

THE IMPACT OF ECONOMIC INCENTIVES ON THE AWARD OF ATTORNEY'S FEES IN PUBLIC INTEREST LITIGATION

I. INTRODUCTION

Alaska Civil Rule 82¹ provides for the assessment of *partial*² attorney's fees³ to the prevailing party⁴ in civil litigation.⁵ Alaska is

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1. Rule 82(a) of the Alaska Rules of Civil Procedure provides as follows:

(a) Allowance to Prevailing Party.

(1) Unless the court, in its discretion, otherwise directs, the following schedule of attorney's fees will be adhered to in fixing such fees for the party recovering any money judgment therein:

ATTORNEY'S FEES IN AVERAGE CASES

		Contested	Without Trial	Non-Contested
First	\$2,000	25%	20%	15%
Next	\$3,000	20%	15%	12.5%
Next	\$5,000	15%	12.5%	10%
Over	\$10,000	10%	7.5%	5%

Should no recovery be had, attorney's fees for the prevailing party may be fixed by the court *in its discretion* in a reasonable amount.

(2) In actions where the money judgment is not an accurate criteria [sic] for determining the fee to be allowed to the prevailing side, the court shall award a fee commensurate with the amount and value of legal services rendered.

(3) The allowance of attorney's fees by the court in conformance with the foregoing schedule is not to be construed as fixing the fees between attorney and client. . . .

ALASKA R. CIV. P. 82(a) (emphasis added).

2. See ALASKA R. CIV. P. 82(a)(1)-(2). See also *Stepanov v. Gavrilovich*, 594 P.2d 30, 37 (Alaska 1979) (purpose is to partially compensate party under Rule 82); *Malvo v. J.C. Penney Co.*, 512 P.2d 575, 588 (Alaska 1973) (the purpose of Alaska Rule 82 of Civil Procedure is to partially compensate the prevailing party); *Preferred Gen. Agency, Inc. v. Raffetto*, 391 P.2d 951, 954 (Alaska 1964) (it is the purpose of Rule 82 "to partially compensate a prevailing party for the costs to which he has been put in the litigation. . . . The rule was not designed to be used capriciously or arbitrarily, or as a vehicle for accomplishing any purpose other than providing compensation where it is justified.").

3. Two-way fee shifting is involved in Alaska statutes, unlike many statutes enacted by the federal government. See, e.g., *Civil Rights Attorney's Fees Awards Act of 1976*, 42 U.S.C.A. § 1988 (Supp. V 1981) (providing for two-way fee shifting

the only state in the United States that follows the English rule which routinely assesses attorney's fees.⁶ Great discretion is vested in the trial court to determine whether attorney's fees should be assessed, and, if so, in what amount.⁷

A judicial exception to this general rule for attorney's fees is "public interest"⁸ litigation brought in good faith.⁹ Under the public

in favor of the party alleging a violation of the Act). See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 260-61 & n.33 (1975) (stating the general principle that attorney's fees are not recoverable absent an express statutory provision for fees). See generally Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?*, LAW & CONTEMP. PROBS., Winter 1984, at —.

The relevance of a one or two-way fee shifting statute is reflected in the impact that it has on the actions of potential plaintiffs. A one way fee shifting statute in favor of the plaintiff tends to encourage the bringing of such suits more than a two way fee shifting provision which carries with it potential liability for the legal fees of the opposing party. See Rowe, *Predicting the Effects of Attorney Fee Shifting*, LAW & CONTEMP. PROBS., Winter 1984, at —.

4. An analysis of the definition of prevailing party is beyond the scope of this note. Prevailing party will refer to the party in the lawsuit who successfully bears the burden of proof as to his claim or successfully defends against an opposing party's claim. The party need only prevail on the main issue involved in the lawsuit. It is not necessary to prevail to the extent of the original claim. See *State v. Alaska Int'l Air, Inc.*, 562 P.2d 1064, 1067 (Alaska 1977); *Buza v. Columbia Lumber Co.*, 395 P.2d 511, 514 (Alaska 1964).

5. See generally Note, *Award of Attorney's Fees in Alaska: An Analysis of Rule 82*, 4 U.C.L.A.-ALASKA L. REV. 129 (1974) (history of Rule 82 in Alaska).

