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A Giant Step Backwards: Alyeska Pipeline Service Co. v. Wilderness Society' and Its Effect on Public Interest Litigation

A GIANT STEP BACKWARDS: ALYESKA PIPELINE SERVICE CO. v. WILDERNESS SOCIETY[1] AND ITS EFFECT ON PUBLIC INTEREST LITIGATION

In *Alyeska Pipeline Service Co. v. Wilderness Society,* the Supreme Court sounded a death knell to growing hopes that the judiciary would exercise its equity powers to shift the prevailing party's attorneys' fees to the losing litigant in public interest litigation.[2] In doing so, the Court expressly reaffirmed the "American Rule" under which attorneys' fees generally are not recoverable by the prevailing litigant in federal litigation.[3] Congress has often acted to mitigate the severity of the American Rule by authorizing awards of attorneys' fees to litigants suing under specific statutes.[4] The courts had also awarded attorneys' fees under two judicially

1. 421 U.S. 240 (1975) (Brennan & Marshall, JJ., dissenting; Douglas & Powell, JJ., not participating).

2. *See, e.g.,* Nussbaum, *Attorney's Fees in Public Interest Litigation,* 48 N.Y.U.L. REV. 301 (1973) [hereinafter cited as Nussbaum]; 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 *Judicial Green Light*]; Note, *The Allocation of Attorneys' Fees After* Mills v. Electric Auto-Lite Co., 38 U. CHI. L. REV. 316 (1971) [hereinafter cited as *After Mills*]; Comment, *Court Awarded Attorneys' Fees and Equal Access to the Courts,* 122 U. PA. L. REV. 636 (1974) [hereinafter cited as *Equal Access*].

3. 421 U.S. at 247, 270–71. For application of the American Rule, see F.D. Rich Co. v. United States *ex rel.* Industrial Lumber Co., 417 U.S. 116, 126–31 (1974); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717–18 (1967); Stewart v. Sonneborn, 98 U.S. 187 (1878); Flanders v. Tweed, 82 U.S. (15 Wall.) 450 (1873); Oelrichs v. Spain, 82 U.S. (15 Wall.) 211 (1872); Day v. Woodworth, 54 U.S. (13 How.) 363 (1852); Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796).

4. *See, e.g.,* Amendment to Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (Supp. IV, 1974); Perishable Agricultural Commodities Act § 7, 7 U.S.C. § 499g(b) (1970); Bankruptcy Act of July 1, 1898, 11 U.S.C. §§ 104(a)(1), 641–44 (1970); Clayton Act § 4, 15 U.S.C. § 15 (1970); Unfair Competition Act § 801, 15 U.S.C. § 72 (1970); Securities Act of 1933, 15 U.S.C. § 77k(e) (1970); Trust Indenture Act of 1939, 15 U.S.C. §§ 77ooo(e), 77www(e) (1970); Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(e), 78r(a) (1970); Copyright Act § 116, 17 U.S.C. § 116 (1970); Truth-in-Lending Act, 15 U.S.C. § 1640(a)(3) (Supp. IV, 1974) *amending* 15 U.S.C. § 1640(a) (1970); Organized Crime Control Act of 1970 tit. IX § 901(a), 18 U.S.C. § 1964(c) (1970); Education Amendments of 1972 tit. VII § 718, 20 U.S.C. § 1617 (Supp. IV, 1974); Norris-LaGuardia Act § 7, 29 U.S.C. § 107(e) (1970); Fair Labor Standards Act of 1938 § 16, 29 U.S.C. § 216(b) (1970); Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 § 13, 33 U.S.C. §§ 928(a) & (b) (Supp. IV, 1972); Federal Water Pollution Control Act Amendments of 1972 tit. V § 505, 33 U.S.C. § 1365(d) (1974); Marine Protection, Research and Sanctuaries Act of 1972 tit. I § 105, 33 U.S.C. § 1415(g)(4) (Supp. IV, 1974); 35 U.S.C. § 285 (1970) (patent infringement); Clean Air Amendments of 1970, 42 U.S.C. § 1857h-2(d) (1970); Civil Rights Act of 1964 tit. VII § 706, 42 U.S.C. § 2000e-5(k) (1970); Civil Rights Act of 1964 tit. II § 204, 42 U.S.C. § 2000a-3(b) (1970); Fair Housing Act of 1968 tit. VIII, 42 U.S.C. § 3612(c) (1970); Noise Control Act of 1972 § 12, 42 U.S.C. § 4911(d) (Supp. IV, 1974); Railway Labor Act

fashioned exceptions to the American Rule. Under the common benefit exception attorneys' fees are awarded to a party whose successful suit has generated a benefit that he shares with others not participating in the litigation.[5] Under the improper conduct exception a defendant whose improper behavior has caused or oppressively complicated the suit is required to pay the attorneys' fees of the prevailing plaintiff.[6] In *Alyeska,* the Court halted the development of a third exception. It barred judicial use of the "private attorneys general" theory[7] to award attorneys' fees to the environmentalist groups that had sued to prevent the construction of a trans-Alaska oil pipeline which, as originally planned, would have violated several statutes. Under the private attorneys general concept, awards of attorneys' fees had been made to prevailing private or public interest litigants whose suits had clarified or enforced the law.[8] In an opinion reminiscent of the views of the late Justice Frankfurter that the judiciary should abstain from law making and leave that responsibility to the national legislature,[9] the Supreme Court reversed the United States Court of

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§ 3(p), 45 U.S.C. § 153(p) (1970); Merchant Marine Act of 1936 § 810, 46 U.S.C. § 1227 (1970); Federal Communications Act of 1934 § 206, 47 U.S.C. § 206 (1970); Interstate Commerce Act pt. I, 49 U.S.C. §§ 8 & 16(2) (1970); Interstate Commerce Act pt. II, 49 U.S.C. § 908(b) (1970); FED. R. CIV. P. 37(a) & (c).

5. *See* notes 61–79 and accompanying text *infra.*

6. *See* notes 80–88 and accompanying text *infra.*

7. This doctrine was the basis of the lower court's order awarding attorneys' fees. Wilderness Soc'y v. Morton, 495 F.2d 1026 (D.C. Cir. 1974) (en banc), *rev'd sub nom.* Alyeska Pipeline Service Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).

8. Many lower courts have recently used this rationale to redistribute the prevailing party's attorneys fees. In *Alyeska* the Court noted this, 421 U.S. at 270 n.46, citing cases that "erroneously . . . employed the private-attorney-general approach" to award attorneys' fees where the plaintiff had sued to vindicate constitutional or statutory rights: Souza v. Travisano, 512 F.2d 1137 (1st Cir. 1975) (protection of prison inmates' rights); Taylor v. Perini, 503 F.2d 899 (6th Cir. 1974) (prevention of discriminatory treatment in prisons); Hoitt v. Vitek, 495 F.2d 219 (1st Cir. 1974) (protection of inmates' civil rights against administrative discrimination); Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974) (action to compel reapportionment to protect voting rights); Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972) (prevention of racial discrimination in public employment); Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972) (per curiam) (fair rental enforced under 42 U.S.C. § 1982 (1970)); Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971) (suit in response to discrimination in real estate sales); La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972) (failure of governmental enforcement to prevent non-compliance with environmental protection and housing assistance laws). *See also* Brewer v. School Bd., 456 F.2d 943 (4th Cir. 1972) (Winter, J., concurring), *cert. denied,* 406 U.S. 933 (1972) (suit to compel school desegregation); Harrisburg Coalition Against Ruining the Environment v. Volpe, 381 F. Supp. 893 (M.D. Pa. 1974) (suit to enjoin highway construction detrimental to the environment); Sierra Club v. Lynn, 364 F. Supp. 834 (W.D. Tex. 1973) (highway construction enjoined to protect environmental interests; *losing* party awarded attorneys' fees).

9. *See, e.g.,* Frankfurter, *Some Reflections on the Reading of Statutes,* 47 COLUM. L. REV. 527, 533–35, 538–40 (1947).

> The vital difference between initiating policy, often involving a decided break with the past, and merely carrying out a formulated policy, indicates the relatively

Appeals for the District of Columbia and held that only Congress could authorize such an exception to the American Rule.[10]

This Note will examine *Alyeska* and, more broadly, how the case fits into the parameters of the American Rule. It will take a close look at the history of the American Rule and the recognized exceptions to it and will discuss many of the factors and precedents that the Court considered or failed to consider in refusing to use its historical equity powers either to extend the common benefit exception to cover the *Alyeska* facts or to adopt the private attorneys general rationale.

Alyeska

In March, 1970, the Wilderness Society, the Friends of the Earth, and the Environmental Defense Fund, Inc., sued to enjoin the Secretary of the Interior[11] from issuing rights-of-way permits[12] requested by Alyeska, an oil company consortium.[13] Alyeska planned to use the rights-of-way over federally owned land in the construction of a trans-Alaska pipeline designed to connect the lower states to the extensive new oil field discovered in Alaska in 1968.[14] The environmentalist plaintiffs claimed that the issuance of the permits would violate the Mineral Lands Leasing Act,[15]

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narrow limits within which choice is fairly open to courts and the extent to which interpreting law is inescapably making law. To say that, because of this restricted field of interpretive declaration, courts make law just as do legislatures is to deny essential features in the history of our democracy. It denies that legislation and adjudication have had different lines of growth, serve vitally different purposes, function under different conditions, and bear different responsibilities.

Id. at 534.

10. 421 U.S. at 270–71.

11. Alyeska and the State of Alaska intervened in the suit in September of 1971. 421 U.S. at 4 n.7.

12. Wilderness Soc'y v. Hickel, 325 F. Supp. 422 (D.D.C. 1970).

13. Originally Atlantic Richfield Company, Humble Oil & Refining Company, and the British Petroleum Corporation formed the Trans-Alaska Pipeline System which was replaced in 1970 by Alyeska, owned by ARCO Pipeline Company, Sohio Pipeline Company, Humble Pipeline Company, Mobil Pipeline Company, Phillips Petroleum Company, Amerada Hess Corporation, and Union Oil Company of California, 421 U.S. at 241–42 n.2.

14. The full extent of this oil field is not known, but knowledgeable estimates range from ten to seventy billion barrels. If the higher estimates ultimately prove to be correct, this oil field would be the second or third largest in the world and should be of immense political advantage and use, ending much of the United States' dependence on foreign oil. The discovery and the development of this field, then, are immensely important to the country as well as to the oil companies. *See* Dominick & Brody, *The Alaska Pipeline:* The Wilderness Society v. Morton *and the Trans-Alaska Pipeline Authorization Act,* 23 AM. U.L. REV. 337, 348–49 n.43 (1973) [hereinafter cited as Dominick & Brody].

