5, at 7; *accord,* Hartmann v. Gaffney, 446 F. Supp. 809 (D. Minn. 1977); *cf.* Parker v. Matthews, 411 F. Supp. 1059 (D.D.C. 1976), *aff'd sub nom.* Parker v. Califano, 561 F.2d 320 (D.C. Cir. 1977) (fees awarded to plaintiffs after settlement of Title VII claim). Finally, where a defendant voluntarily ceases the unlawful practice which gave rise to the litigation, thus obviating the need for formal relief, a fee award would still be permissible under the Act. H. REP., *supra* note 5, at 7; *see* International Soc'y for Krishna Consciousness v. Andersen, 569 F.2d 1027 (8th Cir. 1978); NAACP v. Bell, 448 F. Supp. 1164 (D.D.C. 1978); *cf.* Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377 (4th Cir.), *cert. denied,* 409 U.S. 982 (1972) (Title VII fee award).

As decisions under the Civil Rights Act of 1964 were intended to operate as guidelines in applying the 1976 Act, S. REP., *supra* note 5, at 5, the seventh circuit's decision in Williams v. General Foods Corp., 492 F.2d 399 (7th Cir. 1974), illustrates the boundaries of the term "prevailing party." Plaintiff Williams, seeking a Title VII fee award under 42 U.S.C. § 2000e-5(k) (1976), asserted that a litigant is entitled to fees if an action has precipitated policy changes in a corporation's employment department, notwithstanding a judgment on the merits in favor of the defendant. Rejecting this argument, the *Williams* court stated that the scope of the term prevailing party could not be extended beyond a "courtroom context." 492 F.2d at 408.

[72] Hartmann v. Gaffney, 446 F. Supp. 809, 812 (D. Minn. 1977). In *Hartmann,* the settlement agreement in a § 1988 suit required, *inter alia,* that the plaintiff dismiss his action against the defendant who in turn was to maintain the plaintiff's hospital privileges. Based on this eventual resolution of the action, the court awarded attorney's fees to the plaintiff as a "prevailing party" under the Act, despite the fact that he received less relief through settlement than was originally requested. 446 F. Supp. at 812.

[73] *Id.*

Joint Fee and Non-Fee Claims

Consistent with the remedial purpose of the Act, its legislative history states that a party may recover attorney's fees even though the grounds on which the action was finally adjudicated were not covered by the Act.[74] Illustrative in this regard is *Southeast Legal Defense Group v. Adams*,[75] where the plaintiffs, in challenging the location of a proposed freeway, alleged racial discrimination under 42 U.S.C. § 1983 and violations of the Federal Highway Act.[76] In holding that the plaintiffs were entitled to judgment under the Federal Highway Act,[77] the court dismissed the civil rights claim as moot.[78] The *Adams* court rejected the defendants' contention that the plaintiffs were not entitled to attorney's fees since they had not prevailed under a statute enumerated in the Act.[79] The court quoted the House Report which notes that sometimes "the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional (sic) claim is dispositive."[80] In recognition of this, the House Report states that fees may still be awarded if the claim for which the statute authorizes fees meets the "substantiality" test[81] and "the plaintiff prevails on the non-fee

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[74] H. REP., *supra* note 5, at 4 n.7.

[75] 436 F. Supp. 891 (D. Ore. 1977).

[76] *See* 23 U.S.C. § 128(a) (1976).

[77] 436 F. Supp. at 892.

[78] *Id.* at 894.

[79] *Id.* The statute utilized by the court in granting relief, the Federal Aid Highway Act, 23 U.S.C. § 128(a) (1976), contains no fee shifting provision.

[80] H. REP., *supra* note 5, at 4 n.7. The report also notes that when neither the fee nor the non-fee claims have constitutional dimensions and the plaintiff prevails on the latter ground, he "is entitled to a determination on the [fee] claim for the purpose of awarding counsel fees." *Id.*

[81] *Id.* The substantiality test derives from the doctrine of pendant jurisdiction which allows federal courts concurrently to entertain state and federal claims. For example, in Hagans v. Lavine, 415 U.S. 528 (1974), the plaintiffs, attacking a New York State regulation under § 1983, also claimed that it conflicted with various federal regulations. The district court ruled in favor of the plaintiffs based on the supremacy clause. The second circuit reversed this decision, holding that because the plaintiffs had failed to present a substantial constitutional claim, subject matter jurisdiction was lacking in the lower court. 471 F.2d 347 (2d Cir. 1973). The Supreme Court, however, rejected the notion that a "substantial" question is necessary to support jurisdiction. 415 U.S. at 537. Rather, the Court set forth the test as follows:

> [F]ederal courts are without power to entertain claims otherwise within their jurisdiction if they are "so attenuated and unsubstantial as to be absolutely devoid of merit," . . . "wholly insubstantial," . . . "obviously frivolous," . . . "plainly unsubstantial," . . . or "no longer open to discussion . . . ."

Id. at 536-37 (quoting Bailey v. Patterson, 369 U.S. 31, 33 (1962); Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105 (1933); Hannis Distilling Co. v. Baltimore, 216 U.S. 285, 288 (1910); McGilvra v. Ross, 215 U.S. 70, 80 (1909); Newburyport Water Co. v. Newburyport, 193 U.S. 561, 579 (1904)). Consequently, since the complaint alleged state actions which were

claim arising out of a 'common nucleus of operative fact.' "[82] Since the constitutional issue in *Adams* was not " 'plainly insubstantial,' or 'obviously without merit' "[83] and the two claims were "so interrelated that plaintiffs 'would ordinarily be expected to try them all in one judicial proceeding,' "[84] the court found that the requirements for a fee award under the Act were met.[85]

Fear that decisions such as *Adams* will lead to artificial civil rights actions being joined with non-fee claims is easily dispelled. The "substantiality" and "common nucleus" requirements, coupled with the equitable power of courts to shift the burden of fees to the plaintiff if an action has been commenced in bad faith, should provide adequate safeguards against the fabrication of spurious federal claims. As noted by the *Adams* court, it would be "manifestly unfair to penalize plaintiffs who couple their constitutional claims with meritorious statutory claims and thereby facilitate the federal policy of avoiding unnecessary constitutional decisions."[86] Such reasoning effectuates the Act's purpose by protecting the public interest litigant from compromising his rights in order to come within the purview of the Act.

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not "so patently rational as to require no meaningful consideration," 415 U.S. at 541, the Court was able to find a sufficient basis for subject matter jurisdiction.

[82] H. REP., *supra* note 5, at 4 n.7 (quoting United Mine Workers of America v. Gibbs, 383 U.S. 715, 725 (1966)). Assuming the substantiality of a federal claim, *see* note 81 *supra*, the Supreme Court, in *United Mine Workers*, declared that a state claim may not be heard in federal court based on pendant jurisdiction unless it is shown to have arisen from the same actionable wrong as the federal claim. *Id.* at 725-30; *see* Kimbrough v. Arkansas Activities Ass'n, 574 F.2d 423 (8th Cir. 1978).

