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Western New England Law Review

Volume 2 2 (1979-1980)
Issue 2

Article 2

1-1-1979

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Hon. James L. Oakes, *INTRODUCTION: A BRIEF GLANCE AT ATTORNEYS' FEES AFTER ALYESKA*, 2 W. New Eng. L. Rev. 169 (1979), http://digitalcommons.law.wne.edu/lawreview/vol2/iss2/2

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INTRODUCTION A BRIEF GLANCE AT ATTORNEYS' FEES AFTER *ALYESKA*

Hon. James L. Oakes*

When the Supreme Court decided *Alyeska Pipeline Service Co. v. Wilderness Society* [1] reaffirming the American Rule that a prevailing party is generally not entitled to attorneys fees,[2] it merely altered the parameters of litigation over attorneys fees; it did not end the controversy This symposium addresses many of the issues that remain. This introduction is intended to provide a background to, and delineate some of, those issues without preempting the authors of the commentaries that follow

The Court in *Alyeska* was disturbed by a growing tendency of the lower federal courts to permit an award of attorneys fees to parties vindicating the public interest" by acting as private attorneys general."[3] The "private attorney general" concept had found perhaps its most expansionist expression in *La Raza Unida v. Volpe* [4] In that case the district court, after enjoining a highway construction project for failure to comply with statutory housing relocation requirements, awarded attorneys fees against the California Highway and Public Works Departments as well as against the Chief Highway Engineer in his individual and representative capacity The decision may have envisaged:

> [A]n era of the law s developing its own internal self-sustaining institution meeting the social demand for law actively to subserve the public interest in environmental protection—creating in three steps (1) a public right, (2) persons (or objects) with

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U.S. Circuit Judge, United States Court of Appeals for the Second Circuit.

1. 421 U.S. 240 (1975).

2. The Court in *Alyeska* gave special heed to an article by Professor John Dawson, 421 U.S. at 258 (citing Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV L. REV 1597 (1974) [hereinafter cited as *Dawson I*]). *See also* Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV L. REV 849 (1975) [hereinafter cited as *Dawson II*].

3. *See* 421 U.S. at 270 n.46 (citations omitted).

4. 57 F.R.D. 94 (N.D. Cal. 1972), *aff'd*, 488 F.2d 559 (9th Cir. 1973). Interestingly even after *Alyeska*, California as matter of state law appears to permit the award of fees for the vindication of state constitutional rights under private attorney general" concept. *See* Serrano Priest, 20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 315 (1977).

> standing to assert that right, and (3) providing the means for paying the lawyers and technical experts who do the work to assert the right. Thus evolves democracy in this wondrous law-oriented society of ours.[5]

Alyeska has effectively ended the visionary fanciful, or rather frightening—depending on the viewer's perspective—scheme of things foreshadowed by *La Raza Unida*. But it has left open four doors[6] for the award of attorneys' fees.

First, Congress may authorize the award of attorneys' fees by statute.[7] Many statutes authorizing these awards predate *Alyeska*.[8] New statutes have been adopted,[9] perhaps the most important of which is the Civil Rights Attorney's Fees Awards Act of 1976.[10] Since *Alyeska*, at least four major questions have been litigated under these statutes: (1) Whether they permit the award of fees in connection with litigation commenced prior to statutory enactment; (2) whether, when statutes provide for awards to the prevailing party in the trial court's discretion, presumptive rules should differentiate between prevailing plaintiffs and defendants; (3) whether attorneys' fees are an element of costs or of damages. If they are an element of damages, then postjudgment interest is allowable; (4) whether the statutes permit fees to legal organizations, such as legal aid societies and some "public interest" law firms, that are partially funded by the government.

Following the Supreme Court's interpretation of the Emergency School Aid Act of 1972,[11] subsequently applied in respect to

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5. Oakes, *Environmental Litigation: Current Developments and Suggestions for the Future*, 5 CONN. L. REV 531, 538 (1973).