15. 30 U.S.C. § 185 (1970). The consortium applied for "special land use permits," seeking as much as 246 feet more land width in some areas than the width-of-the-pipe plus 50 feet right-of-way the Act authorized the Secretary of the Interior to grant. 421 U.S. at 242 and n.4.

the National Environmental Policy Act of 1969 (NEPA)[16] and the National Forest Lands — Use and Occupancy Act.[17] The district court granted a temporary injunction[18] but later dissolved it and dismissed the suit.[19] The plaintiffs appealed, and the Court of Appeals for the District of Columbia expedited hearing the case in view of its urgency.[20] Basing its decision solely on the Secretary's violation of the Mineral Lands Leasing Act, the court issued a permanent injunction without considering the complex NEPA issues.[21] The Supreme Court denied certiorari.[22] Reacting quickly to the injunction, Congress enacted the Trans-Alaska Pipeline Authorization Act[23] which authorized prompt construction of the pipeline. By the same Public Law, Congress amended the Mineral Lands Leasing Act both to allow for wider rights-of-way, such as those requested by Alyeska, and to define with greater specificity the process by which rights-of-way are to be awarded and the conditions under which they will be held.[24] The amended statute was generally less favorable to permit holders and applicants than was the original Mineral Lands Leasing Act.[25] Con-

16. 42 U.S.C. §§ 4321–47 (1970). The plaintiffs contended that the Interior Department's impact statement (comprising six volumes and costing over twelve million dollars, Lieberman, *5-Year Fight on Alaska Pipeline Made It Better and More Costly,* N.Y. Times, May 26, 1974, § 1 at 1, col. 1) failed to consider adequately either the alternative of a pipeline route through Canada or the deferral of a decision until more information on a Canadian route could be considered. Wilderness Soc'y v. Morton, 479 F.2d 842, 846 (D.C. Cir. 1973).

17. 16 U.S.C. § 497a (1970). The plaintiffs argued that a permit issued by the Supervisor of the Forest Service violated the eighty acre limit imposed by these sections. *See* Wilderness Soc'y v. Hickel, 325 F. Supp. 422 (D.D.C. 1970).

18. 325 F. Supp. at 424.

19. 421 U.S. at 244. The dismissal decision of August 15, 1972, was unreported and contained no findings of fact.

20. The court noted:

> [A]ny decision further enjoining construction of this project will impose serious costs on the oil companies who plan to build the pipeline and who have made substantial investments. . . . The project means much needed jobs and income to the people of the State of Alaska, and . . . badly needed revenues for the Alaska State Treasury.

Wilderness Soc'y v. Morton, 479 F.2d 842, 847 (D.C. Cir. 1973).

21. *Id.* at 889, 893. The court noted that the NEPA issues were "not ripe for adjudication at the present time." The necessity of considering these issues was specifically obviated by Congress in the Trans-Alaska Pipeline Authorization Act. *See* notes 23–26 and accompanying text *infra.*

22. 411 U.S. 917 (1973).

23. 43 U.S.C. §§ 1651–55 (Supp. IV, 1974).

24. Act of November 16, 1973, Pub. L. No. 93–153, tit. I § 101, 87 Stat. 576, *amending* 30 U.S.C. § 185 (1970) (codified at 30 U.S.C. § 185 (Supp. III, 1973)).

25. For example, the new safety and liability standards, the requirement that all permit holders pay fair market value for the right-of-way, costs of permit application and monitoring are contained in 30 U.S.C. §§ 185(h), (*l*), (x) (1970). *See* Lieberman, *5-Year Fight on Alaska Pipeline Made It Better and More Costly,* N.Y. Times, May 26, 1974, § 1, at 1, col. 1. In an evaluation by Walter Hickel, an original

gress acted to increase the nation's independent oil supply and to mitigate the severe shortages which became apparent in the early 1970's and clearly did not intend to make the oil companies the ultimate "winners" of this litigation. As explained by Senator Henry Jackson, the new Act was adopted "*in spite of* the testimony and arguments presented by industry and administration spokesmen who advocated construction" of the Pipeline.[26] As a result of the more stringent safety and financial liability requirements imposed by the new Act, the environment was protected, government monies were saved, and the public interest was served.[27]

The environmentalist plaintiffs then sought in the court of appeals to recover their costs and attorneys' fees expended in the litigation from Alyeska, the State of Alaska, and the United States on the grounds among others that they had acted as private attorneys general in enforcing the Mineral Lands Leasing Act.[28] There was no statutory authorization for the award of attorneys' fees under the Mineral Lands Leasing Act, and the court concluded that neither of the two recognized exceptions[29] to the American Rule applied to the facts.[30] Yet the court still permitted the plaintiffs to recover because "the equities of this particular case support an award of attorneys' fees . . . ."[31] Recognizing that the plaintiffs might not have undertaken the litigation without the possibility of such an award, the court reasoned that the plaintiffs, "[a]cting as private attorneys general, . . . not only have . . . ensured the proper functioning of our system of government, but . . . have protected in a very concrete manner substantial public interests."[32] Interpreting a 1966 cost statute[33] to prohibit their taxing attorneys' fees against the federal government without

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defendant in the litigation: "That first pipeline wouldn't have just been an environmental disaster. . . . [i]t would have been a total engineering disaster." *Id.* at 34, col. 4.

26. 119 CONG. REC. 22798 (July 17, 1973) (report to the Senate supporting the Trans-Alaska Pipeline Authorization Act) (emphasis added).

27. Because the litigation directly caused the passage of the Act and secured these public benefits, the court of appeals termed the litigation of "great therapuetic value" and "a catalyst to effect change and thereby achieve a great public service." *See* 495 F.2d at 1033–34.

28. Wilderness Soc'y v. Morton, 495 F.2d 1026 (D.C. Cir. 1974) (en banc).

29. For a discussion of the common benefit and improper conduct exceptions to the American Rule, see notes 61–88 and accompanying text *infra.*

30. 495 F.2d at 1029.

31. *Id.* at 1036. Judge Wright wrote for the majority of four. Judges MacKinnon, Wilkey and Robb dissented.

32. *Id. See also* Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation,* 88 HARV. L. REV. 849, 901 n.223 (1975) [hereinafter cited as Dawson, *Public Interest Litigation*].

33. 28 U.S.C. § 2412 (1970) provides:

> Except as otherwise specifically provided by statute, a judgment for costs . . . but *not including the fees and expenses of attorneys may be awarded* to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity. . . . (emphasis added).

congressional provision, and refusing to hold the State of Alaska responsible because it had voluntarily entered the suit simply to present another viewpoint,[34] the court taxed the non-governmental defendant Alyeska only with its proportionate share (one-half) of the environmental groups' fees.[35]

In reversing these awards, the Supreme Court refused to adopt the private attorneys general rationale for fee-shifting without specific congressional authorization.[36] After a largely historical review of prior cases[37] and prior federal statutes on attorneys' fees,[38] the Court concluded that, because neither the common benefit[39] nor the improper conduct[40] exception applied in this case, there was no alternative to application of the American Rule.

THE AMERICAN RULE AND ITS COMMON LAW EXCEPTIONS

The American Rule was adopted by the Supreme Court in 1796 in *Arcambel v. Wiseman*,[41] when the Court reversed an award of $1600 for counsel's fees entered by a lower federal court. The Court recognized that "the general practice of the United States is in opposition to [this award]" even though the colonists had inherited from England a tradition of awarding attorneys' fees to prevailing plaintiffs. In the English common law courts, these awards were authorized by parliamentary statutes dating from as early as 1275. In equity courts, awards had long been made regard-

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34. 495 F.2d at 1036 n.8.

35. *Id.* at 1036. The vigorous dissents by Judges MacKinnon and Wilkey objected to applying the private attorneys general rationale to the facts of the case since they found only a public detriment in the delayed construction of the pipeline: Alaskan oil will reach Americans at least three years later and cost at least $637 million more than initially intended. The dissents did not question the validity of the private attorneys general rationale but argued strongly that it was inapplicable to the facts. 495 F.2d at 1039–46.

36. 421 U.S. at 269–70. Justice White delivered the opinion of the Court.

37. *Id.* at 249–50, 253–57. Justice Marshall, however, argued in dissent that there *are* "cases [which] plainly establish by presenting persuasive precedents an independent basis for equity courts to grant attorneys' fees under several rather generous rubrics." *Id.* at 277; *accord,* Justice Brennan's dissent, *id.* at 271–72. *See also* notes 110–13 and accompanying text *infra.*

38. *Id.* at 250–57. Early statutes holding federal courts to the practice of the state in which the federal court was located had expired or were repealed by 1800. *See also* note 60 *infra.*

39. For a discussion of the common benefit exceptions to the American Rule, see notes 61–79 and accompanying text *infra.* For a discussion of how the Court could have applied the common benefit exception to the *Alyeska* facts, see text accompanying notes 94–105 *infra.*

40. For a discussion of the improper conduct exception, see notes 80–88 *infra.*

41. 3 U.S. (3 Dall.) 306 (1796). The Court noted the infirmity of the principle: "[E]ven if that practice [no awards of attorneys' fees] were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute."

less of statutes.[42] Perhaps the reluctance of American courts to shift the cost of legal representation arose from the general distrust of the legal profession prevalent in colonial society.[43] Moreover, laymen often tried their own cases, thus obviating the need for any fee-shifting. In addition, the law, with its adversary system, has often been conceptualized as a sporting contest with a winner and a loser; thus, it might be thought unfair, or unsportsmanlike, to burden the loser with the winner's costs,[44] including his attorneys' fees. It has been argued, however, that it was a "process of gradual forgetting rather than a deep-seated moral argument that has apparently caused the abolition of the prevailing party's right to the recovery of his counsel fees."[45]

Yet many attorneys today support the American Rule as "part of our democratic tradition and a bulwark of equality."[46] In 1964, Justice Goldberg rejected the "historical accident" explanation of the origin of the American Rule and defended the ban on fee-shifting as "a deliberate choice to insure that access to the Courts be not effectively denied to those of moderate means,"[47] reasoning that a poor plaintiff would be deterred from suing by the possibility of having to pay not only his but also his opponent's costs. Whatever the rationale, the Supreme Court gradually armored the

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42. Goodhart, *Costs,* 38 YALE L.J. 849, 851–56 (1929) [hereinafter cited as Goodhart].

43. In every one of the colonies, practically throughout the 17th century, a lawyer or attorney was a character of disrepute or suspicion. . . . In many of the colonies, persons acting as attorneys were forbidden to receive any fee; in some, all paid attorneys were barred from the courts; in all, they were subject to the most rigid restrictions as to fees and procedures.

C. WARREN, A HISTORY OF THE AMERICAN BAR 4 (1966 ed.).

44. *See* Goodhart, *supra* note 42, at 876–77; Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?,* 20 VAND. L. REV. 1216, 1220–24 (1967) [hereinafter cited as *The Ultimate Burden*].

45. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society,* 54 CALIF. L. REV. 792, 799 (1966) [hereinafter cited as Ehrenzweig]. Professor Ehrenzweig called the American Rule "a festering cancer in the body of our law without whose excision our society will not be great." *Id.* at 794.