[83] 436 F. Supp. at 894 (quoting Hagans v. Lavine, 415 U.S. 528, 536 (1974)); *see* note 81 *supra*.

[84] 436 F. Supp. at 894 (quoting United Mine Workers of America v. Gibbs, 383 U.S. 715, 725 (1966)).

[85] 436 F. Supp. at 894. The court noted that the "substantiality" and "common nucleus" tests, *see* notes 81-84 and accompanying text *supra*, were formulated by the Supreme Court in determining a federal court's authority to adjudicate pendant claims. 436 F. Supp. at 895. Both cases, however, were cited in the House Report as persuasive analogies to be used in resolving a fee award issue identical to that before the court in *Adams*. *See* H. REP., *supra* note 2, at 4 n.7. The *Adams* court concluded that to interpret Congress' intent in any other fashion would "require a decision of the fee claim in all instances," thereby "thwart[ing] the federal policy discouraging unnecessary constitutional decisions in order to further the congressional policy of encouraging private actions to enforce the civil rights laws which is expressed in the Act." 436 F. Supp. at 895.

Approximately 1 week following the *Adams* decision, the sixth circuit, in Seals v. Quarterly County Ct., 562 F.2d 390 (6th Cir. 1977), construed the Act in a virtually identical fashion. In an action seeking reformation of certain county election plans, the district court had granted the requested relief but had denied their requests for attorney's fees. *Id.* at 392. On appeal, the sixth circuit reversed the denial of fees, notwithstanding the fact that the lower court's final disposition rested on a state law claim rather than the constitutional argument offered under § 1983. *Id.* at 394.

[86] 436 F. Supp. at 895.

The Discretionary Nature of the Award

Notwithstanding a determination that a party has prevailed in an action to which the Act is applicable, an award of attorney's fees is not mandated by the statute.[87] Tracking the language of *Newman*,[88] the Senate Report states that "[a] party seeking to enforce the rights protected by the [applicable] statutes if successful 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' "[89] Since the Act's passage, courts have exercised their discretionary power to shift fees in a wide variety of actions.[90] Generally, these cases involved classic private attorney general situations in which a party obtained injunctive relief in actions embracing constitutional issues of great magnitude.[91] In addition, the positive disposition of these suits typically benefited persons other than the party who initiated the lawsuit. In contrast, when the scope and effect of litigation has been something less than pervasive, and a large damage award rendered, courts have had difficulty applying the Act. For example, in *Zarcone v. Perry*[92] the defendant was a county judge in Suffolk County, New York, who, upon tasting a cup of coffee purchased from Zarcone, expressed "disapproval of its quality."[93] The judge then had Zarcone handcuffed and brought to his chambers to be severely reprimanded.[94] In a suit brought under section 1983, the plaintiff recovered a judgment of $141,000 in compensatory and punitive damages.[95] The district court, however, refused to award attorney's fees to the plaintiff under the Act.[96] Noting the discretionary nature of the fee award, the court emphasized that the plaintiff's

[87] *See* note 113 *infra*.

[88] *See* notes 41-45 and accompanying text *supra*.

[89] S. REP., *supra* note 5, at 4 (quoting 390 U.S. at 402).

[90] *See, e.g.*, Miller v. Carson, 563 F.2d 741 (5th Cir. 1977) (unconstitutional conditions in detention facilities); Gore v. Turner, 563 F.2d 159 (5th Cir. 1977) (housing discrimination); Rosado v. Santiago, 562 F.2d 114 (1st Cir. 1977) (first amendment violations); Brown v. Culpepper, 559 F.2d 274 (5th Cir. 1977) (unconstitutional denial of medical reimbursements); Fuller v. Alexander, 440 F. Supp. 383 (D.D.C. 1977) (unconstitutional mail inspection); Schmidt v. Schuvert, 433 F. Supp. 1115 (E.D. Wis. 1977) (unconstitutional hospital visitation policies); Peacock v. Drew Mun. Separate School Dist., 433 F. Supp. 1072 (N.D. Miss. 1977) (employment discrimination); Commonwealth of Pa. v. O'Neill, 431 F. Supp. 700 (E.D. Pa. 1977) (mem.), *aff'd*, 573 F.2d 1301 (3d Cir. 1978) (unconstitutional promotional practices).

[91] *See* Derfner, *supra* note 39, at 443 & nn.9-22.

[92] 581 F.2d 1039 (2d Cir. 1978), *aff'g on other grounds* 438 F. Supp. 788 (E.D.N.Y. 1977).

[93] 438 F. Supp. at 789.

[94] *Id.*

[95] *Id.* On a prior appeal, the second circuit refused to overturn the punitive damage award despite the defendant's claim that it was excessive. Zarcone v. Perry, 572 F.2d 52 (2d Cir. 1978).

[96] 438 F. Supp. at 792.

claim was "solely for damages."[97] Equating the plaintiff's suit to one in tort for false arrest and imprisonment, the court found that the public interest was vindicated in only "a general, indirect sense."[98] Although the complaint in this case was phrased in constitutional terms, the court reasoned that "it is only when plaintiffs advance the public interest by bringing the action that an award of attorneys' fees is proper."[99]

While the second circuit affirmed the denial of a fee award, it specifically rejected the view that to be eligible for attorney's fees the plaintiff must show a direct benefit resulting to others.[100] Instead, the court considered the applicability of the *Newman* rule under the facts presented.[101] The court reasoned that the defendant's excellent "prospects for a substantial monetary recovery" eliminated any barrier that counsel fees would present to bringing a suit for damages since competent legal representation could readily be procured on a contingent basis.[102] In contrast, *Newman* involved a suit for injunctive relief in which the plaintiff could not receive damages and thus had no assurance that his attorney's fees would be paid.[103] Interpreting the *Newman* rationale to be based on the notion that fee awards are necessary when a "financial disincentive or bar to vigorous enforcement of civil rights" exists, the second circuit determined that a denial of fees to Zarcone would have no such effect.[104]

It is submitted that the *Zarcone* court misinterpreted the discretionary nature of the fee award under the *Newman* test and incorrectly applied factors which were meant to be weighed in determining the size of the award. Significantly, in authorizing fee shift-

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[97] *Id.* at 790.

[98] *Id.*

[99] *Id.* at 791. The district court found support for its position in the second circuit decision of Fort v. White, 530 F.2d 1113 (2d Cir. 1976). *Fort* involved a housing discrimination claim brought under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3612(c) (1976), which authorizes a discretionary award of attorney's fees to the prevailing plaintiff. In shifting the burden of fees to the defendant, the second circuit stated:

> It is a matter of discretion for the trial judge but in the exercise of that discretion the role of counsel acting not only on behalf of his client but others similarly situated cannot be ignored. . . . In view of this contribution we feel that the plaintiffs may be recognized as having rendered substantial service to the community and that on this basis attorney's fees should be awarded.

530 F.2d at 1118-19.

[100] 581 F.2d at 1040.

[101] *Id.* at 1042-44.