6. What I call the "fourth door" allows the award of attorneys' fees in federal diversity cases where the applicable state law permits it. But this exception is often redundant with the *Alyeska* conclusion, since most states themselves follow the restrictive American Rule. 421 U.S. at 259 n.31. As such, and as otherwise of little moment, this "door" is not discussed in this introduction.

7 421 U.S. at 263 (1975).

8. *See* 421 U.S. at 260 n.33; Oakes, *Awarding Attorneys' Fees After Alyeska*, in 2 CURRENT PROBLEMS IN FEDERAL CIVIL PRACTICE 598 (1976).

9. *See* Solovy & Barnard, *Attorneys' Fees in Commercial and Civil Rights Actions*, in 2 CURRENT PROBLEMS IN FEDERAL CIVIL PRACTICE 760 (1979) (list including newer statutes); NATIONAL LAW JOURNAL, Oct. 2, 1978, at 8.

10. 42 U.S.C. § 1988 (1976). *See generally* Lipson, *Beyond Alyeska—Judicial Response to the Civil Rights Attorney's Fees Act*, 22 ST. LOUIS U.L.J. 243 (1978); Malson, *In Response to Alyeska—The Civil Rights Attorney's Fees Awards Act of 1976*, 21 ST. LOUIS U.L.J. 430 (1977); Note, *The Civil Rights Attorney's Fee Awards Act of 1976*, 52 ST. JOHN'S L. REV 562 (1978); Comment, *Civil Rights Attorney's Fees Awards Act of 1976*, 34 WASH. & LEE L. REV 205 (1977).

11. *See* Bradley's School Bd., 416 U.S. 696 (1974) (interpreting 20 U.S.C. §

the Civil Rights Attorney s Fees Awards Act of 1976,[12] most lower federal courts have allowed the award of fees in cases commenced prior to the statutory enactment.[13]

The Supreme Court has answered the question whether different standards should govern the award of attorneys fees to a prevailing party plaintiff or a prevailing party defendant, by endorsing a presumptive award to plaintiffs. The Court, however, requires more specific findings for an award to defendants. Thus, in *Newman v. Piggie Park Enterprises*,[14] the Court held that, under the prevailing party language of Title II of the Civil Rights Act of 1964, a prevailing plaintiff should ordinarily recover an attorney s fee unless special circumstances would render [that] award unjust."[15] The prevailing plaintiff standard was followed in *Northcross v. Board of Education*,[16] an educational civil rights case, and in *Albermarle Paper Co. v. Moody* [17] a title VII case. In *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*,[18] however the Court applied a different test to a defendant prevailing under title VII. Rejecting both the prevailing plaintiff standard and the suggestion that a defendant should recover only when the action was brought in bad faith, the Court held that fees may be awarded upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."[19] Presumably a similar standard would apply to other comparable statutes.

The third question, whether fees are costs or damages, has

1617 (1976) (repealed effective Sept. 30, 1979, and replaced by the identical 20 U.S.C.A. § 3205 (West Cum. Supp. 1979))). *See also* Walker, *Recovery of Attorney Fees in Civil Rights Litigation*, 39 ALA. LAW 93 (1978).

12. *See* Hutto Finney 437 U.S. 678, 694 n.23 (1978) (interpreting 42 U.S.C. § 1988 (1976)).

13. Holley v. Lavine, Nos. 79-7182, 79-7190, 79-7207, slip op. at 3725 (2d Cir. July 13, 1979); Gagne v. Maher, 594 F.2d 336, 342 (2d Cir. 1979), *cert. granted*, 48 U.S.L.W 3047 (Oct. 1, 1979) (No. 78-1888); Pickett Milam, 579 F.2d 1118, 1120 (8th Cir. 1978); Beazer v. New York City Transit Auth., 558 F.2d 97 (2d Cir. 1977), *rev d on other grounds*, 99 S.Ct. 1355 (1979).

14. 390 U.S. 400 (1968) (per curiam).

