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Attorney's Fees in Public Interest Litigation: A Return to the Wilderness of the American Rule

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ereign powers the federal government has paramount rights in the marginal sea."[67] This merely begs the crucial issue: whether proprietary rights are necessarily subsumed within rights of political sovereignty. The Court, by relying upon *paramount national concerns*,[68] never considers the possibility of protecting such concerns while concurrently granting the defendant states the proprietary rights they assert.

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ATTORNEYS' FEES IN PUBLIC INTEREST LITIGATION: A RETURN TO THE WILDERNESS OF THE AMERICAN RULE

Alyeska Pipeline Serv. Co. v. The Wilderness Society, 95 S. Ct. 1612 (1975)

Respondent Wilderness Society[1] sought an award of attorneys' fees for its three-year effort to compel the Secretary of the Interior and the petitioner[2] to comply with certain federal statutes during the pre-construction phase of the Alaska Pipeline.[3] The Court of Appeals for the District of Columbia Circuit, finding no statutory basis for the award and determining that neither of the two recognized exceptions[4] to the American Rule[5] against fee-shifting[6] were ap-

67. 95 S. Ct. at 1159, *quoting Special Master's Report* at 23.

68. 95 S. Ct. at 1158. This phrase typifies the Court's analytical approach to the problems posed by this case.

1. The Environmental Defense Fund, Inc. and The Friends of the Earth were also respondents.

2. Petitioner Alyeska was an intervenor along with the State of Alaska in respondents' original action against the Secretary of the Interior. Alyeska was the only defendant against whom attorneys' fees were assessed in the court of appeals. The Secretary of the Interior was immunized from an award by 28 U.S.C. §2412 (1970).

3. The respondents had succeeded in enjoining construction of the pipeline for approximately three years on the ground that Alyeska's application for a right-of-way for the pipeline exceeded the width limitations prescribed by the Mineral Leasing Act of 1920, 30 U.S.C. §185 (1970). The respondents had also argued that the Secretary of the Interior had violated the impact statement requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §4321 *et seq.* (1970), but the courts had rested the injunction on the narrow Mineral Leasing Act ground. After the Supreme Court denied certiorari from the final D.C. court of appeals decision upholding the injunction, Congress quickly passed amendments to both the Mineral Leasing Act and the NEPA that permitted the pipeline construction to proceed essentially as planned. Respondents then commenced this action for attorneys' fees in the D.C. Court of Appeals. For a comprehensive chronology and commentary on the entire controversy, see Dominick & Brody, *The Alaska Pipeline:* Wilderness Society v. Morton *and the Trans-Alaska Pipeline Authorization Act*, 23 AM.U.L.REV. 337 (1973).

4. The bad faith and common fund exceptions. See text accompanying notes 15-24 *infra*.

5. The Rule may be stated generally that, in the absence of a statute or contractual provision, a court will not impose one litigant's attorneys' fees on the other. The Rule is subject to exceptions, the most significant of which are discussed herein.

6. "Fee shifting" refers to a statutory requirement or judicial decision that one litigant

plicable, nonetheless shifted half of respondent's attorneys' fees to petitioner on the basis of the "private attorney general" rationale.[7] After granting certiorari, the Supreme Court reversed and HELD, Congress, not the federal courts, has the sole authority to implement the "private attorney general" exception to the American Rule.[8]

The American Rule, which dictates that each litigant must pay his own attorneys' fees, is unique among the world's major nations.[9] Although their reasons are unclear, the American colonists rejected the English model, which taxed fees against the losing litigant.[10] Since the colonial period, courts have consistently upheld the Rule[11] despite vigorous criticism advocating its abandonment or substantial revision.[12] Against this background, Congress incorpo-

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pay the other's attorneys' fees. Although theoretically under the bad faith exception and certain statutes allowing the "prevailing party" to recover fees, either the plaintiff or defendant may benefit from the shift, the most common fee-shifting context is the payment of a prevailing plaintiff's attorneys' fees by the defendant. In the common fund, common benefit, and private attorney general exceptions, the shift is always in favor of the plaintiff, by definition.