[102] *Id.* at 1044.

[103] *See* notes 41-45 and accompanying text *supra.*

[104] 581 F.2d at 1044.

ing under The Fair Housing Act of 1968,[105] Congress provided that fees may be granted unless the party requesting the award is financially able to assume them. This proviso has been interpreted to preclude fee recoveries by prevailing plaintiffs who were represented by counsel on a contingent fee basis.[106] Had Congress intended that an ostensibly meritorious damage suit should render an award unnecessary under the 1976 Act, a similar provision could readily have been added. To the contrary, the House Report which accompanied the Act states:

> Of course, it should be noted that the mere recovery of damages should not preclude the awarding of counsel fees. Under the antitrust laws, for example, a plaintiff may recover treble damages and still the court is required to award attorney fees. The same principle should apply here as civil rights plaintiffs should not be singled out for different and less favorable treatment.[107]

The necessity of a two-tiered inquiry whereby a court determines whether a fee award is proper prior to considering the factors relevant to its size was recognized by a first circuit panel in *Sargeant v. Sharp.*[108] In *Sargeant,* the district court denied fees to a prevailing plaintiff who had recovered damages of $88,000 in a section 1983 suit,[109] reasoning that a contingency fee arrangement had guaranteed that the plaintiff's counsel would be adequately compensated.[110] Rejecting this rationale, the court of appeals stated that

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[105] 42 U.S.C. §§ 3601-3631 (1976). The fee-shifting provision of the Fair Housing Act is embodied in § 3612(c).

[106] In Samuel v. Benedict, 573 F.2d 580 (9th Cir. 1978), the prevailing plaintiff sought attorney's fees under the fee-shifting provision of the Fair Housing Act of 1968, 42 U.S.C. § 3612(c) (1976). Noting that this provision allows the court to award fees *provided* "the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees," the court refused to allow the award since a plaintiff who enteres into a contingency fee arrangement is "financially able to assume attorney's fees." 573 F.2d at 582.

[107] H. REP., *supra* note 5, at 8-9 (footnotes omitted). Consistent with the language in the House Report, a federal district court, in Furtado v. Bishop, 453 F. Supp. 606 (D. Mass. 1978), granted fees to a prevailing civil rights plaintiff who previously had been awarded a judgment of $27,500 after being beaten by several state prison officials. *Id.* at 607. The award was premised on the court's recognition of Congress' intent that the "plaintiff's recovery should not be reduced by having to pay counsel." *Id.* Similarly, a number of other courts have unhesitatingly assessed fees under the Act despite damage awards to plaintiffs who, at the outset of the litigation, were possessed of apparently good "prospects for a substantial monetary recovery." *See, e.g.,* Sargeant v. Sharp, 579 F.2d 645 (1st Cir. 1978); Dean v. Gladney, 451 F. Supp. 1313 (S.D. Tex. 1978); Ellis v. Zieger, 449 F. Supp. 24 (E.D. Wis. 1978); Fagot v. Ciravola, 445 F. Supp. 342 (E.D. La. 1978).

[108] 579 F.2d 645 (1st Cir. 1978).

[109] *Id.* at 646. The suit was based on the defendants' failure to compensate the plaintiffs, pursuant to an administrative order, for assistance rendered over a 6-year period by various registered nurses. *Id.*

[110] *Id.* The trial judge stated that a fee award is primarily meant " 'to cover the ser-

entitlement to fees is an issue to which the *Newman* "special circumstances" test should apply, and to which the existence of a private fee arrangement is irrelevant.[111] In recognizing entitlement as a question antecedent to and separate from all others, it appears that the *Sargeant* court has properly interpreted the Act. Implicity in the court's approach is the view that strong prospects of a damage recovery should neither render the *Newman* rule inapplicable nor qualify as a "special circumstance" under it.[112]

Notwithstanding the liberal language used in the House and Senate Reports, it is clear that Congress envisioned certain cases in which the prevailing party should be denied an award of fees. Were its intent otherwise, the statute could have provided that a prevailing party "will" be awarded attorney's fees.[113] Congress, in delineating the breadth of the Act, noted that "[i]t is limited to cases arising under our civil rights laws, a category of cases in which attorney's fees have been *traditionally* regarded as appropriate."[114]

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vices of counsel who undertake to bring such cases as public service for individuals or classes of individuals who are unable to pay.' "*Id.*

[111] *Id.* at 648.

[112] *Id.* In contrast to the *Sargeant* approach, the *Zarcone* court stated that when a plaintiff's prospects for a damage recovery "are sufficiently bright . . . , the underlying rationale of the *Newman-Northcross* rule may be inapplicable." 581 F.2d at 1044. It appears that in resolving the initial question of entitlement the second circuit has considered factors which are only to be weighed in determining the proper size of the award to be granted. In discussing the criteria to to be used in determining a reasonable fee award, both the House and Senate Report approved the method of fee calculation employed by the fifth circuit in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974); *see* S. REP., *supra* note 5, at 6; H. REP., *supra* note 5, at 8. The *Johnson* court stated that although a court "should consider the amount of damages [recovered by the party requesting attorney's fees], . . . that consideration should not obviate court scrutiny of the decision's effect on the law. If the decision corrects across-the-board discrimination affecting a large class of [people], the attorney's fee award should reflect the relief granted." 488 F.2d at 718. In *Johnson*, a plaintiff who had been awarded attorney's fees as the prevailing party in a suit under the Civil Rights Act of 1964 challenged the adequacy of the fees. The court enumerated 12 factors to be used in calculating the proper size of the award. *See* note 164 and accompanying text *infra*. This calculation was appropriate only after it had been determined that an award was justified under the *Newman* standard. *See* notes 41-45 and accompanying text *supra*. In contrast, the *Zarcone* court tracked the *Johnson* language and criteria but stated that these factors must be weighed "in determining whether to award fees." 581 F.2d at 1044.

[113] Certain bills were introduced which would have required the courts to shift fees in favor of prevailing plaintiffs. *See* 122 CONG. REC. H12,165 (daily ed. Oct. 1, 1976). These bills were, however, defeated in deference to the Act's present standards of award, which illustrate "a more moderate approach." H. REP., *supra* note 5, at 8; *see id.* n.5 and accompanying text. *See also* Wharton v. Knefel, 562 F.2d 550, 557-58 & n.36 (8th Cir. 1977).