6. See Note, *supra* note 3; cf. *Urban Dev. Co. v. DeKreon*, 526 P.2d 325, 329 (Alaska 1974)(Rule 82(a) does not require a formal motion for attorney's fees or an opportunity to be heard. A trial court judge may award attorney's fees as a matter of course under Rule 82(a)); see also ALASKA R. CIV. P. 82(a)(1) (trial court has discretion in determining the award of attorney's fees).

7. See, e.g., *Froelicher v. Hadley*, 442 P.2d 51, 53 (Alaska 1968) (absent an abuse of discretion, a trial judge's decision regarding attorney's fees will not be overruled); see also ALASKA R. CIV. P. 82(a)(1), *supra* note 1.

8. "Public interest" is not easily defined. In *Anchorage v. McCabe*, 568 P.2d 986, 991 (Alaska 1977), the Alaska court looked to *La Raza Unida v. Volpe*, 57 F.R.D. 94, 99-102 (N.D. Cal. 1972), for aid in determining the relevant facts and circumstances to assess the presence of a public interest. *La Raza Unida* set forth the three factors stated *infra* in text accompanying note 18. *La Raza Unida* involved a class action which sought to enjoin the construction of a proposed federal aid highway. The application of federal statutes and regulations to a state highway project requiring state compliance with federal environmental laws was analyzed. The court held that a state project became subject to federal laws upon the approval of the location of the federal aid highway. Addressing the public interests involved in the suit, the court considered the following elements in assessing the existence of a public interest:

a) The effectuation of strong Congressional policies[;]

. . . .

b) The number of people who have benefited from plaintiff's efforts. . . .
[and;]

. . . .

interest exception, the prevailing party may receive up to *full* attorney's fees.¹⁰ In the event the public interest litigant loses the lawsuit, he may be excused from paying the attorney's fees of the prevailing party.¹¹ This judicially recognized exception was first enunciated in *Gilbert v. State*.¹² In *Gilbert* the court stated that the purpose of the public interest exception was to "encourage plaintiffs to raise issues of public interest by removing the awesome financial burden of such a suit."¹³ The court accepted the view that "awarding fees [to prevailing defendants] in this type of controversy [public interest] [would] deter citizens from litigating questions of general public concern for fear of incurring the expense of the other party's attorneys' fees."¹⁴ It held that "it is an abuse of discretion to award attorneys' fees against a losing party who has in good faith raised a question of genuine public interest before the courts."¹⁵ The Alaska public interest exception is, then, a judicial mechanism to encourage plaintiffs to undertake the risks of public interest litigation and to reward their

c) The necessity, and financial burden, of private enforcement — Because of the limited resources and potentially conflicting interests within and among governmental entities, effectuation of the public policies towards environmental protection . . . frequently depend on private vigilance and enforcement.

57 F.R.D. at 99-100. See Nussbaum, *Attorney's Fees in Public Interest Litigation*, 48 N.Y.U. L. Rev. 301, 304-05 (1973).

9. See *Gilbert v. State*, 526 P.2d 1131, 1136 (Alaska 1974).

10. The recovery of litigation costs, other than attorney's fees, is not within the scope of this note.

11. See *Whitson v. Anchorage*, 632 P.2d 232, 233-34 (Alaska 1981) (per curiam) (court did not award attorney's fees against defendants who raised public interest claims as a defense; litigants should not be deterred by the prospect of the imposition of attorney's fees for the opposing party); see also *Thomas v. Croft*, 614 P.2d 795, 798 (Alaska 1980) (award of attorney's fees was justified because of the inherent equitable power of the court to award fees when justice requires).

12. 526 P.2d 1131, 1136 (Alaska 1974). In *Gilbert*, a potential political candidate sought a declaratory judgment that the state residency statute, which established certain durational residency requirements for candidacy, was unconstitutional on equal protection grounds. The court held that there was a compelling state interest for the statute. Thus, the statute did not deny equal protection. The court determined that the plaintiff had asserted a matter of public interest in good faith and that it would be an abuse of discretion to assess attorney's fees against such a plaintiff.

13. See *Anchorage v. McCabe*, 568 P.2d 986, 990 (Alaska 1977) (emphasis added) (relying heavily on *Gilbert*, 526 P.2d 1131, 1136 (Alaska 1974)). See also *Whitson v. Anchorage*, 632 P.2d at 233-34 (Alaska 1981); *Douglas v. Glacier State Tel. Co.*, 615 P.2d 580, 594 (Alaska 1980); *Moses v. McGarvey*, 614 P.2d 1363, 1369 (Alaska 1980); *Thomas v. Croft*, 614 P.2d 795, 798 (Alaska 1980); *Rouse v. Anchorage School Dist.*, 613 P.2d 263, 267 (Alaska 1980); *Girves v. Kenai Peninsula Borough*, 536 P.2d 1221, 1227 (Alaska 1975).