7. The Wilderness Society v. Morton, 495 F.2d 1026 (D.C. Cir. 1973). For a commentary on this case, see Note, *Private Attorney General Fees Emerge from the Wilderness*, 43 FORDHAM L. REV. 258 (1974). For a brief description of the essential elements of the private attorney general rationale, see note 14 *infra*.

8. Alyeska Pipeline Service Co. v. The Wilderness Society, 95 S. Ct. 1612, 1627 (1975).

9. *See* Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966).

10. Among the explanations for the rejection: The 17th and early 18th century perception of lawyers as disreputable characters who should not be encouraged by fee awards; the concept of law as a body of rules that could be applied by the intelligent layman, making a lawyer a luxury; the rugged individualism fostered by the frontier experience; and, particularly following the Revolution, a pervasive reaction against anything British. *See generally* R. POUND, THE SPIRIT OF THE COMMON LAW 112-38 (1921); Goodhart, *Costs*, 38 YALE L.J. 849, 872-75 (1929).

Professor Ehrenzweig, *supra* note 9, offers an alternate explanation. After the stature of the legal profession increased during the early 19th century, many states adopted statutes taxing attorneys' fees as a part of costs against the losing party. However, the statutes contained strict controls and provided for the award of only nominal amounts. As time passed and the costs of litigation increased, the amounts allowed by the statutes became wholly unrealistic. The legislatures did not amend the statutes to increase the amounts, and the original fee-shifting intent of the statutes was forgotten. *See also* McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN. L. REV. 619, 620-21 (1931).

11. F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 117, 129 (1974). Some of the common arguments for the Rule are: a person should not have to risk an additional penalty for prosecuting or defending a lawsuit; such a potential penalty would deter poorer litigants with meritorious cases; and too much judicial effort would be expended in litigating the difficult issue of reasonable attorneys' fees. Also, fee-shifting might lead to abuses such as hiring more counsel than necessary, or paying them excessive fees. For criticisms of the Rule's justifications, see McCormick, *supra* note 10, at 639-41; Fleishmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967); Oelrichs v. Spain, 82 U.S. (15 Wall.) 211, 231 (1872).

12. *See generally* Ehrenzweig, *supra* note 9; Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 U. COLO. L. REV. 202 (1966); Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636 (1974); Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216 (1967). Some criticisms of the Rule: (1) it results in the prevailing party being made less than whole since he must pay his attorney out of his recovery; (2) meritorious litigation is sometimes discouraged in cases

rated provisions into many federal statutes[13] shifting the burden of attorneys' fees under certain circumstances. Additionally, equitable exceptions permitting fee-shifting – the "bad faith" and "common fund" exceptions – developed in the courts. At issue in the instant case was another fee-shifting rationale, first incorporated in certain congressional enactments and later developed in the lower federal courts – the "private attorney general" doctrine.[14]

The bad faith exception allows a court to punish litigants who have acted vexatiously or oppressively, or who have forced their opponent to incur unnecessary litigation and expense.[15] The exception derives from the courts' inherent powers to prevent abuse of the legal process and avoid injustice to the innocent litigant.[16] In *Vaughan v. Atkinson*[17] the Supreme Court assessed fees against the defendants because they "were callous in their attitude, making no investigation of libellant's claim and by their silence neither admitting nor denying it. . . . [L]ibellant was forced to hire a lawyer and go to court to get what was plainly owed him under laws that are centuries old."[18] Similarly, in *Bell v. School Board*,[19] the court awarded attorneys' fees to plaintiffs in a school desegregation action, emphasizing the defendants' "long continued pattern of evasion and obstruction," which required the plaintiffs to undertake the expense of litigation.[20]

The common fund exception was first enunciated in the early case of *Trustees v. Greenough*,[21] in which a railroad bondholder sued successfully on behalf of himself and all other bondholders to prevent the fraudulent sale of trust fund assets. In awarding the plaintiff attorneys' fees, the Court reasoned that, because the bondholder's efforts had conferred a monetary benefit on all the nonlitigating bondholders, it would be inequitable to require him to bear the entire burden of attorneys' fees. By charging the fees to the common trust fund preserved by the plaintiff, the Court was able to spread the fees among

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where the fee could exceed the total recovery (particularly in public interest litigation, where monetary damages are not always available); and (3) the financially secure litigant enjoys an unconscionable advantage over his poorer adversary.