[114] S. REP., *supra* note 5, at 4 (emphasis added). With respect to traditional definitions, it is difficult to classify Zarcone as a public interest litigant in the first instance. The conceptualization and classification of plaintiff Zarcone is an important factor since the Supreme Court, in Bradley v. School Bd., 416 U.S. 696 (1974), identified the nature and identity of the parties as one of three crucial factors to be considered in determining whether a fee award

Examination of previous fee awards fails to reveal precedent for fee shifting in cases which are essentially tort actions whose factual bases are not likely to generate recurrent civil rights violations.[115] Thus, it is not untenable to conclude that Congress considers it a "special circumstance" to force states to absorb the costs of lawsuits which are not likely to benefit other aggrieved persons by affecting changes in the law, or by altering governmental or judicial policy. The district court opinion in *Zarcone,* which emphasized the tortious nature of the plaintiff's claim and the fact that the public interest had been advanced in only a general sense,[116] appears to have taken a proper analytical approach.[117]

Naprstek v. City of Norwich[118] presented another situation where an award of fees could be considered unjust. After having successfully attacked the constitutionality of the defendant's juvenile curfew odinances under section 1983,[119] the plaintiff sought attorney's fees. The court, emphasizing that the challenged statute was "antiquated" and "rarely enforced," stated that the plaintiff's claim was "more contrived than real."[120] Further, since the defen-

would work an injustice. *Id.* at 717. As the rationale underlying many statutory fee award provisions is that the litigant's suit will benefit the general public, fee awards become less proper as the nature of the parties and the action become more private.

[115] The *Zarcone* district court stated that "in every action brought under Title VII . . . where damages have been awarded and attorneys' fees granted, the interest of the public or an identifiable class has been benefitted." 438 F. Supp. at 791 (footnotes omitted); *see id.* at 795-96 (appendix of Title VII cases). Many courts have awarded fees under the Act in a factual setting which arguably gives rise to a tort action but is framed in terms of a constitutional claim. For example, in Phillips v. Moore, 411 F. Supp. 833 (W.D.N.C. 1977), the plaintiff prevailed in a suit brought under § 1983. The suit had been instituted after the plaintiff had been struck by the sheriff while in the general custody of the County Sheriff's department. *Phillips,* however, appears distinguishable from *Zarcone.* In the former case, the cause of action arose from conduct of the defendant which emanated from the performance of his official duties. Hence, plaintiff's suit may be viewed as having been brought against an entire branch of the government, resulting in a vindication of prisoners' rights on a pervasive level. *Zarcone* lacks these characteristics, however, since the cause of action arose from one man's peculiarities exercised in an *ex officio* manner. As noted, the public or private nature of the parties and the action are relevant considerations to a court exercising its discretionary powers of fee shifting under the Act. *See* note 114 *supra.*

[116] *See* notes 97-99 and accompanying text *supra.*

[117] In an earlier second circuit decision where fees were granted pursuant to the Act, the court cited the district court opinion in *Zarcone* with approval, noting that "[t]he plaintiffs were not seeking to gain any narrow personal objective" by instituting their civil rights suit. Mid-Hudson Legal Servs., Inc. v. G & U, Inc., 578 F.2d 38, 46 (2d Cir. 1978).

[118] 433 F. Supp. 1369 (N.D.N.Y. 1977).

[119] *Id.* at 1369. The ordinance in question forbade children under 17 years of age from being on the streets or in the public places and buildings of Norwich after 11:00 p.m. on Sunday through Thursday, and midnight on Friday and Saturday. *Id.*

[120] *Id.* at 1370. Although the district court had originally abstained from deciding the constitutional issues pending state court construction of the ordinance, the second circuit

dant offered to redraft the ordinance to correct the alleged deficiencies and the city council subsequently nullified the curfew, the court found that an award would be unjust.[121] In holding as it did, the court underscored its belief that attorneys and litigants should not be rewarded for burdening the courts with unnecessary litigation.[122]

Given the discretionary nature of the fee award under the *Newman* standard, it behooves courts to examine initially the basis of the underlying litigation and the effect that its adjudication may have on the free exercise of civil rights by the public at large. While a litigant's action should not have to benefit other persons directly in order to merit a fee award, the lawsuit should redress wrongs in a manner which could be deemed "therapeutic."

Fee Awards to Prevailing Defendants

Another interesting aspect of the Act is that it provides for discretionary fee shifting in favor of the defendant. In an exceptional case a prevailing defendant will be considered a private attorney general and will be eligible to recover fees under the *Newman* rule.[123] In the normal situation, however, it would appear that Con-

held that the absence of a termination date in the ordinance rendered it unconstitutionally vague. Naprstek v. City of Norwich, 545 F.2d 815, 818 (2d Cir. 1976) (per curiam).

[121] 433 F. Supp. at 1370-71.

[122] *Id.* at 1371. The court was undoubtedly correct in concluding that the plaintiff's suit was unwarranted since it appeared that he refused to meet with Norwich city officials who were ready to reconcile all differences by redrafting those portions of the ordinance which constituted the foundation for the suit. *Id.*

Despite the apparent propriety of the court's result, certain problems nonetheless inhere in the language and approach of *Naprstek*. It was noted that the plaintiff's claim did not "rise to the level of national priority or constitutional dimension which warranted the award of fees in *Newman*." *Id.* at 1370. From this, the court seemed to conclude that the plaintiff's suit was not within the general thrust of the Act, and thus, the *Newman* test should not even be reached with respect to the question of entitlement. *Id.* It is submitted that a more proper approach is simply to apply the *Newman* guidelines to every victorious party in the first instance. *See* notes 108-112 and accompanying text *supra*. To do otherwise would establish an arbitrary test. It would vest too broad a discretionary power to preclude fee awards for litigants whose claims are meritorious but which do not, in the judge's view, present issues of sufficient constitutional magnitude. Applying the *Newman* test in the first instance would afford a more liberal approach to the determination of entitlement consistent with the intent of Congress. This process would in essence place on the defendant the burden of disproving entitlement by showing "special circumstances" rather than forcing the plaintiff to further establish that his action has vindicated rights of the public-at-large.

[123] *See* S. REP., *supra* note 5, at 4 n.4. The Senate Report cited Shelley v. Kraemer, 334 U.S. 1 (1948), as an example of a situation where fee awards to defendants should be granted under the *Newman* rule. S. REP., *supra* note 5, at 4 n.4. The *Shelley* plaintiff had sought to enforce a constitutionally violative restrictive covenant which excluded persons of particular races from owning or occupying real property. 334 U.S. at 4-5. In situations like this, it is the defendant who has assumed the role of the public interest litigant.

gress intended a defendant to receive a fee award only under the traditional bad faith doctrine. In this vein, the Senate Report prescribes that defendants should recover attorney's fees only in those instances where the action is "clearly frivolous, vexatious, or brought for harassment purposes."[124] Limiting defendant fee awards to the traditional equitable exception to the general no-fee rule reflects an effort by Congress to minimize the hazards of litigation often encountered by public interest litigants.[125] Unlike the private attorney general whose claims the Act was meant to promote, defendants do not ordinarily "appear before the court cloaked in a mantle of public interest."[126]

A more liberal approach to awarding fees to prevailing defendants is evident in *Goff v. Texas Instruments, Inc.*,[127] wherein the plaintiff claimed that he had been discharged by the defendant on the basis of religion and national origin.[128] After a hearing at which Goff conceded that he had not stated a claim under the federal civil rights statutes, the suit was dismissed.[129] The court noted that Goff refused to abandon the case voluntarily and found that "[t]he discovery conducted in the case indicated not an iota of evidence to support [his] claim."[130] In granting the defendant's request for attorney's fees, the court stated that "prevailing defendants may recover under less egregious circumstances than traditional bad faith, harassment, or an absolute refusal to cooperate in the litigation."[131] As the Act refers to "prevailing parties" rather than prevailing plaintiffs, the *Goff* court reasoned that if the traditional bad faith standard were used in awarding fees to defendants, "the statute would be logically redundant and unnecessary."[132]

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[124] S. REP., *supra* note 5, at 5 (citing United States Steel Corp. v. United States, 385 F. Supp. 346 (W.D. Pa. 1974), *aff'd*, 519 F.2d 359 (3d Cir. 1975)).