14. 526 P.2d at 1136.

15. *Id.* See *Douglas v. Glacier State Tel. Co.*, 615 P.2d at 594.

efforts by relieving them of potential liability for the payment of the opposing party's attorney's fees.¹⁶

Alaska courts have considered three factors to be relevant in the determination of whether the litigation involved a sufficient public interest to trigger the public interest exception. These factors, still used today,¹⁷ are:

- (1) the effectuation of strong public policies;
- (2) the fact that numerous people received benefits from plaintiffs' litigation success; [and]
- (3) the fact that only a private party could have been expected to bring [the] action.¹⁸

In addition to the three factors enumerated above, Alaska courts have considered a fourth factor. This fourth inquiry asks whether the litigant claiming public interest status would have had sufficient economic incentive to bring the lawsuit even if it involved only narrow issues lacking general importance. Such a litigant is less apt than a party lacking this incentive to be deterred from bringing a good faith claim by the prospect of an adverse award of attorney's fees.¹⁹

This factor seems to preclude a plaintiff with a substantial economic stake in the outcome of the litigation from establishing the public interest character of his lawsuit.²⁰

This note will analyze this factor, hereafter referred to as the economic incentive factor. The analysis will take place in the context of two recent Alaska Supreme Court decisions, *Kenai Peninsula Borough v. Kenai Peninsula Board of Realtors, Inc. (Board of Realtors)*²¹ and *Kenai Lumber Co. v. LeResche (Kenai Lumber)*.²² First, the analysis will consider the economic incentive factor in conjunction with the goal of the public interest exception. The problems in applying the public interest exception will then be discussed. A sug-

16. *See La Raza Unida v. Volpe*, 57 F.R.D. 94, 102 (N.D. Cal. 1972) (purpose of public interest exception is not to penalize the losing party, but rather it is to further the promotion of strong policies) (case relied on to formulate the relevant factors in *Anchorage v. McCabe*, 568 P.2d at 991).

17. *See supra* note 13.

18. *Anchorage v. McCabe*, 568 P.2d 991 (Alaska 1977) (citing *La Raza Unida v. Volpe*, 57 F.R.D. 94, 101 (N.D. Cal. 1972)). *See Nussbaum, supra* note 8, at 304-05.

19. *Kenai Lumber Co. v. LeResche*, 646 P.2d 215, 223 (Alaska 1982).

20. In *Gilbert*, 526 P.2d at 1136, the court stated that the economic benefit conferred or potentially conferred upon the litigant *may* or *could* be a factor in the determination of the existence of a sufficient public interest in the litigation; but the economic interest of the litigant was by no means elevated to a separate and identifiable factor, equivalent in importance to the other factors, such as the general public benefit, strong public policy, and expectation that only a private party could have brought the suit.

21. 652 P.2d 471 (Alaska 1982).

22. 646 P.2d 215 (Alaska 1982).

gested method of analysis for public interest litigation will be offered using *Board of Realtors* and *Kenai Lumber* as vantage points. Second, the ramifications of the economic incentive factor on potential public interest litigants, counsel, and lower courts will be discussed.

II. THE ECONOMIC INCENTIVE FACTOR IN CONTEXT

A. *Kenai Peninsula Borough v. Kenai Peninsula Board of Realtors, Inc.*

Board of Realtors involved a city ordinance which allowed land to be subdivided into parcels of ten acres or more without presentation of the proposed plat to the State Planning Commission. The ordinance directly conflicted with an Alaska statute that required prior approval of proposed plats by the State Planning Commission.²³ A title insurer brought suit alleging that the ordinance was invalid. The court held that the plaintiff had sufficient standing to challenge the validity of the ordinance.²⁴ The basis for standing was the plaintiff's substantial economic interest in the outcome. The trial court noted that the plaintiff

is a business corporation in the business of issuing policies of title

23. ALASKA STAT. § 40.15.010 (1971) provides:

Before the lots or tracts of any subdivision or dedication may be sold or offered for sale, the subdivision or dedication shall be submitted for approval to the authority having jurisdiction, as prescribed in this chapter. The regular approval of the authority shall be shown on it or attached to it and the subdivision or dedication shall be filed for record in the office of the recorder. The recorder shall not accept a subdivision or dedication for filing unless it shows this approval. If no platting authority exists as provided in §§ 70-130 of this chapter, lands may be sold without approval.