13. *E.g.*, Clayton Act, 15 U.S.C. §15 (1970); Truth-in-Lending Act, 15 U.S.C. §1640(a) (1970); Fair Labor Standards Act, 29 U.S.C. §216(b) (1970); Fair Housing Act, 42 U.S.C. §3612(c) (1970). For a compilation of the statutory fee-shifts, see 95 S. Ct. at 1623 n.33.

14. One court has succinctly described the private attorney general rationale as follows: "[A] 'private attorney general' should be awarded attorneys' fees when he has effectuated a strong congressional policy which has benefited a large class of people, and where further the necessity and financial burden of private enforcement are such as to make the award essential." La Raza Unida v. Volpe, 57 F.R.D. 94, 98 (N.D. Cal. 1972).

15. *See* 6 J. MOORE, FEDERAL PRACTICE ¶54.77(2), at 1709 (2d ed. 1974), and cases cited therein.

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

17. 369 U.S. 527 (1962).

18. *Id.* at 530-32.

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

20. *Id.* at 500. *See also* Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 (1923) (defendant assessed attorneys' fees for wilful disobedience of a court order).

21. 105 U.S. 527 (1881). For a discussion of the common fund exception, see Dawson, *Lawyers and Involuntary Clients: Attorneys Fees From Funds*, 87 HARV. L. REV. 1597 (1974).

all the benefited bondholders.[22] The common fund exception was extended slightly in the 1939 decision of *Sprague v. Ticonic Bank*,[23] where the Court awarded attorneys' fees to a plaintiff who had sued solely in her own interest, rather than on behalf of a benefited class. The collateral estoppel effect of the plaintiff's judgment had enabled others similarly situated to recover from the same defendant out of the common fund preserved by her action.[24]

Unlike the bad faith and common fund exceptions, the private attorney general exception first appeared in certain congressional enactments wherein private litigation was encouraged as a means of implementing the public policy represented by the statutes.[25] The Supreme Court treated the congressional efforts in this area as exclusive, refusing, in *Fleishmann Distilling Corp. v. Maier Brewing Co.*,[26] to grant fee-shifting in a trademark infringement action where no fee shift appeared in the relevant statute.[27] *Fleishmann* reversed a line of lower federal court cases[28] awarding fees to successful plaintiffs in similar actions. Since *Fleishmann*, however, lower court decisions have generally been adverse to other nonstatutory fee shifting.[29]

One year after *Fleishmann*, the Supreme Court decided *Newman v. Piggie Park Enterprises, Inc.*,[30] involving the fee shifting provision of Title II of the 1964 Civil Rights Act.[31] In a class action enjoining discrimination at defendant's restaurants, the fourth circuit had concluded that attorneys' fees were available under the statute only upon a finding of defendant's bad faith.[32] The Supreme Court reversed the denial of an award, holding that the bad faith standard did not properly effectuate Congress' purpose in enacting the fee shift. Noting the difficulty of enforcing the Civil Rights Act, the Court viewed the fee shift as designed "to encourage individuals injured by racial discrimination to seek judicial relief."[33]

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22. "It would be very hard on him to turn him away without any allowance except the paltry sum which could be taxed under the fee bill. It would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself . . . ." 105 U.S. at 532.

23. 307 U.S. 161 (1939).

24. *Id.* at 167.