[125] Public interest litigants were often hesitant to commence expensive, protracted litigation. This resulted from the realization that plaintiffs who often prevailed in these actions were denied fees under the traditional exceptions to the American no-fee rule. *See* notes 37-38 and accompanying text *supra*. Since the Act was designed to alleviate this problem, Congress sought to maintain a strict standard for defendant fee awards in order to avoid deterring the commencement of civil rights suits because of the "prospect of having [public interest litigants] pay their opponent's counsel fees should they lose." S. REP., *supra* note 5, at 5.

[126] H. REP., *supra* note 5, at 6 (quoting United States Steel Corp. v. United States, 519 F.2d 359, 364 (3d Cir. 1975)).

[127] 429 F. Supp. 973 (N.D. Tex. 1977) (mem.).

[128] Plaintiff Goff, an engineer, alleged that he had been laid off by the defendant because of his Jewish-American background. *Id.* at 974.

[129] *Id.* Goff filed suit under 42 U.S.C. §§ 1981-1983, 1985 (1976). 429 F. Supp. at 974 n.1.

[130] 429 F. Supp. at 976.

[131] *Id.* at 975.

[132] *Id.* The court, quoting the Senate Report guidelines respecting defendant fee

Virtually identical reasoning was used in *Christiansburg Garment Co. v. EEOC*,[133] where the Supreme Court articulated the circumstances under which a prevailing defendant may be granted fees under the Civil Rights Act of 1964.[134] Rejecting the contention that fees to prevailing defendants may be awarded only when the lawsuit is "brought in subjective bad faith," the Court stated that the plaintiff's action must be "frivolous, unreasonable or without foundation."[135] Crucial to the Court's holding was the 1964 Act's authorization of fee shifting in favor of a "prevailing party" rather

awards, *see* note 140 *infra*, focused on the report's statement that fees could be assessed against a public interest litigant "only where it is shown that his suit was clearly frivolous, vexatious, or brought for harassment purposes." 429 F. Supp. at 975 (quoting S. REP., *supra* note 5, at 5 (citing United States Steel Corp. v. United States, 519 F.2d 359 (3d Cir. 1975))). The *Goff* court then distinguished this standard from the traditional rule which requires that one has litigated " 'in bad faith, vexatiously, wantonly, or for oppressive reasons.' " 429 F. Supp. at 975 (quoting Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975)). Although it was conceded that there appears to be "substantial overlap in these standards," 429 F. Supp. at 975, the court attempted to distinguish them. Of particular note was the court's reliance on the defendant fee award standards enunciated in various Title VII cases, all of which highlighted the plaintiffs' "unreasonableness" in bringing "meritless or frivolous" suits. *See id.* at 975-76 (quoting Carrion v. Yeshiva Univ., 535 F.2d 722 (2d Cir. 1976); Lee v. Chesapeake & O. Ry., 389 F. Supp. 84 (D. Md. 1975); Paddison v. Fidelity Bank, 60 F.R.D. 695 (E.D. Pa. 1973)). These standards were deemed to allow the assessment of fees against a plaintiff who had, in good faith, instituted or maintained a meritless suit. In this regard, it appears that the *Goff* court overlooked much language in the House and Senate Reports which strongly indicates a congressional adoption of the traditional bad faith standard, and which also illustrates a different interpretation of certain Title VII cases relied on by the court. *See* notes 139-140 and accompanying text *infra*.

[133] 98 S. Ct. 694 (1978).

[134] In *Christiansburg*, the EEOC brought a Title VII suit against the Christiansburg Garment Co., alleging violations of the unlawful employment practice provisions of the Civil Rights Act of 1964. *Id.* at 696; *see* 42 U.S.C. § 2000e-2 (1976). The EEOC sued in its own name pursuant to the 1972 amendments which authorize this procedure if the underlying charges were pending on the effective date of the amendments. 98 S. Ct. at 696. The district court granted summary judgment after finding that the complainant's charges were not pending with the EEOC at the time the action was commenced. 376 F. Supp. 1067 (W.D. Va. 1974). Attorney's fees were denied by the trial court, however, upon a finding that " 'the Commission's action in bringing the suit cannot be characterized as unreasonable or meritless.' " 98 S. Ct. at 697. A divided fourth circuit panel affirmed the denial of fees on the basis of the EEOC's "good faith" in pursuing the litigation. 550 F.2d 949, 951 (4th Cir. 1977).

[135] 98 S. Ct. at 700. In holding that subjective bad faith is not necessary to justify a defendant fee award, the Court approved the standards previously set by two circuit courts of appeals in United States Steel Corp. v. United States, 519 F.2d 359 (3d Cir. 1975), and Carrion v. Yeshiva Univ., 535 F.2d 722 (2d Cir. 1976). The Court's adoption of the standards employed in these cases was prompted in great part by their authorization of defendant fee awards in "unreasonable," "meritless," and "frivolous" lawsuits. *See* 98 S. Ct. at 700. Although the approaches of both *Carrion* and *United States Steel* were also approved in the reports accompanying the 1976 Act, it appears that Congress viewed these cases as requiring a defendant to show subjective bad faith on the part of the plaintiff. *See* notes 139-140 and accompanying text *infra*.

than a prevailing plaintiff.[136] It was reasoned that if fees were meant to be awarded to defendants under the more exacting traditional bad faith standard, then the statute would in part be redundant since "no [fee-shifting] provision would have been necessary."[137]

It is submitted that however applicable considerations of redundancy may be to interpreting congressional intent in making fee awards available to "prevailing parties" under Title VII of the Civil Rights Act of 1964, the reports accompanying the 1976 Act evince a clear intent that bad faith be measured by the traditional subjective standard. As the Supreme Court noted, the legislative history of the Title VII fee shifting provision provides only the "barest outlines" respecting the proper defendant fee award standard.[138] In contrast, the numerous references to "bad faith" in the legislative history of the 1976 Act provide compelling support for adoption of a subjective standard. Specifically, the House Report states that "[i]f the plaintiff is 'motivated by malice and vindictiveness' . . . the court may award counsel fees to the prevailing defendant."[139] Similarly, the Senate Report adopts the position that fees should not be assessed against a party whose claim, if it was brought in good faith, is found to be meritless.[140] This standard was deemed sufficient to

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[136] 98 S. Ct. at 699 & n.13.

[137] *Id.* at 699.