24. Standing is a matter of *who* may properly raise a particular claim. It is based on the litigant's personal stake in the outcome which may have arisen out of threatened harm to the plaintiff or harm already suffered by the plaintiff. *See, e.g., United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686-90 (1973); *Flast v. Cohen*, 392 U.S. 83, 103-06 (1968).

A finding of standing differs from the determination of a plaintiff's economic incentives and the consequent effect of these incentives on his public interest status.

The public interest exception requirement that only a private plaintiff would be expected to bring the suit implicitly assumes that such a private plaintiff possesses the requisite standing to sue. In practice, the kind of injury or potential harm likely to encourage most civil suits is economic. These economic incentives may, therefore, be required for a finding of sufficient standing to sue; simultaneously, pursuant to the economic incentive factor, they may be the very aspect of the plaintiff's lawsuit that precludes public interest status. It may be difficult to determine when a given plaintiff has sufficient standing to bring suit, but too much of an interest to be entitled to public interest status. Furthermore, unlike the other factors, such as breadth of impact (which deals with the effect of the litigation) and the effectuation of strong policies (which deals with the substance of the litigation), the economic factor is inextricably intertwined with another concern, the standing requirement; yet they represent purportedly separate considerations in the court's analysis.

insurance on real property. If the invalid ordinance were allowed to stand, [the plaintiff] would be harmed in that it would have to forego issuing policies of title insurance because of potentially invalid titles or write the policies and risk the consequences.²⁵

It is clear from this statement that the court was cognizant of the plaintiff's economic incentives for bringing suit.

On appeal, the Supreme Court of Alaska stated that the "ordinance quite plausibly would harm [the plaintiff's] *economic interests*. The ambiguous and uncertain property descriptions which would probably occur with greater frequency under the ordinance could substantially increase [the plaintiff's] burden in determining titles and its exposure to liability. These interests are *economic*."²⁶ The Alaska Supreme Court affirmed both the trial court's determination that a sufficient public interest was presented and the award of full attorney's fees to the plaintiff as prevailing party in the suit.²⁷

Board of Realtors illustrates the court's unwillingness to apply the economic incentive factor. Clearly, the plaintiff in *Board of Realtors* faced enormous potential economic liability in the event that the ordinance was upheld; in fact, the court expressly recognized this economic interest. Yet, the court found that a public interest was involved, thereby excepting the plaintiff from the general rule for attorney's fees, and entitling the plaintiff to full attorney's fees. This holding is contrary to the *apparent* scope and purpose of the economic incentive factor, which is to preclude a finding of public interest status where the litigant is unlikely to be deterred from initiating the lawsuit because of his substantial economic motivations.²⁸

B. *Kenai Lumber Co. v. LeResche*

In *Kenai Lumber*,²⁹ a timber company brought suit asserting that material modifications and amendments were made to a timber harvesting contract. The plaintiff was not a party to the contract, but was a competitor of a party to the contract. The complaint alleged that the amendments to the timber harvesting contract constituted significant changes which should have been bargained for through Alaska's statutory competitive bidding process.³⁰ The Supreme

25. *Board of Realtors*, 652 P.2d at 472 (Alaska 1982) (quoting from the trial court).

26. *Id.* at 472-73 (emphasis added).

27. *Id.* at 473.

28. See generally *supra* notes 19-20 and accompanying text.

29. 646 P.2d 215 (Alaska 1982).

30. See ALASKA STAT. § 38.05.120 (1977) which provides:

Disposal procedure. Timber and other materials shall be sold either by sealed bids or public auction, depending on which method is determined by the commissioner to be in the best interests of the state, to the highest

Court of Alaska affirmed both the trial court's holding that no public interest litigation was involved and its award of attorney's fees to the prevailing defendant. The court focused on the competitive advantage it felt the plaintiff had sought through the litigation, an advantage which constituted a substantial economic incentive for initiating the lawsuit. The court expressly stated that plaintiff "was a competitor of [the defendant] and was seeking a continuing source of timber to process in its mill."³¹ Therefore, "[b]ecause the sums at stake in [the] controversy [were] large enough to prompt a suit without consideration of the public interest, the superior court could have concluded that the property owners were acting in their private interests and not in behalf of the public."³²

In *Kenai Lumber* the economic incentive factor was clearly utilized to preclude a finding that public interest litigation was involved. The court focused almost exclusively on the competitive relationship between the parties.³³ The court implicitly assumed that *if* parties are commercial competitors, *then* the public interest must not be involved. This holding appears to be consistent with the scope and purpose of the economic incentive factor. The rationale of the opinion, however, is a *non sequitur*: public interest litigation is not necessarily precluded by the parties' competitive relationship.