25. *See, e.g.*, Clayton Act, 15 U.S.C. §15 (1970); Comment, *Attorney Fees in Individual and Class Action Anti-Trust Litigation*, 60 CALIF. L. REV. 1656 (1972).

26. 386 U.S. 714 (1967).

27. The Lanham Act, 15 U.S.C. §1117 (1970). The Court also noted two unsuccessful attempts to amend the Act to include a fee-shifting provision.

28. *E.g.*, Baker v. Simmons Co., 325 F.2d 580 (1st Cir. 1963); Wolfe v. National Lead Co., 272 F.2d 867 (9th Cir. 1959); Keller Products v. Rubber Linings Corp., 213 F.2d 382 (7th Cir. 1954).

29. *E.g.*, Missouri Pac. R. R. v. Slayton, 407 F.2d 1078, 1082 (8th Cir. 1969) (court refused on authority of *Fleishmann*, to award attorney fees to plaintiff under the Interstate Commerce Act, which contained no fee-shifting provision).

30. 390 U.S. 400 (1968).

31. 42 U.S.C. §2000a-3(b) (1970): "In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as a part of costs . . . ."

32. Newman v. Piggie Park Enterprises, Inc., 377 F.2d 433 (1967).

33. *Id.*

> 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.[34]

The Court held that, unless the award would be unjust, attorneys' fees should be awarded to successful Title II plaintiffs. Although *Newman* involved the construction of a statutory fee shift, it also focused attention on fee shifts as instruments of public policy enforcement. *Newman* also seemed to represent a more positive attitude toward fee shifts, because, while the statute made the award discretionary,[35] the Court created a presumption in its favor.

The positive approach to fee shifts evidenced by *Newman* received additional impetus two years later when the Supreme Court, in *Mills v. Electric Auto-Lite Co.*,[36] awarded attorneys' fees to the successful plaintiffs in a stockholders' derivative action to enforce compliance with the proxy provisions of the Securities Exchange Act of 1934.[37] The Court could not rely upon a statutory provision or upon a "common fund" of dollars but instead focused on the "therapeutic"[38] benefit accruing from the plaintiffs' action to the corporation and its shareholders – an action that was consonant with the strong congressional policy of "fair and informed corporate suffrage."[39]

Requiring the defendant corporation to pay the plaintiffs' attorneys' fees effectively distributed the cost among all those benefited.[40] The broad language of the case indicated that this "common benefit" variant of the common fund exception may apply whenever members of an ascertainable class are benefited and "where the court's jurisdiction . . . makes possible an award that will operate to spread the costs proportionately among them."[41] The *Mills* rationale was subsequently applied in *Hall v. Cole*,[42] where a union member recovered his attorneys' fees against the union in an action under the Labor Management Reporting and Disclosure Act,[43] which contained no fee-shifting provision.[44]

The "serendipitous synergy"[45] of *Newman* and *Mills* provided the Fifth

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34. *Id.*

35. See note 31 *supra.*

36. 396 U.S. 375 (1970).

37. *Id.* at 392; Securities Exchange Act of 1934, 15 U.S.C. §78n (1970).

38. The Court in *Mills* cited and relied in part on Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 HARV. L. REV. 658, 669-79 (1956).

39. 396 U.S. at 396.

40. *Id.* at 396-97.

41. *Id.* at 394. For an analysis of the *Mills* case and its impact, see Comment, *The Allocation of Attorney Fees After* Mills v. Electric Auto-Lite Co., 38 U. CHI. L. REV. 316 (1971).

42. 412 U.S. 1 (1973).

43. 29 U.S.C. §412 (1970).

44. The Court said, quoting *Mills*: "[A]n award of counsel fees to a successful plaintiff in an action under §102 of the LMRDA falls squarely within the traditional equitable power of federal courts to award such fees whenever 'overriding considerations indicate the need for such a recovery.' " 412 U.S. at 9.

45. This phrase is used in King & Plater, *The Right to Counsel Fees in Public Interest Environmental Litigation*, 41 TENN. L. REV. 27, 51 (1973).