[138] *Id.*

[139] H. REP., *supra* note 5, at 7 (quoting Carrion v. Yeshiva Univ., 535 F.2d 722 (2d Cir. 1976)). In contrast to the House Report's apparent adoption of *Carrion* as a case requiring a showing of subjective bad faith, both *Christiansburg* and *Goff* cited *Carrion* in support of the position that Title VII defendant fee awards could be premised on the institution of a meritless or groundless action. *See* notes 132 & 135 *supra.*

[140] S. REP., *supra* note 5, at 5 (citing Richardson v. Hotel Corp. of America, 332 F. Supp. 519 (E.D. La. 1971), *aff'd*, 468 F.2d 951 (5th Cir. 1972)). In *Richardson*, the plaintiff was discharged by the defendant employer after it was learned that the plaintiff previously had been convicted of theft and receipt of stolen goods. 332 F. Supp. at 520. In his Title VII action, the plaintiff claimed that racial discrimination inhered in the employer's policy of discharging persons with criminal records since more black persons than white have been convicted of serious crimes. *Id.* After prevailing on the merits, the defendant sought attorney's fees. This request was denied on the ground that "the plaintiff proceeded in good faith on the advice of competent counsel." *Id.* at 522.

Following its reference to *Richardson*, the Senate Report cited United States Steel Corp. v. United States, 385 F. Supp. 346 (W.D. Pa. 1974), *aff'd*, 519 F.2d 359 (3d Cir. 1975). This case was referred to in *Christiansburg* as one which authorized defendant fee awards in Title VII cases upon a showing that the plaintiff's suit was meritless or unfounded. *See* note 135 *supra.* The Senate Report, however, cited *United States Steel* and then stated that the 1976 Act "thus deters frivolous suits by authorizing an award of attorneys' fees against a party shown to have litigated in 'bad faith.'" S. REP., *supra* note 5, at 5.

The uncertainties that *Christiansburg* may foster in determining the propriety of defendant fee awards under the 1976 Act are apparent in Hughes v. Repko, 578 F.2d 483 (3d Cir. 1978). In *Hughes*, suit was commenced under §§ 1982 and 1985, alleging racial discrimination and conspiracy on the part of Mr. and Mrs. John Repko in refusing to rent an apartment to

prevent the Act from being "used for clearly unwarranted harassment purposes."[141] Posed against this concrete language, the more abstruse redundancy arguments advanced in *Christiansburg* and *Goff* must yield to the conclusion that Congress, in authorizing defendant fee awards under the 1976 Act, meant only to codify the equitable power previously held by the courts.[142] Application of a standard more lenient than "bad faith" in granting fee awards to defendants would result in increased hesitance to vindicate civil rights in a manner similar to that which crippled public interest litigation before passage of the Act. In *Goff* it was properly noted that "a court should not assess penalties against a plaintiff for proceeding on a novel . . . theory."[143] Nonetheless, the court's holding would appear to increase the probability that a litigant with a "novel theory" would be unwilling to speculate that his action would not result in fee shifting to the defendant by a court applying standards any less exacting than those of the bad faith doctrine.

TAX SUITS AND FEE SHIFTING UNDER THE ACT

Apart from awards to prevailing civil rights litigants, the Act authorizes the shifting of fees in favor of prevailing parties, other than the United States, "in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code."[144] Incorporated into the Act through a Senate amendment to the original bill,[145] discussion of the intended purpose and effect of this provision is absent from both the House and Senate Reports. After introducing this amendment, Senator Allen described its scope by stating that if "the Government does not prevail against the taxpayer, then the court, in its discretion, just as in the other

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the black plaintiffs. *Id.* at 485. The plaintiffs prevailed on the § 1982 claim against Mrs. Repko. *Id.* Thereafter, Mr. Repko, who had prevailed on both claims against him, sought an award of attorney's fees under the Act. *Id.* While the court first referred to the standards enunciated in *Christiansburg*, the award was denied on the basis of the district court's finding that the "plaintiffs proceeded in good faith on the advice of counsel," and did not intend to "harass, embarass, or abuse" the defendant. *Id.* at 489.

[141] H. REP., *supra* note 5, at 7; *see* S. REP., *supra* note 5, at 5.

[142] Further detracting from the redundancy argument espoused in *Goff*, *see* notes 127-132 and accompanying text *supra*, is the court's failure to recognize that use of the term "prevailing party" was necessary to bring within the scope of the Act those defendants who, in the procedural posture of some cases, may be the public interest litigants. *See* note 123 *supra*.

[143] 429 F. Supp. at 976.

[144] 42 U.S.C. § 1988 (1976).

[145] *See* 122 CONG. REC. S17,049-53 (daily ed. Sept. 29, 1976).

cases, would be entitled to award the taxpayer attorney's fees."[146] Thereafter, the sponsor of the Act, Senator Tunney, in an effort "to make clear [his] understanding of the intent of this amendment," stated that its purpose was "to discourage frivolous or harrassing lawsuits."[147] Moreover, subsequent to the Act's passage, it was noted that the amendment was meant to apply only to those cases where the taxpayer could "show bad faith on the part of the government."[148]

At first glance, it might appear that a traditional "bad faith" standard under this amendment would merely grant statutory authority to the courts which they already exercised in their equitable capacities. By statute, however, the recovery of attorney's fees from the United States is exclusively forbidden absent congressional authority.[149] In light of this requirement, it becomes evident that the Act provides the taxpayer with a previously unavailable remedy. Thus, any argument of redundancy concerning the inclusion of the bad faith standard in the tax amendment is groundless. Furthermore, it does not seem sound to conclude that Senator Allen was referring to the *Newman* rule when he stated that the taxpayer should recover fees "just as in other cases."[150] Although Congress intended the public interest litigant to "ordinarily recover an attorney's fee," such a result in tax cases would effectively penalize the United States for attempting in good faith to enforce its own laws.[151] Clearly, if this were Congress' desired result in passing the Act, far more explicit language would have been employed.

Assuming bad faith on the part of the United States, a court faced with a fee request by a prevailing taxpayer must determine whether there has in fact been an "action or proceeding, by or on behalf of the United States." This issue is of particular relevance in a tax refund suit. Senator Allen's intention that his amendment encompass all tax controversies involving disputed liability is clear from a statement he made after the Act became law:

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[146] *Id.* at S17,049 (remarks of Sen. Allen) (emphasis added).

[147] *Id.* at S17,050 (remarks of Sen. Tunney).

[148] *Id.* (remarks of Sen. Kennedy).

[149] 28 U.S.C. § 2412 (1976) explicitly forbids the assessment of attorney's fees against the United States government unless otherwise provided for by statute. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 267-69 (1975). For an example of the specific authorization required by § 2412, see Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b) (1976).

[150] *See* note 146 and accompanying text *supra*.

[151] In clarifying the intended scope of the amendment awarding fees to prevailing parties in tax proceedings, Senator Tunney related his view that "[t]he purpose of this amendment is not to discourage meritorious lawsuits by the IRS." 122 CONG. REC. S17,050 (daily ed. Sept. 29, 1976).