The difficulty presented by both *Board of Realtors* and *Kenai Lumber* is twofold. First, the court did not consistently analyze the character of the claims made. Second, the court sporadically applied the economic incentive factor. Several questions are suggested by these varying analyses by the same court. For instance, what is the role of the economic incentive factor in the analysis of the "public

qualified bidder as determined by the director. An aggrieved bidder may appeal to the commissioner within five days after the sale for a review of the director's determination. The sale shall be conducted by the director or his representative, and at the time of sale the successful bidder shall deposit the amount specified in the terms of sale. The means by which the amount of deposit is determined shall be prescribed by appropriate regulation. The director or his representative shall immediately issue a receipt containing a description of the timber or materials purchased, the price bid, and the terms of sale. The receipt shall be acknowledged in writing by the bidder. A contract of sale, on a form approved by the attorney general, shall be signed by the purchaser and, following the approval of the commissioner, the contract shall be signed by the director on behalf of the state. The director, with the approval of the commissioner, may impose conditions, limitations, and terms which he considers necessary and proper to protect the interests of the state. Violation of any provision of this chapter or the terms of the contract of sale subjects the purchaser to appropriate legal action.

31. 646 P.2d at 223.

32. *Id.* (quoting *Mobil Oil Corp. v. Local Boundary Comm'n*, 518 P.2d 92, 104 (Alaska 1974)).

33. 646 P.2d at 223.

interest" character of the controversy? Is the economic incentive of the party equally weighed with the other three relevant factors enumerated by the court? Is the consideration of economic incentives dispensable merely upon judicial discretion, as appeared to be the case in *Board of Realtors*; and, if so, what are the telltale signs of such dispensability? Is the general goal to encourage public interest litigation promoted by the analysis of the court in *Board of Realtors* and *Kenai Lumber*?

Furthermore, the policy behind the public interest exception is the encouragement of public interest litigation. The relatively recent enunciation of the economic incentive factor, however, introduces much uncertainty into the determination of whether a plaintiff's suit possesses the requisite public interest character to fall within the public interest exception to attorney's fees. This uncertainty arises from the broad discretion granted to trial courts and the concomitant lack of clear guidelines for the application of the relevant factors in determining the existence or nonexistence of a public interest claim.

A better method of analysis than that used in *Kenai Lumber* and *Board of Realtors* would be to rest the determination of public interest status on objective criteria which would consistently form the framework of analysis. Such an analysis would effectuate the goals of encouraging public interest litigation and of providing useful guidelines for litigants seeking to initiate public interest lawsuits.

III. THE ECONOMIC INCENTIVE FACTOR AND THE GOAL OF THE PUBLIC INTEREST EXCEPTION

The provision for two-way attorney fee shifting, whether statutorily or judicially created, may reflect several different underlying goals.³⁴ First, it may reflect a desire to compensate the prevailing party, thereby recognizing that certain wrongdoings warrant partial or full recovery of attorney's fees. Second, assessing attorney's fees against the losing party can increase deterrence of certain conduct through the establishment of a risk of payment of the prevailing party's attorney's fees. Third, awarding attorney's fees in areas involving private interests may reflect a policy choice to encourage lawsuits in areas where special incentives may be necessary to prompt plaintiffs to action — for instance, securities fraud and civil rights actions. Fourth, it may reflect a desire to promote the vindication of public rights involving matters of broad social impact. This goal reflects the view that a plaintiff should be encouraged to benefit the community through his actions.³⁵ Alaska courts have stated that

34. See generally Rowe, *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651.

35. See *id.* at 663 n.56.

this goal, to encourage public interest litigation, is the one underlying the Alaska public interest exception.³⁶ Fifth, it may reflect a desire to encourage *uneconomical* litigation that benefits the public. This lattermost goal suggests a significantly narrower scope than the broader fourth possible goal. It seeks only to encourage plaintiffs who might not otherwise have a sufficient economic interest at stake and to prompt their actions to bring suit. The goals to be served by an award of partial or full attorney's fees to a prevailing plaintiff can be summarized as follows: compensating prevailing parties, deterring certain conduct, creating special incentives for particular kinds of litigation, encouraging public interest lawsuits, and encouraging only *uneconomical* public interest litigation.