46. 1962 ABA SECTION OF INTERNATIONAL AND COMPARATIVE LAW, PROCEEDINGS, REPORT OF COMMITTEE ON COMPARATIVE PROCEDURE AND PRACTICE 117–18. The report continued: "[The American Rule] reduces the differences in part between the wealthy and the poor and permits the less affluent to press for the redress of wrongs" without the threat of paying his opponents attorneys fees. *Id.* at 118; *accord,* Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967), discussed in notes 161–65 and accompanying text *infra.*

47. Farmer v. Arabian American Oil Co., 379 U.S. 227, 237 (1964) (concurring opinion, quoting Judge Smith in the court below, 324 F.2d 359, 365). In Dawson, *Public Interest Litigation, supra* note 32, the rationale that fewer poor litigants are deterred from litigation by the American Rule than would be by the "English Rule" is called an "unverifiable guess." *Id.* at 849. Perhaps American attorneys are reluctant to adopt fee-shifting because it would require that they relinquish the contingent fee system that often pays so well. Court-awarded and statutorily prescribed attorneys' fees probably would be lower than those recovered under a contingent fee arrangement.

Rule with precedents[48] by fashioning only two exceptions to it since 1796,[49] and assured its survival as a virtual legal oddity in present times.[50]

In 1853, Congress enacted a statute designed to standardize cost awards in federal courts and which included specified amounts that prevailing parties could recover from their opponents to pay attorneys' fees.[51] Despite inflation, these specific amounts remained constant throughout subsequent revisions;[52] although awards under this statute were strictly enforced by the Court,[53] they were largely unsought after 1879, due to the twenty dollar limit imposed by the statute.

Against this background of outmoded statutory amount limitations and the federal courts' persistence in otherwise following the American Rule, Congress has made express provisions in an increasing number of

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48. *See, e.g.*, F.D. Rich Co. v. United States *ex rel.* Industrial Lumber Co., 417 U.S. 116, 126–31 (1974); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717–18 (1967); Stewart v. Sonneborn, 98 U.S. 187 (1878); Flanders v. Tweed, 82 U.S. (15 Wall.) 450 (1872); Oelrichs v. Spain, 82 U.S. (15 Wall.) 211 (1872); Day v. Woodworth, 15 U.S. (13 How.) 363 (1852); Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796).

49. For a discussion of these exceptions, see notes 61–88 and accompanying text *infra*.

50. For a discussion on the prevalence of fee-shifting in other countries, see Baeck, *Imposition of Fees of Attorney of Prevailing Party Upon the Losing Party Under the Laws of Austria,* 1962 PROCEEDINGS, *supra* note 46, at 119; Baeck, *Imposition of Legal Fees and Disbursements of Prevailing Party Upon the Losing Party — Under the Laws of Switzerland,* 1962 PROCEEDINGS 124; Dietz, *Payment of Court Costs by the Losing Party Under the Laws of Hungary,* 1962 PROCEEDINGS 131; Freed, *Payment of Court Costs by the Losing Party in France,* 1962 PROCEEDINGS 126; Schima, *The Treatment of Costs and Fees of Procedure in the Austrian Law,* 1962 PROCEEDINGS 121; and Nussbaum, *supra* note 2, at 310.

51. Act of Feb. 26, 1853, 10 Stat. 161 (1853) (emphasis added):

> That in lieu of the compensation now allowed to attorneys, solicitors, and proctors in the United States courts . . . the following and *no other compensation* shall be taxed and allowed. But this act shall not be construed to prohibit attorneys, solicitors and proctors from charging to and receiving from their clients, other than the Government, such reasonable compensation for their services, *in addition to* the taxable costs as may be in accordance with general usage . . . or may be agreed upon between the parties.

The Act then specified the sums that could be taxed to compensate the lawyer for the prevailing party, but these did not exceed a twenty dollar docket fee for civil and criminal trials by jury or a final hearing in equity or admiralty.

52. The wording remained similar and the fee schedules the same through 1926 when they were codified as 28 U.S.C. §§ 521 & 572. When the Code was revised in 1948, the statute became 28 U.S.C. §§ 1920 & 1923(a), and the fee limits appeared to become discretionary as the stricture "and no other compensation shall be allowed" was removed. 28 U.S.C. §§ 1920, 1923(a) (1970). Nevertheless, the *Alyeska* Court concluded that these changes did not alter "the longstanding rule limiting attorneys' fees to the amounts schedule." 421 U.S. at 256 n.29. The dissent is critical of relying on the statute as presently written as "an uncompromising bar to equitable fee awards." *Id.* at 280.

53. Flanders v. Tweed, 82 U.S. (15 Wall.) 450 (1872); *see In re* Pashcal, 77 U.S. (10 Wall.) 483, 493–94 (1870) (dictum).

laws[54] for substantial awards of attorneys' fees to successful plaintiffs. It has used the private attorneys general theory to authorize these awards to the plaintiff whose suit protects public rights or interests.[55] While some laws prescribe a mandatory award of attorneys' fees[56] to the prevailing plaintiff, most provide that attorneys' fees be awarded at the court's discretion.[57] As a result of these congressional enactments, the Supreme Court in *Alyeska* concluded that only Congress could provide for the award of attorneys' fees under the private attorneys general rationale;[58] thus, absent statutory guidance, the American Rule would operate to bar an award of attorneys' fees to the environmental groups.[59]

The Court's unwillingness to fashion another exception to the American Rule and allow fee-shifting for private attorneys general without statutory authorization appears inconsistent with the Court's approval of the two existing exceptions to the Rule. Both the common benefit and improper conduct exceptions developed without congressional mandate and thus depend solely on the Court's inherent equity powers.[60] The common benefit exception originated over ninety years ago in *Trustees v. Greenough*[61] where the Court was faced with the obvious injustice of holding a single creditor responsible for the entire cost of litigation when the suit he won preserved a trust fund for other bondholders as well as for himself. The Court held that the plaintiff's attorneys' fees should be paid from the common fund so that all who benefited from the suit would bear equally its financial burden.[62]

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54. *See* note 3 *supra*.

55. The plaintiff can recover his attorneys' fees, for example, if he sues under the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1415(g)(4) (Supp. IV, 1974); Clean Air Amendments of 1970, 42 U.S.C. § 1857h-2(d) (1970); Civil Rights Act of 1964 tit. II, 42 U.S.C. 2000a-3(b) (1970); Civil Rights Act of 1964 tit. VII, 42 U.S.C. § 2000e-5(k) (1970); Noise Control Act of 1972, 42 U.S.C. § 4911(d) (Supp. IV, 1974).

56. Attorneys' fees are a mandatory award under the Clayton Act, 15 U.S.C. § 15 (1970); Truth-in-Lending Act, 15 U.S.C. § 1640(a)(3) (Supp. IV, 1974); Fair Labor Standards Act, 29 U.S.C. § 216(b) (1970); Merchant Marine Act of 1936, 46 U.S.C. § 1227 (1970).

57. *See, e.g.*, Securities Act of 1933, 15 U.S.C. § 77k(e) (1970); Trust Indenture Act, 15 U.S.C. § 77www(a) (1970); Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(e), 78r(a) (1970); Clean Air Amendments of 1970, 42 U.S.C. § 1857h-2(d) (1970); Civil Rights Act of 1964 tit. II, 42 U.S.C. § 2000a-3(b) (1970); Civil Rights Act of 1964 tit. VII, 42 U.S.C. § 2000e-5(k) (1970); Noise Control Act of 1972, 42 U.S.C. § 4911(d) (Supp. IV, 1974).

58. 421 U.S. at 271.

59. *Id.*

60. Federal courts from their inception have been endowed with equity jurisdiction like that of the English Courts of Chancery. Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (15 How.) 556, 603 (1851). For a discussion of the historical basis and extent of these powers, see Guardian Trust Co. v. Kansas City So. Ry., 28 F.2d 233, 240-43 (8th Cir. 1928).

61. 105 U.S. 527 (1881).

62. *Id.* at 532.

This exception was broadened considerably in *Central Railroad & Banking Co. v. Pettus*[63] where the attorneys who had brought a successful class action sued to recover attorneys' fees from passive members of the prevailing class. Even though the attorneys had been paid their agreed upon fees by the named plaintiffs prior to the suit for fees and despite the absence of an agreement with the inactive members of the class, the Court allowed them to recover additional fees because "every ground of justice" demanded that those who "accepted the fruits" of the litigation participate in paying for it.[64] While the common benefit exception had originally operated to protect the prevailing plaintiff from the injustice of bearing all attorneys' fees himself, *Pettus* went far beyond that rationale and gave an independent right to additional fees to the lawyer.[65]

The common benefit concept was expanded still further in *Sprague v. Ticonic National Bank*.[66] The plaintiff obtained a lien on certain funds of an insolvent bank where she was a depositor. The Court allowed her to recover her attorneys' fees from these funds, reasoning that since the principle of stare decisis operated to give other depositors rights to similar liens, the plaintiff should recover her attorneys' fees from the common funds.[67] Justice Frankfurter seized the occasion to note the Court's wide equity powers that allow a shift of attorneys' fees in an attempt to avoid injustice,[68] in spite of the longstanding American Rule.[69]

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63. 113 U.S. 116 (1885).

64. *Id.* at 127. To secure their extra fee, the lawyers were given a lien on the salvaged assets made available to the creditors.

65. Professor Dawson suggests that the Court must have been "bemused" to allow the lawyers' "appeal to unjust enrichment" to satisfy "such a far-fetched claim." Dawson, *Lawyers and Involuntary Clients: Attorneys' Fees From Funds,* 87 HARV. L. REV. 1587, 1604 (1974) [hereinafter cited as Dawson, *Fees from Funds*].

66. 307 U.S. 161 (1939).

67. *Id.* at 167.

68. *Id.* (emphasis added):

> [W]hen such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation — the absence of an avowed class suit or the creation of a fund, . . . through *stare decisis* rather than through a decree — *hardly touch the power of equity* in doing justice as between a party and the beneficiaries of his litigation.

While these equity powers have been used to award attorneys' fees only if the attorneys' services were connected with litigation, there have been a few exceptions. *See, e.g.,* Winton v. Amos, 255 U.S. 373 (1921) (securing beneficial legislation for Choctaw Indians by successful lobbying); Blau v. Rayette-Faberge, Inc., 389 F.2d 469 (2d Cir. 1968) (notification of company official's illegal actions); Louisiana State Mineral Bd. v. Abadie, 164 So. 2d 159 (La. App. 1964) (lobbying services).