15. *Id.* at 402.

16. 412 U.S. 427, 428 (1973) (per curiam) (construing the Emergency School Aid Act of 1972, 20 U.S.C. §§ 1601-19 (1976)).

17 422 U.S. 405, 415 (1975) (dictum) (§ 706(k) of Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (1976)); *see* Christiansburg Garment Co. EEOC, 434 U.S. 412, 417 (1978) (dictum). *See also, e.g.*, Carrion v. Yeshiva Univ 535 F.2d 722, 727 (2d Cir. 1976).

18. 434 U.S. 412 (1978).

19. *Id.* at 421.

been answered differently by the U.S. Courts of Appeals for the Fifth and Ninth Circuit.[20] The fourth question, whether a state-funded plaintiff's attorney is entitled to fees, has received varying answers from different courts, with most favoring the award.[21]

Recent cases have held that even where a nonconstitutional claim is involved,[22] attorneys fees may be awarded from state defendants despite the eleventh amendment, at least when Congress is exercising its fourteenth amendment section 5 powers.[23] But several important issues remain unresolved, including the use of pendent jurisdiction to bring nonconstitutional claims within the purview of a congressional act, the standards pertaining to the exercise of the court's discretion thereunder; the applicability of an act to government officials and the United States itself, whether as losing or prevailing[24] parties; and compensation for legal services rendered in administrative proceedings,[25] all of which are discussed in depth within the pages of this symposium.

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20. *Compare* Carpa, Inc. v. Ward Foods, Inc., 567 F.2d 1316, 1321-23 (5th Cir. 1978) (holding fees to be costs, not permitting award of interest thereon) *with* Perkins Standard Oil Co., 487 F.2d 672 (9th Cir. 1973) (treating attorneys fees as damages, permitting award of interest). The *Carpa* case appears the better reasoned in light of the cost" language in the private suit provision of the Clayton Act. 15 U.S.C. § 15 (1976).

21. *See, e.g.*, Gagne Maher, 594 F.2d 336, 345 (2d Cir. 1979), *cert. granted*, 48 U.S.L.W 3047 (Oct. 1, 1979) (No. 78-1888) (attorneys fees reduced to reflect public funding); Mid-Hudson Legal Servs., Inc. v. G & U Inc., 578 F.2d 34 (2d Cir. 1978); Perez Rodriguez Bou, 575 F.2d 21, 24 (1st Cir. 1978).

22. Gagne Maher, 594 F.2d 336, 342 (2d Cir. 1979), *cert. granted*, 48 U.S.L.W 3047 (Oct. 1, 1979) (No. 78-1888).

23. *Id.* (retroactive relief); Fitzpatrick Bitzer, 519 F.2d 559, 571-72 (2nd Cir. 1975), *aff'd in part, rev d in part*, 427 U.S. 445 (1976) (prospective relief). *See also* Hutto v. Finney 437 U.S. 678 (1978); Lund v. Affleck, 587 F.2d 75, 76-77 (1st Cir. 1978); Bond Stanton, 555 F.2d 172, 174-75 (7th Cir. 1977), *cert. denied*, 438 U.S. 916 (1978).

24. *See* Comment, *United States as Prevailing Defendant in Title VII Actions: Attorneys Fees and Costs*, 66 GEO. L.J. 899 (1978).

25. Carey v. New York Gaslight Club, Inc., allowed recovery in title VII suit for services rendered in successful state administrative proceedings, under the 'federal mandate [in title VII] of accommodation to state action. 598 F.2d 1253, 1257, *cert. granted*, 48 U.S.L.W 3235 (Oct. 9, 1979) (No. 79-192) (quoting Voutsis Union Carbide Corp., 452 F.2d 889, 892 (2d Cir. 1971), *cert. denied*, 406 U.S. 918 (1972)). Parker Califano, 561 F.2d 320 (D.C. Cir. 1977), permitted award of fees in title VII case covering services in prior federal administrative proceedings. ***But cf.*** Fitzgerald United States Civil Serv Comm n, 554 F.2d 1186 (D.C. Cir. 1977) (disallowed award under Veterans Preference Act where no express statutory provision for fees was found. 5 U.S.C. § 7511 (1976)). *See also* Note, *Civil Rights—Title VII—Recovery of Attorneys Fees for Services Rendered in Connection with Administrative Proceedings*, 24 WAYNE L. REV 1409, 1419-20 (1978).