It is crucial to ascertain which of these fee shifting goals is consistent with the Alaska public interest exception. Once that is ascertained, it is possible to assess whether application of the four factors that determine public interest status is consistent with the fulfillment of the stated goal. This determination is important because a specific goal indicates which actions are necessary to fulfill it. Only when both the goal and implementing actions are harmonized can the stated goal be achieved.³⁷

Alaska courts have stated that promoting lawsuits which benefit the public is the goal behind the Alaska public interest exception.³⁸

36. See *supra* note 13 and accompanying text.

37. For an analogous situation, consider the various goals within the criminal justice system of retribution, deterrence, and vindication of the public interest. Given these goals, it can be expected that a prosecutor would be likely to undertake enforcement measures consistent with the fulfillment of these overall goals. Rehabilitation or other diversions from criminal sanctions, therefore, would not be expected to be the desired end in such a criminal justice system. Furthermore, assume that certain prosecutorial decisionmaking reflects a conscious concentration of effort to stringently enforce the laws against murder, rape, and drug offenses. The underlying goal in this instance, in addition to the general goals previously stated, would be to prevent such conduct by punishing the criminal whose conduct was felt to result in the irreparable harm to the public welfare. One would expect that the fulfillment of this policy would be manifest in frequent prosecutions, multiple charging of offenses and related offenses with resulting consecutive sentencing, and a paucity of plea bargaining opportunities for defendants charged with the commission of these crimes. As a consequence of these goals and of limited resources, the enforcement of less violent offenses, such as mail fraud or other white collar crimes, may be less diligent. The stringent enforcement of particularly heinous crimes, therefore, may reflect the underlying enforcement policy which embodies the implicit assumption that the commission of other crimes is not as immediately detrimental to the public welfare.

38. See *supra* note 13 and accompanying text. In determining what constitutes a public interest, the Alaska Supreme Court might pursue several goals. Even if several goals are apparent, however, a clarification of exactly what those goals are would still be manifestly useful to guide practitioners, future plaintiffs, and lower courts.

Consequently, one would expect that court decisions would manifest a desire to encourage such litigation. The application of the economic incentive factor, however, is inconsistent with the encouragement of public interest lawsuits because an economic interest is not necessarily inconsistent with the presence of a public interest concern. The goal to encourage public interest litigation would be best promoted by clearly focusing on the goal to promote public interest litigation in general, adhering to the stated goal, and defining the scope of the public interest itself in conjunction with the stated goal.³⁹

The economic motivations of the plaintiff may be relevant in determining the sufficiency of the public interest involved. However, the proper role of the plaintiff's economic incentives is within a subset of factors to be considered in determining the presence or absence of a sufficient public interest.⁴⁰ A strong economic interest

39. If it is assumed that the goal behind the public interest exception was limited to simply encouraging the bringing of uneconomical litigation, the scope of the goal of the public interest exception would be markedly narrowed. Perhaps only the altruistic plaintiff would appropriately fall within the ambit of the public interest exception, given this limited purpose. The goal and operation of the public interest exception, as narrowed, would be similar to the general policy behind attorney fee shifting in Alaska for all other civil cases: partial compensation of the prevailing party. Thus, if the goal were simply to compensate, there would be no justification for the public interest exception, because compensation is the current purpose behind general attorney fee shifting in Alaska. Compensation, therefore, cannot be the purpose underlying the public interest exception because Alaska courts have consistently stated that the goal of the public interest exception is to encourage public interest litigation. See *supra* notes 12-13 and accompanying text. Assuming that encouragement is the ultimate goal, it does not make sense to rest the ultimate characterization of the suit on the economic incentives of the parties.

40. The court's focus on the economic incentives of the parties may reflect a concern that the public interest exception not be broadened to the extent that nearly every claim is amenable to the definition of public interest. Some balancing of interests is necessary. The goal, however, of encouraging public interest litigation is better served by permitting some of the more questionable cases to be classified as public interest litigation, rather than by precluding such suits because of potential or assumed economic incentives. In developing the relevant factors to determine public interest status, the court should err on the side of vindicating the public interest.