69. The Court in *Alyeska* accorded only superficial recognition to these broadly exercised discretionary powers by noting, in one paragraph, that the 1853 Act, note 51 *supra,* had been construed as not infringing or limiting the Court's equity powers. 421 U.S. at 257–58. The *Alyeska* Court thus overlooked the possible conclusion that because the judiciary independently intervened to prevent injustice by awarding attorneys' fees to the prevailing plaintiffs in the common benefit cases, similar discretionary intervention should occur in this case. The dissent seized this point and

These equity powers were again exercised by the Court in *Mills v. Electric Auto-Lite Co.*[70] when the burden of paying attorneys' fees was shifted from the individual stockholder, who sued because of misleading proxy statements made by the company, to all the stockholders benefiting from the suit. Again the Court exercised its discretionary power and broadened the common benefit exception. Not only was the suit brought under a statute[71] silent regarding redistribution of attorneys' fees, but the suit had "not yet produced, and may never produce a monetary recovery from which the fees could be paid. . . ."[72] Yet the Court held that the prevailing plaintiff could recover his attorneys' fees from the company itself because "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."[73] Although the common benefit exception to the American Rule originated with a distinct fund from which the Court could draw the monies for the plaintiff's attorneys' fees, in *Mills* the burden of the fees was borne by the defendant corporation and ultimately by its shareholders, a necessary shift since the suit had not generated any monetary benefit for any of the prevailing parties.[74] This liberal trend was supported in *Hall v. Cole,*[75] which shifted the plaintiff's attorneys' fees to the losing defendant union which had been ordered to reinstate the plaintiff to union membership after he had been expelled illegally for criticizing union officials. The suit thus protected the freedom of speech of all the union's members. In forcing the union, and consequently all the union members to pay the plaintiff's attorneys' fees, the Court reasoned "that an award of counsel fees to a successful plaintiff . . . [under a statute, the Labor Management Reporting and Disclosure Act (LMRDA),[76] that was silent in this regard] f[ell] squarely within the traditional equitable power of federal courts to award such fees" whenever necessary to prevent injustice, and was "consistent

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argued that judicial use of the private attorneys general exception for fee awards is justified by the Court's equity powers exercised in the common benefit cases. *Id.* at 275.

70. 396 U.S. 375 (1970).

71. *Mills* was based on a violation of the Securities Act of 1934 § 14(a), 15 U.S.C. § 78n(a) (1970).

72. 396 U.S. at 392.

73. *Id.* at 396 (footnotes omitted). *See also* Hornstein, *The Counsel Fee in Stockholders' Derivative Suits,* 39 COLUM. L. REV. 784 (1939); Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards,* 69 HARV. L. REV. 658 (1954), which urged recovery for minority stockholders whose suits cleansed or improved their companies.

74. *See* Dawson, *Public Interest Litigation, supra* note 32, at 868–69. Some commentators were optimistic that *Mills,* through its shifting of attorneys' fees to the defendants, heralded a move to change the American Rule. *See* Nussbaum and *After Mills, supra* note 2.

75. 412 U.S. 1 (1973).

76. 29 U.S.C. §§ 401–12 (1970).

with both the [LMRDA] and the historic equitable power of federal courts to grant such relief in the interests of justice."[77]

Thus the common benefit exception to the American Rule, originally applied in the narrow situation in which the prevailing plaintiff sought to secure his attorneys' fees from the specific fund that his suit recovered,[78] expanded to encompass situations in which a significant, non-financial benefit was secured.[79] In theory and in practice, the Court accepted the inherent justice of shifting the burden of the litigation from the plaintiff to members of the plaintiff's class who also benefited from the suit. Where necessary, the defendants in these cases were taxed with the fees because they were the most appropriate parties for the distribution of the burden among the beneficiaries.

More often, fees have been shifted to the losing litigant when he has acted in bad faith. The Court has thus used its discretionary powers and shifted the prevailing plaintiff's attorneys' fees to the losing litigant in cases where the defendant has engaged in improper, oppressive, fraudulent, or vexatious conduct. In *Vaughn v. Atkinson*,[80] for example, a sailor had been forced to leave his ship to receive extended medical treatment. His numerous requests to his employers for maintenance and cure payments to which he was entitled were ignored. Because the defendant's persistent and callous failures to pay or even to respond forced the plaintiff to go to court, and because the fee of plaintiff's attorney would have consumed half of the plaintiff's entitlement, the Court shifted the fee to the defendants.

In addition, fees have been awarded to the plaintiff when the defendant has acted improperly during the suit,[81] or where the defendant's conduct unnecessarily prolonged the litigation. In *Toledo Scale Co. v. Computing Scale Co.*,[82] for example, a patent infringement case, the defendant had increased the cost of the litigation by vexatiously instituting new suits in other jurisdictions to enjoin enforcement of the plaintiff's judgment. Courts have also used the punitive rationale of this exception to provide for the plaintiff's recovery of his attorneys' fees in civil rights litigation where the defendant's conduct has neither been in good faith nor consistent with his responsibilities. Thus the theory has been used to justify the awards of attorneys' fees against defendants who had not made good faith efforts to racially integrate schools,[83] to effect legislative reappor-

77. 412 U.S. at 9, 14.

78. *See* text accompanying notes 61–62 *supra*.

79. *See* text accompanying notes 72–77 *supra*.

80. 369 U.S. 527 (1962).

81. First Nat'l Bank v. Dunham, 471 F.2d 712 (8th Cir. 1973); City Bank v. Rivera Davila, 438 F.2d 1367 (1st Cir. 1971); Niday v. Graef, 279 F. 941 (9th Cir. 1922).

82. 261 U.S. 399 (1923).

83. *See* Bell v. School Bd., 321 F.2d 494 (4th Cir. 1963). There the court concluded that fee-shifting was justified because of the school board's

> long continued pattern of evasion and obstruction which included not only [their] unyielding refusal to take any initiative . . . but their interposing a variety of

tionment,[84] or to reinstate a college teacher dismissed for political reasons.[85] Indeed, it has even been held in a lower court that where there has been a continued and "extreme" pattern of evasion and obstruction which precipitated the suit, "justice would not be attained" without an award of reasonable counsel fees.[86] This expanded concept of improper conduct has been applied to behavior that obstructs the administration of justice, regardless of whether that behavior necessitated the suit[87] or simply prolonged it.[88] The improper conduct exception has thus been applied to complex situations where the courts apparently decided that counsel fee awards were an appropriate, non-criminal form of punishment for the defendants. Like the common benefit exception, the improper conduct exception has been widely applied by the courts to award the prevailing plaintiff his attorneys' fees when justice so demands.

In spite of its recognition of these judicially created exceptions, the Court in *Alyeska* refused to exercise its equity powers again to fashion an additional private attorneys general exception to the American Rule; it simply distinguished the common benefit and improper conduct exceptions as not applicable to the *Alyeska* facts.[89] The Court seemed more anxious to fit *Alyeska* into a consistent chain of cases that follows the American Rule than to rectify any injustice that may have occurred in not shifting attorneys' fees.[90] Part of the explanation for the Court's refusal to use the private attorneys general rationale was its concern with the administrative problems posed by the rationale. For example, it would be necessary to make difficult decisions as to whether the enforcement of a

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> administrative obstacles to thwart . . . a desegregated education. . . . The equitable remedy would be far from complete, and justice would not be attained, if reasonable counsel fees were not awarded in a case so extreme.

Id. at 500. *See also* Nesbit v. Board of Educ., 418 F.2d 1040 (4th Cir. 1969); Rolfe v. County Bd. of Educ., 391 F.2d 77 (6th Cir. 1968); Hill v. Franklin County Bd. of Educ., 390 F.2d 583 (6th Cir. 1968); Clark v. Board of Educ., 369 F.2d 661 (8th Cir. 1966).

84. Sims v. Amos, 340 F. Supp. 691 (M.D. Ala.) (three-judge court) (alternative holding), *aff'd mem.*, 409 U.S. 942 (1972); Dyer v. Love, 307 F. Supp. 974 (N.D. Miss. 1969).

85. Stolberg v. Board of Trustees, 474 F.2d 485, 491 (2d Cir. 1973). In McEnteggart v. Cataldo, 451 F.2d 1109 (1st Cir. 1971), *cert. denied,* 408 U.S. 943 (1972), the court awarded the plaintiff/teacher his counsel fees even though his dismissal by defendants was upheld. The defendants' refusal to supply a statement of reasons for dismissal was sufficiently improper to warrant the award "since plaintiff was forced to go to court to obtain the statement of reasons to which he was constitutionally entitled." 451 F.2d at 1112.

86. Bell v. School Bd., 321 F.2d 494, 500 (4th Cir. 1963).

87. *Id.* (school board refusal to take any initiative to desegregate the schools). *See also* Rolax v. Atlantic Coast Line Ry., 186 F.2d 473 (4th Cir. 1922) (illegal agreement to bar promotion of Negroes).

88. Toledo Scale Co. v. Computing Scale Co., 261 U.S. 527 (1962), discussed in text accompanying note 82 *supra.*

89. 421 U.S. at 257–59, 269.

90. *Id.* at 250, 257.

particular policy should warrant fee-shifting, whether the awards should be mandatory or discretionary, whether a prevailing defendant should recover, and whether the suit should raise a presumption in favor of the plaintiff or against him.[91] Additionally, the Court concluded that any non-statutory award of attorneys' fees would be impossible in the large number of cases where the government is a defendant, because taxing fees against government defendants is explicitly barred by 28 U.S.C. § 2412.[92] Apparently, the Court did not find the desirability of awarding fees in the many other cases involving private defendants the more persuasive consideration. While noting the recent criticisms of the American Rule and tacitly recognizing the desirability of encouraging private litigation to implement public policy,[93] the Court nevertheless chose judicial restraint and decided that Congress, not the courts, must decide if, when, and how litigation costs should be redistributed.

ALTERNATIVES REJECTED: WHAT MIGHT HAVE BEEN

The Court's refusal to accept the private attorneys general rationale as a third exception to the American Rule need not have precluded an award of attorneys' fees. The lower court concluded, without a thorough analysis of the factors involved, that neither of the two traditional exceptions to the American Rule was applicable.[94] A closer examination of the

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91. *Id.* at 263–64.

92. *See* note 33 *supra*. The legislative history of section 2412 supports the interpretation that attorneys' fees generally are not to be taxed against the United States. H.R. REP. No. 308, 80th Cong., 1st Sess. Appendix, at A189 (1947); H.R. REP. No. 1535, 89th Cong., 2, 3 (1966); S. REP. No. 1329, 2d Sess. 2, 3 (1966).

It can be argued, however, that state or federal governmental defendants should pay attorneys' fees, from tax monies specifically allocated for law enforcement, in suits where the plaintiffs are acting in the government's place to enforce the law. This approach would view fee-shifting as another way of taxing the cost of law enforcement to the public. *See* Mause, *Winner Take All: A Re-examination of the Indemnity System*, 55 IOWA L. REV. 26, 37, 41–42 (1969). This argument is closely related, then, to the common benefit rationale which distributes the burden of the suit among those who benefit by it, as well as the improper conduct theory that forces the party causing the expenses of the suit to pay those expenses. *See also Equal Access, supra* note 2 and text accompanying notes 96–100, 104–05 *infra*.