A second door to the award of attorneys fees left open by *Alyeska* is the old equitable common fund" or "common benefit" doctrine.[26] *Alyeska* leaves unclear how wide this opening is. The text of Mr Justice White s opinion reads "benefit" as broadly as the language of *Trustees v. Greenough*[27] permits, referring to a "power of equity to permit the trustee of a fund or property or a party preserving or recovering a fund for the benefit of others ., to recover his costs, including attorneys fees, from the fund or property or directly from the other parties enjoying the benefit."[28] A later footnote, however, narrows the construction to classes of beneficiaries which are small in number and easily identifiable, and where the benefits could be traced with some accuracy so that the costs could be shifted to those truly benefiting.[29]

While we may only speculate, the Court's recent decision to review *Van Gemert v. Boeing Co.*[30] may reflect a desire to clarify the scope of the common benefit" doctrine. In *Van Gemert*, a successful class action suit on behalf of nonconverting debenture holders,[31] the court of appeals allowed the attorneys an award based on the total fund recovered even though not all the members of the class had filed claims for recovery The dissent argued that non-

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26. *See generally* Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1969) (awarding interim attorneys fees to minority stockholders who, suing to set aside their corporation merger, established violation of § 14(a) of Securities Exchange Act of 1934 and Rule 14a-9 thereunder pertaining to proxy disclosures. 15 U.S.C. § 78n (1976)); Sprague Taconic Nat'l Bank, 307 U.S. 161 (1939) (Frankfurter, J.) (trust beneficiary establishing own right to lien on trust fund sale may obtain attorneys fees out of proceeds; case is often cited for dicta, based upon the broad power of equity as applied through stare decisis, where the "fund is for all practical purposes created for the benefit of others. *Id.* at 167); Central R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885) (lawyer may recover attorneys fees not only from his clients but also from other parties benefiting from his efforts to establish lien on property); Trustees v. Greenough, 105 U.S. 527 (1882) (party bringing suit to rescue trust fund and restore it to its proper purposes may recover fees from the fund as means of enforcing contribution to his attorneys fees from his cobeneficiaries of the fund); Smolowe v. Delendo Corp., 136 F.2d 231, 241 (2d Cir.), *cert. denied*, 320 U.S. 751 (1943) (attorneys fees recoverable under unjust enrichment theory in action under § 16(b) of 1934 Act, although no express provision provides such, and express provisions do exist under §§ 9(e) and 18(a) of the Act. 15 U.S.C. §§ 78i(e), 78r(a) (1976)); *Dawson I*, *supra* note 2; *Dawson II*, *supra* note 2.

27. 105 U.S. 527 (1882).

28. 421 U.S. at 257 (footnote omitted).

29. *Id.* at 264 n.39.

30. 590 F.2d 433 (2d Cir. 1978) (en banc), *cert. granted*, 99 S. Ct. 2158 (1979) (No. 78-1327) (Van Gemert IV).