Circuit in *Lee v. Southern Homesites, Inc.*,[46] with a conceptual bridge[47] from the traditional common fund exception to the new, nonstatutory private attorney general doctrine. In *Lee*, a civil rights action[48] against a land seller practicing racial discrimination, the relevant statute contained no fee shifting provision, and neither the common fund nor common benefit exceptions were applicable. The court read *Mills* as demonstrating that it is "proper for the federal courts to award attorneys' fees when this remedy effects congressional policy,"[49] and read *Newman* as validating the private attorney general doctrine whenever a strong congressional policy, a dependence on private enforcement, and the unavailability of damage awards coexist.[50] Perceiving a strong congressional commitment to private enforcement of equal property rights,[51] the court eschewed reliance on defendant's bad faith and found a "broader ground for the award of fees."[52]

In subsequent cases,[53] the Fifth Circuit continued an aggressive[54] development of the nonstatutory private attorney general doctrine, and other circuits

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46. 444 F.2d 143 (5th Cir. 1971).

47. Two commentators have discussed the conceptual similarities and differences between the common fund and private attorney general exceptions:

> There is a basic similarity between the . . . exceptions in that each is based on an exchange of a salutary piece of litigation for the reimbursement of counsel fees. The difference lies in the class benefited. In the fund cases, it is a clearly defined and identifiable class from whom counsel fees are readily extractable. In the private attorney general cases, while there may be an ascertainable class, as in the racial discrimination cases, the benefit in large measure is held to accrue to the society at large. The settings of the fund cases, in effect, from the standpoint of the benefited class, are thus . . . microcosms of the private attorney general; the latter simply operates on a wider, nationwide scale.

King & Plater, *supra* note 45, at 52. The authors also identified the inherent weakness of the common fund or the common benefit exception as fee-shifting rationale in broader public interest litigation: the requirement of a distribution mechanism, the "deep pocket of an accessible class." *Id.* at 48-49.

48. The action was brought under 42 U.S.C. §1982 (1970), enacted in 1866.

49. 444 F.2d at 144.

50. *Id.* at 147-48. See text accompanying notes 30-35 *supra*. For a critique of the court's opinion in *Lee*, see Note, *Attorney Fees Should be Awarded to a Successful Plaintiff Suing Under the Property Rights Section of the 1866 Civil Rights Act*, 50 TEXAS L. REV. 204 (1971). *Compare Lee with* Bradley v. School Board, 472 F.2d 318 (4th Cir. 1972), *vacated on other grounds*, 416 U.S. 696 (1974), where the court said that if the *Mills* common benefit doctrine is expanded into a private attorney general rationale, "it will launch courts on the difficult and complex task of determining what is public policy, an issue normally reserved for legislative determination . . . ." 472 F.2d at 329. See further discussion of *Bradley* in note 56 *infra*.

51. The court noted that §1982 was enforceable only in a private action. *See* Jones v. Alfred Mayer Co., 392 U.S. 409 (1968). Also important was the fee-shifting provision in the related 1968 Fair Housing Act, 42 U.S.C. §3602(c) (1970), which the court believed was directed at a "very similarly defined social problem." 444 F.2d at 146.

52. *Id.* at 144.

53. *See, e.g.*, Cornist v. Richland Parish School Bd., 495 F.2d 189 (5th Cir. 1974); Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972); Sims v. Amos, 340 F. Supp. 691 (M.D. Ala. 1972), *aff'd*, 409 U.S. 942 (1972).