93. 421 U.S. at 270–71. For criticism of the American Rule, see Ehrenzweig, *supra* note 45; Falcon, *Award of Attorneys' Fees in Civil Rights and Constitutional Litigation*, 33 MD. L. REV. 379 (1973); Goodhart, *supra* note 42; Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75 (1963) [hereinafter cited as Kuenzel]; McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN. L. REV. 619 (1931); McLaughlin, *The Recovery of Attorneys' Fees: A New Method of Financing Legal Services*, 40 FORD. L. REV. 761 (1972); Nussbaum, *supra* note 2; Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 U. COLO. L. REV. 202 (1966) [hereinafter cited as Stoebuck]; *Judicial Green Light, supra* note 2; *After Mills, supra* note 2; *Equal Access, supra* note 2; *The Ultimate Burden, supra* note 44.

94. 495 F.2d at 1029. Even though the court noted that "every citizen's interest in the proper functioning of our system of government" was served by the litigation,

Trans-Alaska Pipeline Authorization Act and the litigation that stimulated it, however, reveals that *Alyeska* furnished the Court with at least an arguable case for the application of a somewhat expanded common benefit exception. Although it was hotly debated in the court of appeals whether the environmentalist groups' efforts in court aided or injured the public, a majority of that court found substantial long-term benefit stemming from the reforms inspired by the suit.[95] Essentially, these reforms produced a pipeline system that will operate more effectively as a result of the stringent standards imposed.[96] In the evaluation of Russell B. Train, later the Administrator of the Environmental Protection Agency, the litigation resulted in increased public safety and protection that was beneficial to the government, the public, and the oil industry.[97] The public benefited as well from the increased tort liability and the higher permit and maintenance prices that the new Act[98] imposed.

Given this benefit, one logical approach for the Court to have taken would have been to expand the common benefit exception to cover the *Alyeska* facts. At first glance, such an expansion from fairly well defined beneficiary classes such as stockholders of a corporation[99] or all members of a union to the more amorphous public at large[100] would seem merely to turn the common benefit exception into a private attorney general theory. But by focusing on the benefit conferred, the common benefit exception is intended to give effect to the equitable principle of avoiding unjust enrichment[101] to a far greater extent than is the private attorney

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this interest was determined not to be dispositive of whether to apply the common benefit exception. The court also deemed that the "appellees" legal position . . . was manifestly reasonable and assumed in good faith." *But see* text accompanying note 107 *infra*.

95. 495 F.2d at 1029, 1032–36.

96. *See* Trans-Alaska Pipeline Authorization Act, 30 U.S.C. §§ 85(h), (*l*), and (x) (Supp. IV, 1974); text accompanying notes 24–25 *supra*.

97. The Alaska Pipeline . . . has been an excellent example [of] where NEPA and the courts have forced the reconciliation of environmental concerns with sound engineering practices. . . . Much of the delay has been beneficial. . . . If the pipeline had been constructed using the original design specifications it would very likely have resulted in not only *very serious environmental damage* but also *serious operational problems*. Indeed, the physical integrity of the pipeline itself was very much at stake.

. . . .

. . . [I]ndustry seriously underestimated the real technical difficulties of the task . . . . [G]overnment was ill-equipped both institutionally and informationally for dealing with the complex problems of the pipeline.

495 F.2d at 1034–35 n.3 *quoting* Remarks before the Joint Judicial Conference of the Eighth and Tenth Circuits, June 29, 1973. *See also* note 25 *supra* (former Secretary of Interior Hickel's similar response).

98. *See* the Trans-Alaska Pipeline Authorization Act, 30 U.S.C. §§ 185(h), (*l*), (m) & (x) (Supp. IV, 1974).

99. *See, e.g.*, Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), and text accompanying notes 70–74 *supra*.

100. *See, e.g.*, Hall v. Cole, 412 U.S. 1 (1973).

101. *See* text accompanying notes 75–79 *supra*.

general theory, with its focus on the enforcement of some law or legislative policy. Because the principle of avoiding unjust enrichment is so firmly established as a principle of judge-made common law,[102] while the private attorney general theory has more of a legislative pedigree,[103] an expansion of the common benefit exception to cover the *Alyeska* facts would have allowed the Court to do justice in the case with less of an intrusion into Congress's province than was perceived as the necessary effect of judicial adoption of the private attorney general theory.[104]

One of the prerequisites to application of the common benefit rationale is a showing that the party against whom the award is to be made is a proper party to bear or distribute the burden of the suit.[105] In *Alyeska* the oil company defendant was the proper intermediary to distribute the cost of the litigation because these costs could have been easily passed to the ultimate consumers of the oil in the form of higher prices. The distinction between the beneficiaries of the suit — the general public — and the ultimate consumers of the oil — those members of the public who pay for it — is more conceptual than factual. Additionally, it seems far more equitable to distribute the costs of the suit to the millions of users than to leave it with the three private citizen organizations that are supported by private and often small donations.[106] While this surely would have been a substantial expansion of the common benefit exception, the Court has not shied away from such expansions in the past and no compelling reason appears why the Court could not have made this further expansion in this case.

In addition to the common benefit-redistribution rationale, perhaps on a closer examination of Alyeska's motives and behavior, the Supreme Court could have applied the bad faith exception to award attorneys' fees to the plaintiffs. In the debates surrounding the passage of the Trans-Alaska Pipeline Authorization Act, both "the industry and the Administration" were accused of "having been evasive, legalistic, and less than

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102. The lower court called "spread[ing] the costs of litigation proportionately among the beneficiaries, the key requirement of the 'common benefit' theory." 495 F.2d at 1029.

103. *See, e.g.*, note 4 and accompanying text *supra*.

104. The *Alyeska* majority felt that fee awards under the private attorneys general concept "would make major inroads on a policy matter that Congress has reserved for itself." 421 U.S. at 269.

105. *See* Hall v. Cole, 412 U.S. 1, 9 (1973); Mills v. Electric Auto-Lite Co., 396 U.S. 375, 396–97 (1970). *See also* Yablonski v. United Mine Workers of America, 466 F.2d 434 (D.C. Cir. 1972); Robins v. Schonfeld, 326 F. Supp. 529 (S.D.N.Y. 1971).

106. *Cf.* Natural Resources Defense Council, Inc. v. EPA, 512 F.2d 1351 (D.C. Cir. 1975), which recognized the funding difficulties that public interest environmentalist groups have:

> [These] [g]roups such as NRDC have never been secure financially, and only recently the foundations [as the Ford Foundation] have indicated their intent to divert their support to projects in other areas. Provisions for fees could thus have a strong impact on their continued willingness and ability to pursue . . . [statutory] actions.

Id. at 1358 (footnotes omitted).

credible" in dealing with the issues presented by the development of the Pipeline.[107] This raises doubts about the honesty of the industry's policies and the independence of the various governmental agencies involved. While such inferences alone are not substantial enough to satisfy the bad faith requisite for fee-shifting under the improper conduct rationale, they do warrant a closer look at the facts of the case. The Court did not make this examination, however; it relied instead on the lower court's conclusory assertions of good faith and reasonable behavior of Alyeska and the government defendants without confronting the issue squarely.[108]

THE DISSENT IN *Alyeska*: COMPLETE SUPPORT FOR THE PRIVATE ATTORNEY GENERAL CONCEPT

Justice Marshall and Justice Brennan dissented in *Alyeska*. Justice Marshall insisted that the adoption of the private attorneys general rationale to award the plaintiffs their attorneys' fees was a viable and preferable alternative to the majority's conclusion,[109] arguing that the chains of precedent for the common law exceptions to the judge-made American Rule[110] illustrate that courts do have independent authority to award attorneys' fees. Further, this kind of judicial activity is not preempted by congressional activity because courts have acted to award fees under statutory causes of action which make no provision for such awards[111] and have interpreted various statutory fee regulations as imposing no restrictions on the equity powers of courts to redistribute attorneys' fees.[112] Thus the fashioning of the private attorneys general exception to the American Rule would have been merely another exercise of these same equitable powers, and not a judicial repudiation of the entire American Rule.[113]

Basic in Justice Marshall's vigorous dissent is a denial that congressional action in the area of attorneys' fees prohibits or preempts the Court from making independent decisions in the same area.[114] In response to the majority's concern about manageable standards for application of the

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107. 119 CONG. REC. 22798 (1973) (remarks of Senator Jackson). Senator Jackson also noted that the companies "ridiculously downgraded the oil and gas potential of the [Alaska oil fields]." *Id.* at 22799. *See also* note 21 *supra*.

108. 421 U.S. at 259–60.

109. *Id.* at 271–72 (Brennan, J., dissenting); *id.* at 273–74 (Marshall, J., dissenting).

110. *See* notes 61–77 and 80–88 and accompanying texts *supra*.

111. *See, e.g., Mills v. Electric Auto-Lite,* notes 70–74 *supra* and *Hall v. Cole,* notes 75–77 *supra*.

112. *See, e.g.,* the docketing fees statute, 28 U.S.C. § 1923 (1970), notes 51–52 *supra,* as construed in cases awarding fees under the exceptions to the American Rule: Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 n.11 (1967); Sprague v. Ticonic Bank, 307 U.S. 161, 164 (1939); Trustee v. Greenough, 105 U.S. 527, 535–36 (1881).

113. 421 U.S. at 274, 282.