31. 520 F.2d 1373 (2d Cir.), *cert. denied*, 423 U.S. 947 (1975) (Van Gemert I). *See also* Van Gemert v. Boeing Co., 553 F.2d 812 (2d Cir. 1977) (Van Gemert II).

claiming members were not clients of the attorneys for the named class, if they were even parties to the suit,[32] and that the award was, therefore, a "lawyer s windfall."[33] Given the concern expressed by some judges over possible abuse of class actions by lawyers,[34] one may not safely predict the outcome of *Van Gemert*.[35]

Regardless of how *Van Gemert* is decided, serious problems remain in determining the amount of fees to be awarded, and to whom the award extends, in common benefit" cases, which is a subject covered in this symposium. Some of the decided cases delineate the problems, including when negotiations for attorneys fees should be conducted,[36] the factors to be used in determining the amount of the fees,[37] and whether discovery of defense counsel's hours is appropriate as a basis for comparison with plaintiff's time.[38]

The third door to recovery of attorneys fees left open in *Alyeska*—for vexatious, bad faith, wanton, or oppressive action by the losing party[39]—not only has a longstanding history of Supreme Court approval,[40] but enjoys fairly frequent usage. Since *Alyeska*,

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32. 590 F.2d at 442, 443 (Van Graafeiland, J., dissenting). *But see* 590 F.2d at 440 n.15 (Kaufman, C.J.) ("the *class* [is] the attorney client for all practical purposes") (emphasis in original) (citing Note, *Developments in the Law: Class Actions*, 89 HARV L. REV 1318, 1592-97 (1976)). The majority specifically stated that it did not express any view as to the appropriate ultimate disposition of the unclaimed remainder of the fund. *Id.* at 440 n.17. The dissent was completely silent on this issue. *But see* Van Gemert Boeing Co., 553 F.2d 812 (2d Cir. 1977) (Van Gemert II).

33. 590 F.2d at 443. The dissent also argued that since the common fund" doctrine was created to prevent unjust enrichment, there can be no recovery since no benefit is conferred without claim and knowing acceptance of the benefit. *Id.* at 444.

34. *E.g.*, Van Gemert v. Boeing Co., 573 F.2d 733, 735-36 (2d Cir. 1978) (*Van Gemert III*).

35. Irrespective of that outcome, the author stands by his differentiation between attorneys fees and disbursements, as set forth in the dissent to the panel opinion in *Van Gemert III*. Van Gemert v. Boeing Co., 573 F.2d 733, 738 (1978).

36. Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977) (after main class action is settled, to avoid possible conflict of interests).

37. City of Detroit v. Grinnell Corp., 560 F.2d 1093 (2d Cir. 1977) (numerous factors determining whether basic hourly fee should be increased or decreased); Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974) (twelve factors for same purpose). *See also* ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 2-107. A sophisticated discussion of the cases dealing with the criteria for the award of attorneys fees appears in Solovy & Barnard, *supra* note 9, at 774.

38. *See* Rabb, *Attorney Fees in Civil Rights Actions*, in 2 CURRENT PROBLEMS IN FEDERAL CIVIL PRACTICE 865 (1979) (list of cases).

39. 421 U.S. at 258-59.

40. *E.g.*, F.D. Rich Co. v. United States *ex rel.* International Lumber Co., 417 U.S. 116, 129 (1974); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S.

this exception to the American rule has been used to award attorneys fees in a class action suit against a hospital and local mayor refusing to permit abortions,[41] in a prisoners rights suit,[42] in a housing discrimination case,[43] in a teacher s discharge suit,[44] and most recently in a title VII case.[45] Of course, if a suit is only insubstantial but not in bad faith, fees will not be awarded under this rule.[46] One district court, in a novel case, has assessed a $50,000 award against an unsuccessful plaintiff's lawyer and his law firm for a suit that the court found baseless.[47] The question remains whether the vexatious or bad faith conduct must occur in the handling of the litigation itself, as some courts hold,[48] or may include an opponent's conduct which necessitates the litigation, as held by others.[49] The author tends to support the first of these two theories in the belief that oppressive conduct leading to the litigation can

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714, 718 (1967); Vaughan Atkinson, 369 U.S. 527, 530-31 (1962); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 426-28 (1923).

41. Doe v. Poelker, 515 F.2d 541, 546-48 (8th Cir. 1975), *rev d on other grounds*, 432 U.S. 519 (1977) (per curiam). *See also* Cornist v Richland Parish School Bd., 517 F.2d 1032, 1033 (5th Cir. 1975) (per curiam) (case involving racially discriminatory firings remanded for possible award of fees based on bad faith).