54. As in *Lee*, the Fifth Circuit could have relied upon the bad faith exception rather than the new private attorney general exception in several cases. *See, e.g.*, Fairley v. Patterson, 493 F.2d 598, 606 (5th Cir. 1974).

followed its lead.[55] The Fourth Circuit, however, flatly rejected the doctrine, basing its rejection on the *Fleishmann* rationale, which precludes a fee shift where Congress has not included one in the relevant statute.[56] But until the instant case, the Supreme Court had commented on the developing private attorney general exception on only two occasions, neither requiring a conclusive holding on the doctrine.[57]

After exhaustively surveying the history of the American Rule and its limited equitable exceptions, the instant Court[58] concluded that federal courts have no independent authority to implement the private attorney general ex-

55. *See, e.g.*, Taylor v. Perini, 503 F.2d 899 (6th Cir. 1974); Fowler v. Schwarzwalder, 498 F.2d 143 (8th Cir. 1974); Hoitt v. Vitek, 495 F.2d 219 (1st Cir. 1974); Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974).

56. Bradley v. School Bd., 472 F.2d 318 (4th Cir. 1972), *vacated on other grounds*, 416 U.S. 696 (1974). The *Bradley* case is interesting in that the court of appeals considered an award of fees to the successful plaintiffs on grounds of bad faith and on the private attorney general rationale, as well as under a statutory fee-shift. The court initially reversed the district court's award because it was not persuaded that the defendants had acted in bad faith, and then rejected the private attorney general exception as a basis for sustaining the award. Prior to the issuance of the opinion, the Congress enacted §718 of the Emergency School Aid Act, which allows a federal court to award attorneys' fees to a prevailing party in a school desegregation case where appropriate. On rehearing *en banc* the court of appeals again denied the award, on the ground that §718 could not be given retroactive effect. The Supreme Court eventually reversed and remanded on the retroactivity issue.

57. In Hall v. Cole, 412 U.S. 1 (1973), the Court declined to consider plaintiff's private attorney general ground for the award because of the adequacy of the common benefit ground. Then in F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116 (1974), the Court acknowledged the development of the exception in the lower federal courts but said: "This 'private attorney general' rationale has not been squarely before this Court and it is not so now; nor do we intend to imply any view either on the validity or scope of that doctrine." *Id.* at 130.

The instant case brought the doctrine before the D.C. Court of Appeals for the first time also. Judge Wright based the award on the fact that the environmentalists' action had ensured the "proper functioning of our system of government" because it forced Congress "to revise the Mineral Leasing Act rather than permitting continued evasion of its clear, though anachronistic, restrictions." The award was deemed appropriate even though the environmentalists did not obtain the "ultimate relief sought," so long as important legislative policy was advanced. 495 F.2d at 1033-34. Judge McKinnon, dissenting, pointed to the quick congressional action approving the continued construction of the pipeline as indicating that the environmentalists' attorneys had drawn a "complete blank" on the main NEPA issue, and that their success on the Mineral Leasing Act ground was a "slender reed" upon which to rest the recovery. *Id.* at 1040-41. Judge Wilkey indicated that the award should be denied because the environmenalists had actually frustrated the congressional policy of early development of the pipeline. *Id.* at 1042.

In the instant case, two primary questions were presented by petitioner Alyeska: "(1) Should right to recover attorneys' fees under the private attorney general doctrine, in order to encourage lawsuits challenging governmental action be extended to all cases in which compliance with federal statute by federal official is successfully challenged, even though statute does not reflect policy that Congress considers of high priority? (2) Can doctrine be so extended to award attorneys' fees (a) with respect to issues on which attorneys did not succeed (b) in excess of amounts paid to attorneys by clients and (c) against private party who had no control over actions complained of? . . ." 43 U.S.L.W. 3185 (1974).

58. Justice White wrote the opinion and was joined by Chief Justice Burger and Justices Rehnquist, Blackmun, and Stewart. Justices Douglas and Powell did not participate.

ception.[59] The Court reasoned that (1) Congress, through the passage of the early "fee bills" limiting recovery of attorneys' fees to nominal sums,[60] and through the subsequent enactment of statutes with express fee-shifting provisions,[61] impliedly preempted the judiciary from shifting fees on its own initiative; (2) the Supreme Court had consistently adhered to the American Rule and its few equitable exceptions;[62] and (3) the policy choices that attend the formulation of standards for fee shifting are properly reserved for Congress.[63]