114. *Id.*

rationale,[115] the dissent proposed a three-prong test to identify those cases that warrant fee-shifting. Fees would be awarded to the prevailing plaintiff if (1) the right protected is one shared by the general public or some class thereof; (2) the plaintiff's pecuniary interest in the outcome, if any, would not normally justify incurring the cost of counsel fees; and (3) shifting that cost to the defendant would effectively place it on a class that benefits from the litigation.[116] The first two requirements were met in *Alyeska,* Justice Marshall asserted, by the governmental and public benefit derived[117] and the environmentalists' "largely altruistic" willingness to litigate these issues.[118] In response to the third requirement, Justice Marshall argued that because the consortium does business in forty-nine states and accounts for twenty percent of the national oil market, Alyeska was the proper intermediary to shift the costs of the litigation to the benefiting general public.[119] The majority criticized this test as emasculating the private attorneys general theory.[120] The Court asserted that the test's emphasis on the "important right" protected, without a definition of "important," would make it applicable to virtually all substantive legislation.[121] Thus "if *any* statutory policy is deemed so important" that attorneys' fees should be awarded to those who enforce it, the Court demanded, "how could a court deny attorneys' fees to private litigants in actions under 42 U.S.C. § 1983 seeking to vindicate *constitutional* rights?"[122] Under Justice Marshall's test, however, fees would be awarded *only* in those section 1983 actions where shifting the cost to the defendant would place the burden on the class that benefits from the suit.[123] This limitation seems consistent with the Court's traditional concern that unjust enrichment be avoided[124] and envisions the private attorneys general concept as quite similar to the common benefit theory.[125] The dissent thus recognizes the equitable basis for the private attorneys general concept and rightfully attacks "the inadequacy of the [majority's] analysis."[126]

PUBLIC INTEREST LITIGATION AND THE AMERICAN RULE

As society has become more complex, an increasing number of difficult and important social problems of a type ordinarily treated by legislative

115. *Id.* at 263–64. *See also* text accompanying note 91 *supra.*
116. *Id.* at 284–85.
117. *Id.* at 285–86. *See also* notes 96–98 and accompanying text and note 108 *supra.*
118. *Id.* at 286–87.
119. *Id.* at 288.
120. *Id.* at 264–67 n.39.
121. *Id.* at 266–67 n.39.
122. *Id.* at 264 (emphasis in text).
123. *See id.* at 285.
124. The common benefit exception developed because of this concern. *See* text accompanying notes 59–79 and text following note 100 *supra.*
125. 421 U.S. at 284: "[W]e have already recognized several of the same factors in the recent common-benefit cases." *See also* text accompanying note 143 *infra.*
126. *Id.* at 282.

action have been left unresolved or unenforced by those primarily responsible for their solution. Frustrated citizens and groups with diverse economic resources have increasingly turned to the courts for assistance when other resources have failed them.[127] Initial successes in areas such as desegregation,[128] environmental protection,[129] or prison reform,[130] have encouraged other citizens, concerned with the general welfare, to bring their problems to court when the law, or the official charged with its administration, seems to offer no relief.[131] The complex public interest lawsuit has emerged, generally distinguished by issues of extreme social importance, often involving complex statutory schemes, or inspired by the "strength of Congressional policy."[132] Their complexity and importance often protract the litigation substantially. They often generate injunctive relief that benefits a substantially greater number of people than the litigants themselves but do not generally result in monetary damage awards.[133] Without any provision for fee-shifting, the expenses involved in these suits and the harsh reality of the unlikelihood of any substantial monetary recovery from which attorneys' fees could be paid[134] foreclose many poten-

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127. *See, e.g.,* Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1967); Baker v. Carr, 369 U.S. 186 (1962); Brown v. Board of Educ., 347 U.S. 483 (1954). *Cf.* Bradley v. School Bd., 416 U.S. 696 (1974).

128. *See, e.g.,* Brown v. Board of Educ., 347 U.S. 483 (1954).

129. *See, e.g.,* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); Natural Resources Defense Council v. EPA, 484 F.2d 1331 (1st Cir. 1972); La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972).

130. *See, e.g.,* Taylor v. Perini, 503 F.2d 899 (6th Cir. 1974); Hoitt v. Vitek, 495 F.2d 219 (1st Cir. 1974).

131. Liberalized rules of standing to sue gave greater access to the courts to those who challenged the legality of corporate and government action or inaction. *See* United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972); Association of Data Processing Service Org. v. Camp, 397 U.S. 150 (1970); Flast v. Cohen, 392 U.S. 83 (1968); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied,* Consolidated Edison Co. of N.Y., Inc. v. Scenic Hudson Preservation Conference, 384 U.S. 941 (1966).

Yet other cases restrict access by limiting class actions. *E.g.,* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); *see* note 185 *infra;* Zahn v. International Paper Co., 414 U.S. 291 (1973) and text accompanying notes 182-85 *infra;* Sierra Club v. Morton, 405 U.S. 727, 756 (1972) (Blackmun, J., dissenting).

132. La Raza Unida v. Volpe, 57 F.R.D. 94, 99 (N.D. Cal. 1972). *La Raza,* a class action suit to enjoin construction of a highway, was the first case to apply the private attorneys general concept in awarding fees in environmental litigation.

133. 57 F.R.D. at 101.

134. The damages available in most public interest suits are meager at best in relation to the complexity of the factual, legal and social issues involved. This was recognized in NAACP v. Allen, 340 F. Supp. 703, 710 (M.D. Ala. 1972), where the attorneys had sued in the public interest to preserve civil liberties for black Americans:

> Because the probability of a large damage recovery is remote, . . . plaintiffs or their lawyers who being class actions seeking to preserve civil liberties usually must make substantial financial sacrifices. In addition, a lawyer . . . is likely to suffer social, political and community ostracism [because of this kind of suit].

tial litigants from the courts,[135] regardless of the importance of the rights at issue.

The litigation surrounding the Trans-Alaska Pipeline typifies the public interest lawsuit. The matter at issue, the development of an independent American oil supply, had enormous international and domestic implications.[136] Efforts at development posed major dangers to persons, property, and the environment if the project were undertaken without the more adequate and comprehensive planning and safeguards[137] the environmentalists' suit sought to insure. In its eagerness to develop the oil discovery, the Department of the Interior chose an expedient means of development[138] which was subsequently found to violate the Mineral Land Leasing Act.[139] Since private suit was the only available means of forcing the government to consider adequately the impact of the pipeline as originally engineered, the moderately funded Wilderness Society and its co-plaintiffs devoted five years to this suit, consuming over forty thousand hours of attorneys' time. The attorneys' work was arduous litigation against a powerful oil company consortium which used its full panoply of legal resources in defense.[140] The traditional argument that fee-shifting would deter litigants from defending lawsuits is surely inapplicable to the *Alyeska* situation, where the plaintiffs' atttorneys' fees were "paltry in comparison with the interest [over one billion dollars] Alyeska had in defending this appeal."[141] To encourage other private citizen groups to shoulder complex burdens, such as these, against such large and resourceful defendants,[142] there must be the possibility that successful public interest litigation will carry with it an award of attorneys' fees.

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135. Although it might be suggested that fee-shifting is unnecessary because poor Americans can use Legal Aid to bring these kinds of suits, Legal Aid has not proved a viable alternative because of its limited funding. A realistic method of fee-shifting would encourage more attorneys to undertake this kind of litigation for all clients. *See* Nussbaum, *supra* note 2, at 303–05. Professor Ehrenzweig, *supra* note 45, at 1230, warned:

> If the bar continues to neglect needed reform, not only in its system of fees but also in the availability of legal services, the legal profession could conceivably suffer the same fate of the medical profession — that is, some form of "Legicare," a Government-financed legal service for all.

136. *See* note 14 *supra.*

137. *See* notes 25, 26, 97 and accompanying texts *supra.*

138. *See* note 25 *supra.*

139. *See* note 21 and accompanying text *supra.*

140. Brief for Respondent, Wilderness Society, Appendix.

141. Wilderness Soc'y v. Morton, 495 F.2d 1029, 1032 (D.C. Cir. 1974).

142. For examples of suits involving large corporate defendants, see Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972); Merola v. Atlantic Richfield Co., 493 F.2d 292 (3d Cir. 1974); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970); Kober v. Westinghouse Elec. Corp., 325 F. Supp. 467 (W.D. Pa. 1971), *aff'd* 480 F.2d 240 (3d Cir. 1973). Examples of suits against powerful unions include Hall v. Cole, 412 U.S. 1 (1973); Yablonski v. United Mine Workers of America, 466 F.2d 424 (D.C. Cir. 1972), *cert. denied,* 412 U.S. 918 (1973). For suits involving large governmental defendants, see United States v. SCRAP, 412

The issues involved in public interest lawsuits, such as *Alyeska,* are conceptually similar to many of those involved in cases in which the expanded common benefit and improper conduct exceptions have been invoked. Generally, all of these cases are brought by private parties litigating issues that substantially affect the welfare of other non-parties, often affording a general benefit to a wide number of citizen-beneficiaries. Frequently, the defendant has acted improperly or in bad faith.[143] These similarities prompted lower federal courts to exercise their discretionary powers and view these similarities to the recognized exceptions as a basis for adopting the private attorneys general rationale as a judicial remedy for the financial obstacles confronting public interest litigation.[144] But these lower courts did so only after the Supreme Court provided a supportive milieu for further encroachments on the American Rule.[145] The Court in *Newman v. Piggie Park Enterprises,*[146] had construed Title II of the Civil Rights Act of 1964 to permit an award of attorneys' fees for the purpose of encouraging the initiation of similar suits to enjoin racial discrimination in public accommodations.[147] The Court reasoned that "[i]f [a plaintiff] 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."[148] Although the suit was brought under a statute that explicitly authorized fee-shifting at the discretion of the courts, *Newman* identified the underlying theory as that of the private attorney general and raised a presumption in favor of shifting the prevailing party's fees, rebuttable only by a showing of "special circumstances [that] would render such an award unjust."[149]

U.S. 669 (1973) (Interstate Commerce Commission as defendant); Taylor v. Perini, 503 F.2d 899 (6th Cir. 1974) (Superintendent of Ohio prisons as defendant); Natural Resources Defense Council, Inc. v. EPA, 484 F.2d 1331 (1st Cir. 1973); La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972) (California Highway Department, California Department of Public Works, Chief Highway Engineer of California, and United States Secretary of Transportation as defendants).

143. For discussion of the common benefit exception, see notes 61–79 and accompanying text *supra;* for a discussion of the bad faith exception, see notes 80–88 and accompanying text *supra.*

144. *See* cases cited note 8 *supra.*

145. *See* Northcross v. Board of Educ., 412 U.S. 427 (1973); Hall v. Cole, 412 U.S. 1 (1973); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968). The Court in *Alyeska* did not deal with the implication of these cases; rather, it used the narrowest view of their holdings to fit them into the recognized exceptions: *Mills* and *Hall* into the common benefit exception, 421 U.S. at 258, *Piggie Park* and *Northcross* as statutorially authorized, 421 U.S. at 262. *Cf.* Dawson, *Public Interest Litigation, supra* note 32, at 866–70.

146. 390 U.S. 400 (1968).

147. 42 U.S.C. § 2000a (1970).

148. 390 U.S. at 402 (emphasis added).

149. *Id.*

Adopting the reasoning of *Newman* in a later suit brought under another statute[150] that also made an award of attorneys' fees discretionary, a unanimous Court held, in *Northcross v. Board of Education,*[151] that the plaintiffs were "private attorneys general" and thus entitled to an award of attorneys' fees.[152] Even though consistent with legislative mandate, the Court's action seemed expansive, encouraging many other private attorneys general to bring similar suits. Lower federal courts, guided by this spirit, responded by awarding attorneys' fees pursuant to the private attorneys general theory under other discretionary statutes[153] and statutes silent in regard to fee-shifting.[154] Encouraged by the Supreme Court and drawing on their own equity powers, the lower federal courts thus fashioned the private attorneys general exception to the American Rule.