42. Miller Carson, 401 F Supp. 835, 845-57 (M.D. Fla. 1975).

43. Clemons Runck, 402 F Supp. 863, 870 (S.D. Ohio 1975).

44. Morris v. Board of Educ., 401 F Supp. 188, 215 (D. Del. 1975).

45. Copeland Martinez, 48 U.S.L.W 2089 (D.C. Cir. July 24, 1979).

46. Wimberly Mission Broadcasting Co., 523 F.2d 1260, 1262 (10th Cir. 1975) (no attorneys fees for unsuccessful individual private action by veteran for reemployment following military discharge); United States Ford Motor Co., 522 F.2d 962, 967 (6th Cir. 1975) (no attorneys fees for defending against employer who sought injunction that was ruled insubstantial and with little merit, though not frivolous); Hallmark Clinic v. North Carolina Dep't of Human Resources, 519 F.2d 1315, 1317 (4th Cir. 1975) (no attorneys fees against Human Resources Department as part of executive department; none against individuals because no bad faith when attempting to implement new statutes responsive to new constitutional doctrine); Hander v. San Jacinto Junior College, 519 F.2d 273, 280-81 (5th Cir. 1975) (no attorneys fees for wrongfully discharged public junior college teacher in violation of fourteenth amendment since violation does not fall within the four *Alyeska* exceptions); Lipscomb v. Wise, 399 F Supp. 782, 799 (N.D. Tex. 1975), *rev d on other grounds*, 551 F.2d 1043 (5th Cir. 1977), *rev d on other grounds*, 437 U.S. 535 (1978) (no attorneys fees for successful constitutional challenge of city at large method of electing city council members since there was no bad faith); Walther & Cie U.S. Fidelity & Guar. Co., 397 F Supp. 937, 946 (M.D. Pa. 1975) (no attorneys fees since defendant' failure to consummate settlement agreement in timely manner did not amount to bad faith).

47. Nemeroff Abelson, 469 F Supp. 630 (S.D.N.Y. 1979) (appeal pending).

48. Straub v Voisman & Co., 540 F.2d 591, 599 (3rd Cir. 1976); Tze Zing Yao v. W.E. Hutton & Co., [1977-78 Transfer Binder] FED. SEC. L. REP (CCH) ¶ 96,039 at 91,652 (S.D.N.Y. 1977).

49. Bogart v. Unified School Dist. No. 298, 432 F Supp. 895, 906 (D. Kan. 1977); Lewis v. Texaco, 418 F Supp. 27, 28 (S.D.N.Y. 1976).

ordinarily be compensated for through the doctrine of punitive damages. Although logic may permit the award of attorneys fees, even as authorized by statute, it may nevertheless, be outweighed in a given case in which the punitive damages have been substantial.[50]

These three *Alyeska* exceptions by themselves suggest that the editors of the *Western New England Law Review* have chosen an increasingly important topic for this symposium, and one of growing interest to lawyers and clients alike. The skyrocketing cost of litigation alone makes the topic alive. Statutory proposals such as The Equal Access to Justice Act,[51] which would provide citizens and small businesses reimbursement in prevailing litigation with the government, make the topic even more significant for the future. After twenty years of practice and ten years of observation from the bench, I am well aware that the allocation and amount of attorneys fees and costs have tremendous impact not only on the bringing and settling of litigation but also on achieving real justice. I am honored to have been chosen to write this survey of the problem, a problem for which *Alyeska* set some parameters but did not resolve.

50. *See* Zarcone Perry 581 F.2d 1039 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979) (attorneys fees were disallowed in part because the punitive damages award had been sufficient).

51. S. 265, 96th Cong. 1st Sess. (1979) (passed United States Senate on July 31, 1979 pending with United States House of Representatives Committee on the Judiciary).