An analogy to prior restraints on free speech may be drawn; once it is recognized that the goal is free speech, the question remains as to how great an effort will be made to assure that the understood goal is fulfilled. The evil in a prior restraints statute is that too broad a category of speech may be precluded because of the "chill" created by the possibility of punishment. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Near v. Minnesota*, 283 U.S. 697 (1931) (Minnesota statute that allowed abatement of derogatory publications was struck down as an unconstitutional prior restraint on free speech violative of the fourteenth amendment). The same reasoning, albeit not rising to the level of a constitutional inquiry, is applicable to attorney fee shifting.

may indeed militate against the litigation being appropriately characterized as public interest litigation. Economic incentives, however, are not appropriately considered as a separate and identifiable fourth factor which may singly preclude public interest status.⁴¹ Nor should the economic incentives of the party create so much uncertainty that they are allowed to frustrate the overall goal to encourage public interest litigation. While economic incentives may be relevant, they should not be a controlling factor in assessing public interest status.

The court should thoroughly scrutinize the definition of public interest instead of focusing on the individual plaintiff. If a sufficient public interest is vindicated by the litigation, the individual circumstances of the litigant should be overshadowed.⁴² If the paramount objective is to encourage public interest litigation, the existence of economic incentives, as in *Board of Realtors* and *Kenai Lumber*, does not require the conclusion that the public does not benefit. Nor does it mean that litigating the controversy is not in the public's best interest.⁴³ If the aim is to encourage litigation to resolve important issues of public concern, it is nonsensical to deny public interest status simply because a lucrative economic issue is presented by a plaintiff.⁴⁴ To allow the economic incentives of the plaintiff to become the controlling factor in the determination of whether the suit

41. See *supra* note 20.

42. Consider public interest plaintiffs with "sure winner" cases. As in the case in which litigants have strong economic incentives, they do not need much encouragement to pursue "sure winner" cases. Yet, this "sure winner" incentive does not preclude an award of attorney's fees. Precluding one plaintiff with economic incentives, but not another with a "sure winner" case, discriminates against the public interest plaintiff.

43. In fact, private litigation may be a relatively inexpensive means to enforce laws enacted for the public's benefit and to improve the quality of the laws enacted.

44. It may be possible to incorporate a public interest issue into an otherwise relatively narrow civil claim. For example, a contract claim arising under a state law requiring competitive bidding may be brought in conjunction with a claim concerning the validity of the statute. If the plaintiff can be encouraged to raise the public interest question simultaneously with his contract claim it may be feasible to recognize the gain to society from the litigation and concurrently encourage the plaintiff to undertake the extra research required to raise the public interest question. Thus, when an important public policy question may conveniently be consolidated into the litigation but for the economic incentive factor, the additional expense associated with preparing the public interest claim would be warranted. The court should not overlook this possible avenue to vindicate important public policies.

In addition, it would be possible to determine what portion of the case involved the public interest issue and to apportion the award of attorney's fees accordingly, instead of applying the all-or-nothing rule currently adhered to by the courts, i.e., it either is or is not public interest litigation. Certainly the broad discretion of the courts would countenance such a system. See, e.g., *Hensley v. Eckerhart*, 103 S. Ct.

is public interest litigation dispenses with the three most relevant factors: the breadth of impact, vindication of strong social policies, and the personal standing of the plaintiff.⁴⁵

A. Practical Difficulties in Applying the Economic Incentive Factor

A practical difficulty that may arise with the application of the economic incentive factor is that it may in fact discourage litigation of public interest issues by creating an additional barrier — increased uncertainty surrounding public interest status. Now the potential public interest litigant must ask himself whether he has so great an economic stake in the outcome of the litigation that he will be subjected to payment of the attorney's fees of the prevailing party. This uncertainty undermines the objective of encouraging public interest litigation.

The impact of the economic incentive factor on litigants should also be viewed in conjunction with the other three factors.⁴⁶ The greatest difficulty in applying all four factors arises in the concomitant application of the third and fourth factors. The fact that a private party is expected to bring the suit suggests that he has some motivation for initiating suit. Often this motivation is economic. Because a plaintiff must possess an interest significant enough to confer standing, the question remains as to how great an interest will exceed the economic incentive limits. The economic incentive factor is difficult to mesh with the application of the third factor because it imposes a limit on how much interest the plaintiff can possess. Thus, even though the gain to society from the litigation may be great, the application of the economic incentive factor suggests that if the gain to the plaintiff is correspondingly great, the economic circumstances of the plaintiff will be controlling and will preclude public interest status.