Although the Supreme Court had acted, and the lower courts had quickly followed, to allow fee-shifting to encourage suits in the public interest,[155] a policy that awarded fees in this area in the absence of some statutory authority was never explicitly sanctioned.[156] Nevertheless, by awarding attorneys' fees without enunciating any specific constraints on when this was appropriate, and by mandating that other courts do the same,[157] *Newman* and cases following it raised the hope that judicial repudiation of the American Rule, or at the least an adoption of the private attorneys general rule as a general judicial remedy in public interest litigation, would soon be a reality.[158]

THE IMPACT OF *Alyeska*

THE AMERICAN RULE REITERATED

These repeated hopes that the American Rule would be at least modified were dashed decisively by *Alyeska.* In its rejection of the private attorneys general exception as a judicial discretionary remedy, the

150. The Emergency School Aid Act of 1972 § 718, 20 U.S.C. § 1617 (Supp. II, 1972).

151. 412 U.S. 427 (1973).

152. *Id.* at 428.

153. *See, e.g.,* Civil Rights Act of 1964 tit. VII, 42 U.S.C. § 2000e-5(k) (1970).

154. *See, e.g., Mills,* discussed at notes 70–74 *supra; Hall* discussed at notes 75–77 *supra.*

155. *See* note 145 *supra.*

156. It is true that the statutes involved in *Mills* and *Hall,* the Securities Act of 1934 § 14(a), 15 U.S.C. § 78n(a) (1970) and the LMRDA, 29 U.S.C. §§ 401–12 (1970), respectively, were silent regarding fee-shifting. Yet because the statutes were passed specifically to protect the institutions involved, and the individuals in those institutions, from future abuses of individual rights, it can be argued that Congressional intent to encourage private enforcement was implicit. By fee-shifting, the Court acted pursuant to this intent by encouraging other possible private plaintiffs to sue.

157. *See* text accompanying note 149 *supra.*

158. *See* Nussbaum; *Equal Access; After Mills;* and *Judicial Green Light, supra* note 2.

Court turned away from the *Mills*[159]-*Newman*[160] enlargements and towards the views of an earlier case, *Fleischmann Distilling Corp. v. Maier Brewing Co.*[161] In *Fleischmann,* the Court refused to apply the bad faith exception as a rationale to award the plaintiff his attorneys' fees where the defendant had caused the suit by deliberately infringing plaintiff's patent in violation of the Lanham Act.[162] The Court held that federal courts lacked power to award attorneys' fees even in cases of bad faith on the part of the defendant when the statute creating the cause of action expressly provided remedies for its vindication without including fee-shifting provisions.[163] Implicit in the Court's approach is the notion that the bad faith or any other recognized exception to the American Rule is inadequate to accomplish fee-shifting if juxtaposed against a statute creating the cause of action which specified the relief available without mentioning attorneys' fees. *Mills,* decided after *Fleischmann,*[164] seemed to contradict directly the *Fleischmann* position by holding that attorneys' fees could be awarded to the prevailing plaintiff suing under the Securities Exchange Act of 1934, even though the section sued under was silent regarding plaintiff's attorneys' fees.[165] But the Court returned to its *Fleischmann* approach in *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*[166] In *Rich,* the plaintiff, a supplier of building materials, sued to collect against a payment bond posted in favor of a government contractor under the Miller Act.[167] The plaintiff had not been paid by a company alleged by plaintiff to be a subcontractor of the defendant government contractor. The suit established that the debtor was in fact a subcontractor, thus giving the plaintiff access to the bond under the Act. The Supreme Court reversed the court of appeals decision allowing plaintiff to recover attorneys' fees because, as in *Fleischmann,* the statute creating the cause of action, although allowing the plaintiff to recover "sums justly due," contained no provision for fee-shifting.[168] The Court noted the existing policy arguments for fee-shifting and the judicial remedies for affecting it,[169] but foreshadowed *Alyeska* by nevertheless refusing to depart from the

159. *See* text accompanying notes 70–79 *supra.*

160. *See* text accompanying notes 147–49 *supra.*

161. 386 U.S. 714 (1967).

162. 15 U.S.C. §§ 1051–1127 (Supp. IV, 1974).

163. 386 U.S. at 720. The Court returned to the traditional position on the American Rule, asserting that it protects a losing litigant and encourages the poor to sue.

164. Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), was decided three years after *Fleischmann.*

165. When *Fleischmann* was restricted to its facts in *Mills,* 396 U.S. at 391, the reasonable inference was that *Fleischmann* would be of dubious precedential value in the future. *See After Mills, supra* note 2, at 328, and Nussbaum, *supra* note 2, at 321, 335.

166. 417 U.S. 116 (1974).

167. 40 U.S.C. § 270a (1970) (requiring contractors' bonds on government contracts).

168. 417 U.S. at 128, *construing* 40 U.S.C. § 270b(a) (1970).

169. *Id.* at 128–31.

American Rule without congressional sanction.[170] At the time of the *Rich* and the *Fleischmann* decisions, these cases could have been viewed simply as an unwillingess of the Court to award attorneys fees by applying the bad faith exception to situations involving improper private conduct among competitors within a commercial context. But if *Rich* and *Fleischmann* are viewed as part of the approach that developed more fully in *Alyeska,* continued use of the bad faith as well as the common benefit exception may be doubtful absent statutory guidance. While these cases can be viewed narrowly, the more natural interpretation for the *Fleischmann-Rich-Alyeska* chain is that the Court has made judicial restraint on awards of attorneys' fees the general rule again and it is the exceptions which will be viewed narrowly in the future.

And yet the Court could have used its equity powers to fashion a private attorneys general exception to the American Rule.[171] These were the same equitable powers exercised by the Court when it acted to avert injustice by fashioning a remedy to allow the plaintiff to recover his attorneys' fees from a common fund[172] and then expanded the remedy to award a plaintiff his attorneys' fees because his suit had vindicated the constitutional rights of others.[173] The Court's history of broadening the common benefit exception and its increased use of the improper conduct exception could have been stepping stones to the adoption of the private attorneys general concept. What is missing in the Court's analysis in *Alyeska* is a sensitivity to the practical results of the suit[174] accompanied by a perspective broader than the narrow focus on the individual plaintiffs' relationship to the subject matter of the suit. The rather curt dismissal of the substantial benefit accruing to the public as a result of the suit[175] and of the benefits inherent in encouraging private citizens to sue in the public interest through the promise of attorneys' fees[176] led to the Court's refusal to take another step to avoid injustice in public interest litigation. Although such a step would have led to the shifting of attorneys' fees to

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170. *Id.* at 130–31.

171. *See* 421 U.S. at 274, 282 (Marshall, J., dissenting); notes 110–16 and accompanying text *supra.*

172. Trustees v. Greenough, 105 U.S. 527 (1882), discussed at text accompanying notes 61–62 *supra.*

173. Hall v. Cole, 412 U.S. 1 (1973), discussed at text accompanying notes 75–77 *supra.*

174. For a discussion of the benefits conferred by the suit, see text accompanying notes 96–98 *supra;* for a discussion of the difficulties involved in the suit and the implications from them, see text accompanying notes 140–42 *supra.*

175. The Court implicitly agreed that the litigation produced a substantial benefit, as evidenced by its acceptance of the lower court's finding, 421 U.S. at 259, and its ignoring the dissent in the lower court, which vigorously objected to finding any benefit in the plaintiffs' suit.

176. "It is also apparent from our national experience that the encouragement of private action to implement public policy has been viewed as desirable in a variety of circumstances." 421 U.S. at 271.

the losing *defendant* in public interest suits for the first time, the Court had clearly done this type of shifting before in the improper conduct exceptions.[177] Similarly, since the Court had allowed shifting of attorneys' fees in suits brought under statutes silent regarding attorneys' fees,[178] and even had created a presumption in favor of fee-shifting when a statute had prescribed it as discretionary;[179] it was only a small step to allowing attorneys' fees in cases in which there was no statutory authorization. But the Court refused to take that forward step, retreating instead to a reliance on Congress to make a decision "on a policy matter that [it] has reserved for itself."[180]

PUBLIC INTEREST LITIGATION AFTER *Alyeska*

In the aftermath of *Alyeska,* we are left with a sadly limping, slightly stunned public interest litigation movement even though the damage may be mainly to the movement's morale and not necessarily to its corpus.[181] In fact, *Alyeska* is actually the second case in a one-two punch thrown by the Supreme Court, seemingly aimed at knocking out public interest litigation, especially in the form of class action suits. The first blow was dealt in *Zahn v. International Paper Co.,*[182] where the Supreme Court held in a public interest lawsuit that a class action[183] can be maintained only when *each* member of the class, whether participating in the suit or not, satisfies the ten thousand dollar jurisdiction amount requirement for suits brought in the federal courts.[184] While the *Alyeska* plaintiffs

177. *See* text accompanying notes 80–88 *supra.*

178. *See, e.g.,* Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), and Hall v. Cole, 412 U.S. 1 (1973), discussed in text accompanying notes 70–74 and 75–77 *supra.*

179. *See* Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968), discussed at text accompanying notes 146–49 *supra.*

180. 421 U.S. at 269. The Court did not specify how Congress has made this reservation, however.

181. Although Ralph Nader predicted that *Alyeska* "is going to have a very depressive impact on the ability of public interest lawyers to litigate" unless Congress responds with a statutory authorization for fee-shifting in public interest cases, public interest law firms had only begun to expect fees to be paid by the defendants under a private attorneys general theory. TIME, May 26, 1975, at 42. In fact, the fees that had been awarded under this theory generally were insufficient to adequately compensate the attorneys. *See* Witt, *After Alyeska: Can the Contender Survive?,* 5 JURIS DOCTOR 34, 35, 39 (October, 1975) [hereinafter cited as Witt]. The impact of *Alyeska* can be minimized if the attorneys take care to bring suit under those statutes that specifically provide for awards of attorney's fees. Certainly environmental litigation seem most clearly injured by *Alyeska* because the National Environmental Policy Act, 42 U.S.C. §§ 4321–47 (1970), has no fee award provision.

182. 414 U.S. 291 (1973).

183. Suit was commenced under FED. R. CIV. P. 23(b)(3).

184. The suit was brought under diversity jurisdiction pursuant to 28 U.S.C. § 1332(a) (1970). The Court, interpreting this statute, construed legislative silence regarding aggregation of claims as a prohibition against it, 414 U.S. at 302, and noted that its result would be the same under the general federal question jurisdiction statute, 28 U.S.C. § 1331 (1970). 414 U.S. at 302 n.11.

were not affected by this monetary interest requirement, *Zahn* created a rigid rule the persuasive effect of which must be to inhibit the bringing of public interest class-action suits.[185] Taken together, *Zahn* and *Alyeska* have dealt a powerful blow to the environmental protection movement, and to public interest litigation generally, by substantially reducing the opportunity to bring class action suits in the federal courts and by severely eroding the economic ability to assert environmental rights.[186]

Edelman v. Jordan,[187] which preceded *Alyeska* by a few months, may soon be felt as another blow to public interest litigation. In *Edelman,* the plaintiff brought a class action suit for injunctive and declaratory relief against the Illinois officials administering the federal-state programs of Aid to the Aged, Blind, and Disabled (AABD).[188] Edelman claimed that the Illinois Department of Public Aid, in not processing his claim to disability benefits for almost four months, violated federal law requiring eligibility determinations within thirty or forty-five days of application and the receipt of the assistance check within those periods for eligible applicants.[189] His suit was successful, and the district court issued an injunction to require compliance with the federal regulations and ordered all retroactive benefits be paid to eligible persons who had applied for them.[190] In reversing the court of appeals as to retroactive payments,

185. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), imposed a further restraint on commencing class actions by holding that plaintiffs in class action suits are required to bear the cost of notice to members of the class, regardless of the size of the class or the expense of the notice, and that such cost could not be imposed on the defendant, regardless of the likelihood that the plaintiff class would ultimately prevail on the merits.