The majority, speaking through Justice White, argued that Congress, by selective inclusion of fee shifts in federal statutes, had reserved this policy matter for itself.[64] A strong dissent[65] read *Sprague, Mills,* and *Hall* as implying from congressional silence, not judicial preemption, but "authorization for the Court to decide the attorneys' fee issue in the exercise of its coordinate equitable power."[66] To the majority, though, the *Sprague* line of cases merely represented consistent application of the older common fund exception,[67] and thus was consistent with the majority's premise that the equitable authority of the federal judiciary should be confined to the bad faith, common fund, and common benefit exceptions.

Next, the majority pointed to the difficulties facing courts attempting selective application of the private attorney general doctrine[68] and insisted that the courts are "not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue . . . ."[69] Thus, although it might be argued that Congress had authorized nonstatutory fee shifting under the private attorney general rationale "whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award,"[70] the Court reasoned that if the statute at issue in the

59. 95 S. Ct. at 1627.

60. The current "fee bill" is 28 U.S.C. §1923 (1970), which provides for the recovery of nominal sums known as "attorney's and proctor's docket fees." The sum recoverable under this provision in ordinary litigation and on "trial or final hearing" is $20.

61. See note 13 *supra*.

62. Even in the earliest reported case, the Supreme Court showed great deference to *stare decisis*. In Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306, 306 (1796), the Court said in reference to fee-shifting: "The general practice of the United States is in opposition [*sic*] to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute." A more recent case affirming the Rule is F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116 (1974).

63. For a more extended discussion of this aspect of the rationale, see the Fourth Circuit's opinion in Bradley v. School Board, 472 F.2d 318, 329-31 (4th Cir. 1972).

64. 95 S. Ct. at 1633.

65. Justice Marshall wrote the main dissenting opinion in which Justice Brennan, who had written a brief dissent, joined.

66. 95 S. Ct. at 1633. *See also* Comment, *The Allocation of Attorney Fees After* Mills v. Electric Auto-Lite Co., 38 U. CHI. L. REV. 316 (1971).

67. 95 S. Ct. at 1621-22.

68. *Id.* at 1625.

69. *Id.* at 1627.

70. *Id.* at 1625: *See* Lee v. Southern Homesites, Inc., 444 F.2d 143 (5th Cir. 1971).

instant case[71] were found to be sufficiently important, "it would appear a wide range of statutes would arguably satisfy the criterion of public importance,"[72] and a flood of litigation would ensue.[73]

The dissent, however, felt that appropriate standards could be developed. Justice Marshall proposed a three-part test:

> The reasonable cost of the plaintiff's representation should be placed on the defendant if (1) the important right being protected is one actually or necessarily shared by the general public or some class thereof; (2) the plaintiff's pecuniary interest in the litigation, if any, would not normally justify incurring the cost of counsel; and (3) shifting that cost to the defendant would effectively place it on the class that benefits from the litigation.[74]

The test may offer no real solution, however. The first part would still confront the Court with a policy choice of which Congressional enactments should be so classified.[75] The third part is inconsistent with the private attorney general exception; it imposes a restrictive condition that renders Marshall's concept of that exception virtually indistinguishable from the *Mills* common benefit doctrine.[76]

Ultimately, the instant decision rests upon two policy considerations important to the present Court majority. The first is a refusal of the role of a superlegislature – a refusal to assume the initiative in national policy when Congress has not acted.[77] The second is a desire to avoid facilitating access to the overburdened federal courts at a time of increased emphasis on private litigation in the public interest.

The private attorney general doctrine represented a strong challenge to the long-standing American Rule against fee shifting. The doctrine, however, involved difficult policy considerations. It was necessary to determine: the importance of individual statutory rights to society; whether private defendants should bear the costs of implementing public policy;[78] and whether the re-

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71. Mineral Leasing Act, 30 U.S.C. §185 (1970).

72. 95 S. Ct. at 1625.