> I inserted the word "proceeding" in my new amendment specifically to include administrative proceedings or audits so that fees and costs in connection with audits or other IRS agency proceedings could be awarded by a court on application of a prevailing taxpayer.
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> . . . .
>
> The idea simply is that in any proceeding in which the Government asserts a taxpayer's liability for a tax and the taxpayer asserts that he is not liable for the tax and thereafter prevails, then a court may award fees to the taxpayer as the court sees fit. The form which the action takes is not of consequence.
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> . . . The reasons of public policy which would make proper a discretionary award of fees are thus present or not present in a given tax controversy regardless of the formal position of the parties.[152]

Since these statements were made after passage of the Act, the Court of Claims, in *Aparacor, Inc. v. United States,*[153] concluded that they represent "little more than an expression of Senator Allen's personal opinion and are of slight value in construing the intent and meaning of the statute."[154] Focusing on numerous comments made by legislators during the House and Senate debates, all of which spoke of the amendment in terms of defendant taxpayers and suits initiated by the government,[155] the *Aparacor* court held that the Act does not authorize fee awards in a suit where the taxpayer is the plaintiff.[156]

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[152] 123 CONG. REC. S732 (daily ed. Jan. 14, 1977); *see* Aparacor, Inc. v. United States, 571 F.2d 552, 556-57 (Ct. Cl. 1978).

[153] 571 F.2d 552 (Ct. Cl. 1978).

[154] *Id.* at 556 (citing *In re* Kline, 429 F. Supp. 1025, 1026-27 (D. Md. 1977); Lieb v. United States, [1977] STAND. FED. TAX REP. (CCH) ¶ 9752 (E.D. Okla. 1977); Key Buick Co. v. Commissioner, 68 T.C. 178, 183 (1977); *cf.* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 348-49 (1963) ("views of members of subsequent legislatures upon intent of prior legislatures in passing statute entitled to little weight"); Fogarty v. United States, 340 U.S. 8, 13-14 (1950)).

[155] *See, e.g.,* 122 CONG. REC. S17,050 (daily ed. Sept. 29, 1976) (remarks of Sen. Tunney) ("amendment would not apply to a situation where the Government is plaintiff on appeal since the Government did not bring the action in the first instance"); *id.* (remarks of Sen. Kennedy) ("a court would be authorized to award attorney's fees to a taxpayer who is a defendant in a civil action brought by the U.S. Government"; "awards are appropriate where the action initiated by the plaintiff, the Government, acted in a frivolous or vexatious manner").

[156] 571 F.2d at 558. Despite the clear support that the *Aparacor* holding derives from the Act's legislative record, one federal district court, without reference to the statute or its legislative history, held that "the status of a party as a plaintiff or as a defendant is not relevant with respect to the award of attorney fees" under the Act. Levno v. United States, 440 F. Supp. 8, 11 (D. Mont. 1977). *Levno* was a simple refund suit arising from the IRS' disallowance of the plaintiff's deferred contracts for the sale of cattle. Without examining the

Whether the amendment authorizes fee awards to plaintiffs who have successfully defended against vexatious or harassing governmental counterclaims, a question left open in *Aparacor*,[157] is also unclear. In *Patzkowski v. United States*,[158] the eighth circuit rejected the contention that, notwithstanding a counterclaim by the government, no part of the action could be "by or on behalf of" the United States[159] since the plaintiff had commenced a tax refund suit:

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language of the Allen amendment, but apparently attempting to bring the case within the language and purview of the Act, the court stated that "[t]his civil action was instituted *as a result of* a proceeding on behalf of the United States of America to enforce a provision of the Internal Revenue Code." *Id.* at 9 (emphasis added).

The *Levno* court is singular in its opinion that the Allen amendment authorizes a fee award to a taxpayer in a simple refund suit. Other courts have held the Act inapplicable to these situations. *E.g.*, Haskins v. United States, [1978] STAND. FED. TAX REP. (CCH) ¶ 9197 (C.D. Cal. Nov. 17, 1977); Lieb v. United States, [1977] STAND. FED. TAX REP. (CCH) ¶ 9752 (E.D. Okla. Sept. 29, 1977); Schulken Bros. Paper Stock Co. v. United States, [1977] STAND. FED. TAX REP. (CCH) ¶ 9712 (C.D. Cal. Aug. 29, 1977); *In re* Kline, 429 F. Supp. 1025 (D. Md. 1977); Max Sobel Wholesale Liquors v. Commissioner, 69 T.C. 36 (Dec. 15, 1977).

Unquestionably, the narrow interpretation given the Allen amendment by the majority of courts falls short of providing an effective safeguard against abusive IRS tactics. The Internal Revenue laws are framed so that a taxpayer denying a liability is the technical plaintiff in any refund suit. *See* Note, *Court Awarded Attorneys' Fees in Tax Litigation: 42 U.S.C. § 1988*, 126 U. PA. L. REV. 1368, 1370-71 & nn.14-20 (1978). One commentator, arguing in favor of the *Levno* result, states that a "more reasonable approach is that which accords meaning and content to congressional statutes." *Id.* at 1380. Similarly, two judges concurring in the *Aparacor* decision recognized that the Allen amendment, narrowly construed, "accomplishes an insignificant result." 571 F.2d at 558. They refused to construe the statute more broadly, however, reasoning that to do so would constitute improper judicial legislation. *Id.* at 559. It was thus concluded that until Congress clarified the amendment, it must remain "more an expression of disgruntlement with the tactics of some revenue agents than . . . an effective piece of legislation." *Id.* Identical sentiments were voiced by a district court in Richman v. United States, 447 F. Supp. 929 (N.D. Ill. 1978). Plaintiff Richman, after having been harassed by the Internal Revenue Service, instituted and won a tax refund suit against the government. Despite its awareness that the vast majority of actions stemming from oppressive IRS tactics force the taxpayer to assume the role of the plaintiff-initiator, the court, bound by the procedural restraints of the Allen amendment's language, *see* notes 152-154 and accompanying text *supra*, denied the plaintiff's request for attorney's fees:

> In the instant case, we would be happy to award plaintiff attorney's fees if there were any basis for so doing. He deserves at least to be made whole for his out-of-pocket expenditures and the government deserves to be penalized for the conduct of its agents. If attorney's fees could be awarded, it might deter IRS personnel from similar conduct in the future. Unfortunately, there is no way for us to do so even though we agree with plaintiff's counsel that the statutory language compels an illogical, even ridiculous, result. The correction, however, rests with Congress, not the courts.

447 F. Supp. at 934.

[157] 571 F.2d at 558.

[158] 576 F.2d 134 (8th Cir. 1978).

[159] *Id.* at 136.