186. In the future, the private plaintiff will have no opportunity to recover his attorneys' fees unless the litigation is brought under a statute providing for fee-shifting, as in note 4 *supra,* or unless he can persuade the courts that his suit clearly fits into the common benefit exception. The vitality of the common benefit exception is diminished, however, and that of the improper conduct exceptions, discussed at notes 80–88 and accompanying text *supra,* is dubious at best after *Fleischmann* and *Rich. See* text following note 170 *supra. But see* cases cited note 200 *infra.* Certainly *Alyeska* will influence lower courts to restrict, not enlarge, these exceptions and thus in large measure will foreclose fee-shifting. Until, and unless, Congress acts to authorize wider fee-shifting, the Court has sacrificed these public interest lawsuits and the plaintiffs who bring them, in *spite* of its recognition that "the encouragement of private action to implement public policy has been viewed as desirable in a variety of circumstances." 421 U.S. at 271.

187. 415 U.S. 651 (1974), *rev'g sub nom.,* Jordan v. Weaver, 472 F.2d 985 (7th Cir. 1973).

188. This program was funded by federal and state governments. 42 U.S.C. §§ 1381–85 (Supp. IV, 1970).

189. Title 45 C.F.R. § 206.10(a)(3) (1968) required, at the time the suit was instituted, that applications for Aid to the Aged or Blind be processed within thirty days of receipt and that applications for aid to the disabled be processed within forty-five days.

190. *See* Jordan v. Weaver, 472 F.2d 985, 988 (7th Cir. 1973), affirming the judgment of the lower court.

the Supreme Court held that the eleventh amendment immunity of states from suits in the federal courts precluded, absent state consent to the suit, the entry of an award of retroactive statutory benefits against state officials where the state, and not the individuals, would pay the benefits.[191] Even though the Court in *Alyeska* expressly did not extend the eleventh amendment interpretation espoused in *Edelman* to preclude the award of counsel fees against state defendants,[192] lower courts are currently divided on this question.[193] The conservative tendencies of this Court[194] suggest that such an extension is likely to come.[195] The result may be that even where an award of attorneys' fees is permissible under an exception to the American Rule, it would remain an inefficacious remedy if the defendants to the suit were immune from an award of fees.[196]

CONCLUSION

In a very real sense, it is too early to measure *Alyeska*'s impact on public interest litigation. Although the initial reaction to *Alyeska* was dismay,[197] a more careful consideration must note that in general only

191. 415 U.S. at 678.

192. 421 U.S. at 269–70 n.44. Some lower federal courts, however, have already extended *Edelman* to immunize states and state officials. Skehan v. Trustees, 501 F.2d 31 (3d Cir. 1974).

193. *Compare* Souza v. Travisono, 512 F.2d 1137 (1st Cir. 1975); Class v. Norton, 505 F.2d 123 (2d Cir. 1974); Jordon v. Fusari, 496 F.2d 646 (2d Cir. 1974); Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974); Gates v. Collier, 489 F.2d 298 (5th Cir. 1973); Sims v. Amos, 340 F. Supp. 691 (M.D. Ala.), *aff'd mem.*, 409 U.S. 942 (1972), *with* Taylor v. Perini, 503 F.2d 899 (6th Cir. 1974); Skehan v. Trustees, 501 F.2d 31 (3d Cir. 1974); Jordon v. Gilligan, 500 F.2d 701 (6th Cir. 1974); Named Indiv. Members v. Texas Highway Dep't, 496 F.2d 1017 (5th Cir. 1974).

194. *See* Green, *A Pro-Business Tilt in the Courts,* The Wall Street Journal, June 10, 1975, at 20, col. 3, which noted the current Supreme Court's "judicial conservatism": "It's not willing to go one step further than it has to." The ruling in *Alyeska,* the author concluded, developed logically from this conservatism. *But cf.* an editorial on the same page, *A Case for Restraint,* The Wall Street Journal, June 10, 1975, at 20, col. 1, which applauded the holding in *Alyeska* and, by implication, the conservative Court.

195. Wood v. Strickland, 420 U.S. 308 (1975), although noting that school officials have merely a qualified good-faith immunity, suggests that intentional misconduct, not mere harmful action, may be required in the future to justify damages awarded directly against school, and by extension governmental, officials.

196. This immunity comes from either the eleventh amendment, *see* notes 192–93 and text accompanying note 194 *supra* or from 28 U.S.C. § 2412 (1970), *see* note 33 and accompanying text *supra*. The results could be similar to that of Harrisburg Coalition v. Volpe, 381 F. Supp. 898 (M.D. Pa. 1974), where a citizen's group successfully sued under the Department of Transportation Act to enjoin highway construction through a city park. The court refused to award the plaintiffs their attorneys' fees because only the city officials of Harrisburg, the least culpable of all the defendants, were not statutorially immune from paying them.

197. "They didn't just rule against us . . . . They threw out the whole development in the lower courts that was moving in the direction of more and larger fees on this

expectations were disappointed by the Supreme Court, not funds interrupted.[198] By deferring to a Congress that had manifested an awareness of the problems presented by the American Rule even before *Alyeska* was decided,[199] the Court could actually have helped public interest litigants. If Congress acts to authorize fees taxed to losing defendants, even against the government, ultimately the public at large will benefit. In that case, *Alyeska* will be hardly remembered,[200] significant merely as the im-

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basis," said Charles Halpern of the Council for Public Interest Law, quoted in Witt, *supra* note 181, at 35. *See also* Ralph Nader's reaction at note 181 *supra*.

198. *See* note 181 *supra*.

199. Even before the results of *Alyeska* were announced, some members of Congress had already voiced approval for fee-shifting and there has been some preliminary Congressional debate on the matter. For example, regarding the Legal Services Corporation Act of 1974, 42 U.S.C. § 2996 (1974), "we expect that the courts will award fees to legal service programs in cases where an award would be made to a private attorney or where such officers are functioning like 'private attorneys general.'" 120 CONG. REC. 12953 (1974) (remarks of Senator Kennedy). *See also id.* at 12934–35 (remarks of Senator Abourezk). Senator Tunney has already conducted hearings on attorneys' fees and fee-shifting. *Hearings on Legal Fees Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess., pt. 3 (1973). It is reported that Senator Tunney is considering whether amending existing statutes to authorize fee-shifting or a broad fee-shifting measure would be the more effective. On Aug. 1, 1975, Senator Tunney introduced a bill authorizing attorneys' fees to all prevailing parties in all civil rights cases.

Representative Seiberling has introduced H.R. 7825 and H.R. 8218 to amend the Mineral Land Leasing Act, 30 U.S.C. § 185 (1970); H.R. 7829 and H.R. 8222 to amend the National Environmental Policy Act, 42 U.S.C. §§ 4321–47 (1970); H.R. 7828 and H.R. 8220 to amend some early civil rights statutes, and a bill to amend the injunction section of the Clayton Act, 15 U.S.C. § 15 (1970), to allow awards of attorneys' fees. He has introduced H.R. 7826 and H.R. 8221, which would add a new section to Title 28 of the United States Code to award attorneys fees in civil cases in federal courts at the judge's discretion, even against the United States as a defendant. This would effectively reverse *Alyeska* without providing the guidance the Supreme Court deemed indispensible. See text preceding note 91.

Representative Drinan has introduced H.R. 7968 which would assess attorneys' fees against the United States when a suit successfully challenges an agency decision in civil rights, consumer, and environmental areas.

200. For the immediate present, however, *Alyeska* has made itself felt as the authority by which awards are denied to successful plaintiffs. *See, e.g.*, Ripon Soc'y v. National Republican Party, 525 F.2d 548 (D.C. Cir. 1975) (remanding for a decision consistent with *Alyeska*); Gilliam v. City of Omaha, 524 F.2d 1013 (8th Cir. 1975); Burbank v. Twomey, 520 F.2d 744 (7th Cir. 1975); Kirkland v. Department of Correctional Services, 520 F.2d 420 (2d Cir. 1975); Named Indiv. Members v. Texas Highway Dep't, 519 F.2d 1372 (5th Cir. 1975); Hallmark Clinic v. North Carolina Dep't of Human Res., 519 F.2d 1315 (4th Cir. 1975); O'Neal v. Gresham, 519 F.2d 803 (4th Cir. 1975); Handler v. San Jacinto Jr. College, 519 F.2d 273 (5th Cir. 1975); Tryforos v. Icarian Dev. Corp., 518 F.2d 1258 (7th Cir. 1975); Turner v. FCC, 514 F.2d 1354 (D.C. Cir. 1975); Natural Res. Defense Council v. EPA, 512 F.2d 1351 (D.C. Cir. 1975); Rasmussen v. City of Lake Forest, 404 F. Supp. 148 (N.D. Ill. 1975); Phillips v. Puryear, 403 F. Supp. 80 (W.D. Va. 1975).

Attorneys' fees have been awarded by the courts, in spite of *Alyeska*, in some recent cases. *See, e.g.*, Doe v. Poelker, 527 F.2d 605 (8th Cir. 1976) (reaffirming a

petus for such informed congressional activity. But if Congress chooses not to act at all, *Alyeska* will stand as a reaffirmation of the "traditional American way of *talking about* equal access to the courts . . . [while] *in fact,* because of economics, only government, large corporations and the wealthy will normally have access."[201]

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position in favor of fee awards because of improper conduct in "abortion litigation involving the State of Missouri," enunciated by the same court in Doe v. Poelker, 515 F.2d 541, 547 (8th Cir. 1975)); Carter v. Noble, 526 F.2d 677 (5th Cir. 1976) (for bad faith in cutting a prisoner's hair); McDonald v. Oliver, 525 F.2d 1217 (5th Cir. 1976) (for bad faith and oppressive conduct by union officials); Clemons v. Runck, 402 F. Supp. 863 (S.D. Ohio 1975) (for bad faith in racial discrimination in sale of property); Morris v. Board of Educ., 401 F. Supp. 188 (D. Del. 1975) (for bad faith in firing teacher). *Cf.* SEC v. Aberdeen Securities Co., 526 F.2d 603 (3d Cir. 1975) (remanded to determine if the common benefit exception could be applied to the facts of the case).

201. Witt, *supra* note 181, at 41 (emphasis original).