73. In Hall v. Cole, 412 U.S. 1 (1973), Justice White dissenting from the award of attorneys' fees on the basis of the common fund exception, stated: "[T]he award of fees in the occasionally successful and meritorious case will not be worth the litigation the Court's decision will invite and foster." *Id.* at 16.

74. 95 S. Ct. at 1635.

75. *Id.* at 1625-26 n.39.

76. *Id.* See text accompanying notes 36-41 *supra*. See also note 50 supra.

77. As Justice Black, dissenting in Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), said: "The courts are interpreters, not creators, of legal rights to recover and if there is a need for recovery of attorneys' fees to effectuate the policies of the Act here involved, that need should in my judgment be met by Congress, not by the Court." *Id.* at 397.

78. In Sierra Club v. Lynn, 502 F.2d 43 (5th Cir. 1974), a case very similar to the instant case, the court of appeals held erroneous an assessment of attorneys' fees on the private attorney general rationale against a private developer who had been joined as a defendant in an environmental action with the Secretary of Housing and Urban Development. The district court had assessed the entire fee of $20,000 against the developer, since HUD was immunized by 28 U.S.C. §2412 (1970), the same statute that immunized the Secretary of the

sources of the judiciary are adequate to handle the potential increase in litigation. As these policy decisions may well be beyond the scope of the courts, the instant decision represents a sound recognition of judicial limitations.

Because the bad faith, common fund, and common benefit exceptions are usually unavailable,[79] the decision seems a definite setback for plaintiffs in public interest litigation. But it will hopefully stimulate congressional action leading to eventual statutory relief that will bring uniformity and predictability to this area.[80] Although the Court did not "purport to assess the merits or demerits of the American Rule,"[81] the instant decision certainly discourages its further erosion. Now, the unavailability of the private attorney general exception will result in renewed demands for revision of the Rule to accommodate public interest litigation. The Court, however, has directed the reformers to the congressional forum.

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Interior in the instant case. The Fifth Circuit expressly declined to follow the D.C. court of appeals' reasoning, concluding: "In the absence of proof that the private party controlled the government agency's actions or caused its default, it cannot be cast in judgment as a result of the agency's shortcomings . . . . The result of governmental immunity in this case is to require the plaintiffs to absorb their own legal expenses. Another solution for future cases must come from Congress rather than in whole or half from the pocket of an innocent party." 502 F.2d at 66.

79. See note 47 *supra.*

80. Initial Congressional response to *Alyeska* has included the following: (1) Representative Drinan (D-Mass.) has introduced two bills. One would shift plaintiff's fees against the United States in civil rights, consumer, and environmental cases challenging an agency decision (H.R. 7968, 94th Cong., 1st Sess. (1975)). The second would shift fees in civil rights actions (H.R. 7969, 94th Cong., 1st Sess. (1975)).

(2) Representative Crane (R-Ill.) has introduced a bill to shift fees to prevailing *defendants* in civil actions brought by the United States (H.R. 4675, 94th Cong., 1st Sess. (1975)).

(3) Representative Seiberling (D-Ohio) has introduced bills to include fee-shifting provisions in the Mineral Leasing Act of 1920 (H.R. 7825 & H.R. 8218, 94th Cong., 1st Sess. (1975)); the National Environmental Policy Act of 1969 (H.R. 7829 & H.R. 8222, 94th Cong., 1st Sess. (1975)); and in the injunction section of the Clayton Act (H.R. 7827 & H.R. 8219, 94th Cong., 1st Sess. (1975)).

The most sweeping legislation introduced in response to the instant case is Representative Seiberling's Federal Court Attorneys Fee Act, which proposes: "If in a civil action the court determines the interests of justice so require, the court shall award reasonable attorneys' fees to the prevailing party. The United States shall be liable for such fees the same as a private party." This proposal is a frontal attack on the American Rule itself, as well as the United States immunity under 28 U.S.C. §2412 (1970).

81. 95 S. Ct. at 1628.