> It is beyond all doubt or cavil that this counterclaim was filed by or on behalf of the Government; it was most assuredly not filed on behalf of the taxpayer. The fact that the taxpayer had originally filed a refund suit did not change the reality of the ensuing proceeding, in which he was required to defend against a governmental counterclaim.[160]

The *Patzkowski* decision appears to reach a proper result considering the purpose of the Allen amendment. As an alternative to asserting its collection action as a counterclaim in the taxpayer refund suit, the government could have filed an independent collection action.[161] Notwithstanding the fact that the debates surrounding the amendment are replete with references to defendant taxpayers,[162] it would not appear reasonable to conclude that in adopting this section of the Act, Congress meant to hinge a taxpayer's fortune on the legal nature and posture of the collection process selected by the government.

Determining the "Reasonable" Award

Notwithstanding a court's determination that a fee award under the Act is justified, a public interest litigant must show that the amount requested is reasonable. Congress expressly referred to certain cases which were deemed to exemplify the proper standards to be applied. Specifically, both the House and Senate Reports cited *Johnson v. Georgia Highway Express, Inc.*,[163] with approval. *Johnson* enumerated the relevant criteria in arriving at a reasonable fee award as follows: 1) "The time and labor required"; 2) "The novelty and difficulty of the questions"; 3) "The skill requisite to perform the legal service properly"; 4) "The preclusion of other employment by the attorney due to acceptance of the case"; 5) "The customary fee"; 6) "Whether the fee is fixed or contingent"; 7) "Time limitations imposed by the client or the circumstances"; 8) "The amount involved and the results obtained"; 9) "The experience, reputation, and ability of the attorneys"; 10) "The

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[160] *Id.* (footnote omitted).

[161] *Id.* n.1 (citing Caleshu v. United States, 570 F.2d 711 (8th Cir. 1978)); Pfeiffer Co. v. United States, 518 F.2d 124 (8th Cir. 1975); *see* Flora v. United States, 362 U.S. 145 (1960).

[162] *See* note 155 and accompanying text *supra.*

[163] 488 F.2d 714 (5th Cir. 1974). In the district court, the plaintiffs were awarded attorney's fees as "prevailing parties" in a class action suit alleging discharge from employment because of their race or color. The award was made pursuant to the fee-shifting provision embodied in § 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (1976). On appeal, the fifth circuit vacated the lower court's decision and remanded for reconsideration of the claim for attorney's fees in light of the guidelines for calculation espoused by the court. 488 F.2d at 714; *see* note 164 and accompanying text *infra.*

'undesirability' of the case"; 11) "The nature and length of the professional relationship with the client"; and 12) "Awards in similar cases."[164]

In discussing the factors bearing on the determination of a reasonable award, Congress made clear that the mere recovery of damages should not automatically result in a reduction of the prevailing party's fee award,[165] and that fees should not be denied solely because the recipient is under no legal obligation to pay his counsel.[166] These general guidelines reflect an understanding that the effectiveness of our Civil Rights statutes depends in large part on the ability of litigants to be adequately compensated for the great expense incurred in vindicating rights of vast importance.[167]

CONCLUSION

Clear standards governing awards under the Civil Rights Attorney's Fees Awards Act of 1976 need to be developed and utilized by the federal courts. In order to facilitate the court's exercise of its fee-shifting powers, a two-tiered inquiry is suggested with respect to determining entitlement under the Act. If, through settlement or final decree, a party has received even the most technical or inconsequential relief under an enumerated statute or a "common nucleus"

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[164] 488 F.2d at 717-19.

[165] H. REP., *supra* note 5, at 8-9. The notion that fee and damage recoveries are not mutually exclusive is inherent in various statutes which require the courts to award both damages and attorney's fees to the prevailing plaintiff. *See, e.g.*, Clayton Act, 15 U.S.C. § 15 (1976); Antitrust Parens Patriae Act, 15 U.S.C. § 4c(a)(2) (1976) ("court shall award . . . threefold the total damage . . . , and the cost of suit, including a reasonable attorney's fee"); *see* notes 87-117 and accompanying text *supra*.

[166] *See* H. REP., *supra* note 5, at 8 n.16. In Schmidt v. Schubert, 433 F. Supp. 1115 (E.D. Wis. 1977), the plaintiffs, patients at a state hospital, prevailed in a suit brought under § 1983 which challenged the constitutionality of the hospital's visitation policies. The defendant claimed that an award of attorney's fees under the Act would constitute "unjust special circumstances" since the plaintiffs were under no legal obligation to pay their attorney a fee. 433 F. Supp. at 1118. The court, however, rejected this argument. Similarly, in Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974), a ninth circuit panel reasoned that although the possible denial of fees may not discourage a litigant who is under no legal obligation to pay counsel, this prospect does operate to dissuade attorneys from accepting such suits. *Id.* at 889; *accord*, White v. Beal, 447 F. Supp. 788 (E.D. Pa. 1978); Howard v. Phelps, 443 F. Supp. 374 (E.D. La. 1978); Alsager v. District Ct., 447 F. Supp. 572 (S.D. Iowa 1977); Rodriguez v. Taylor, 420 F. Supp. 893 (E.D. Pa.), *aff'd*, 569 F.2d 1231 (3d Cir. 1976). The failure of courts to award fees to gratuitous counsel would greatly diminish the desirability of public interest litigation in the legal community, thereby defeating the central purpose of the legislation.

[167] Public interest litigation often involves a great expenditure of money and labor. For example, in Keyes v. School Dist. No. 1, 439 F. Supp. 393, 416 (D. Colo. 1977), the court granted an award of $360,100 as reasonable attorney's fees under the Act. Similarly, in Commonwealth of Pa. v. O'Neill, 431 F. Supp. 700 (E.D. Pa. 1977) (mem.), *aff'd*, 573 F.2d 1301 (3d Cir. 1978), the plaintiffs received a fee award of $200,000 pursuant to the Act.

non-fee claim, he should initially be brought within the literal words of the Act. At this juncture, the *Newman* test should operate to deny fees only to litigants whose suits either seek relief which would have no therapeutic value to the public at large or were unnecessarily brought. In no event, however, should the *Newman* standard be applied to preclude fee recoveries by a litigant because he received damages in his action. Since the Act was meant to encourage vindication of rights evincing extremely high congressional priority, it seems reasonable to conclude that Congress intended to establish a standard for fee awards which would leave an aggrieved party fully compensated for his injury after counsel had been paid.

In examining the proper standard for defendant fee awards, it should be noted that Congress did not direct its concern towards the adversary of the public interest litigant. Were defendants awarded fees under a more liberal standard than traditional bad faith, the remedial purpose of the act could be thwarted. Although the intent of the provision allowing fee awards to prevailing parties other than the United States in tax suits is unclear, it appears that fee awards should be made only when the government institutes a collection action or counterclaims in bad faith. Further expansion of the scope of this section so as to permit awards in other circumstnces should await specific legislative approval. Finally, courts should be flexible in arriving at a fee amount which is calculated to effectuate the purpose of the Act. The Civil Rights Attorney's Fees Awards Act of 1976 is a commendable effort by Congress to promote private enforcement of our civil rights laws. It is hoped that the courts in interpreting its provisions will do justice to the spirit of the Act.

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