Assessing a party's economic incentives to ascertain the public interest character of the litigation presents another practical problem. The court must consider the motives of the parties, motives which can be measured only by subjective determinations. The economic incentive factor necessarily implies delving into the *subjective*

1933 (1983) (relevant factors in determining the proportional award of attorney's fees).

45. Furthermore, without this economic incentive the plaintiff may not possess the requisite standing to bring suit. The reasoning of the court in this area suggests that the public interest plaintiff stands between Scylla and Charybdis, for he must possess the requisite personal interest to have standing to sue; but too great a personal stake in the outcome is fatal to the public interest character of the lawsuit because of the economic incentive factor. See *supra* note 24.

46. See *supra* text accompanying note 18.

motives of the parties and calculating *potential* economic recoveries which *may* have prompted the party to bring suit.⁴⁷ Neither the motives nor the possible rewards, however, can be effectively explored in court. Furthermore, as a matter of logic, encouraging public interest litigation does not *a priori* require the court to probe into the economic incentives of the parties.

In addition, the analyses in the two Alaska Supreme Court opinions discussed earlier in this note are unclear. Two alternative rationales could possibly support the court's holdings. First, the court could have reasoned that no public interest was involved because only a private interest with too limited an impact on the public was implicated (a rationale which solely addresses the quantum of public interest). Alternatively, the court could have reasoned that a public interest may be involved, but that it was not the motivating force behind the litigation because the suit would have been brought anyway (a rationale which addresses the economic motives). This latter rationale is problematic because it relies on the subjective and unarticulated motives underlying the plaintiff's conduct. It also suggests that short shrift is given to the other relevant factors: the impact of the lawsuit on the community, the effectuation of strong public policies, and the recognition that only a private party could have been expected to initiate the action. Instead of leaving the interpretation of the court's analysis to guesswork, the Alaska court should clearly articulate the rationale for its decisions so that that rationale can be consistently and logically applied.

B. Suggested Analysis for Public Interest Status

A better analytical approach to follow in determining the public interest character of the litigation would be to focus on only three factors — the breadth of impact, the effectuation of strong public policies, and the likelihood that only a private party would bring the action.⁴⁸ The court should articulate which strong public policies

47. The problem is accentuated when economic incentives are more attenuated. For instance, in a ballot access case a plaintiff may have economic incentives to attain a powerful political office. A strong public interest in having an open and free election process may concurrently exist. In this instance, there would be an inherent inconsistency in denying public interest status to the plaintiff who challenges the political election statute. A similar fact situation was resolved in favor of granting public interest status in *Gilbert*, 526 P.2d 1131 (Alaska 1974). Yet, the extent of the economic incentive test remains unclear. Virtually all litigation involves some economic incentive; given the commonality of this occurrence how useful can the economic incentive test ever be?

48. The third factor addresses both the appropriateness of the particular plaintiff initiating the lawsuit (standing) and the preferred method of litigation (private suit). It is not addressed here because it is more a matter of procedure than a matter which affects the *public interest* character of the litigation. Thus, out of the three

would be promoted by the litigation. To ascertain what matters are of broad public concern, the Alaska court may look to other jurisdictions, state and federal, which have enacted statutes providing for the award of attorney's fees.⁴⁹ For example, various federal statutes allow attorney's fees in areas such as civil rights,⁵⁰ unfair competition,⁵¹ public health and welfare,⁵² securities fraud violations,⁵³ and environmental law.⁵⁴ These statutes focus on the social benefit arising from the litigation of disputes in these areas. Similarly, Alaska courts should consider the breadth of impact of the litigation as the paramount question in evaluating the nature of the litigation. Once this impact is determined, the court can ascertain whether the litigation serves the public interest. Eliminating the economic incentive factor clarifies the analysis and treats the effectuation of strong public policies as the highest goal to be served by the public interest exception.

In addition, the advantage of using only the three factors is that each is more objective than the economic incentive factor. The court can rule without making subjective determinations about the litigant's possible economic motives or subjective mental state. For instance, in *Board of Realtors* the court should have utilized the objective factors and expressly considered the breadth of impact of the litigation and the vindication of a substantial public interest in maintaining clear land titles.⁵⁵ The court should have recognized the nominal interest of the plaintiff in relation to the aggregate potential injury to all future landholders who paid for and relied on the title insurance provided by plaintiff. The court could have identified a strong public policy for avoiding unnecessary litigation, recognizing that such an invalid ordinance was likely to open the floodgates of litigation. A breadth of impact analysis could have supported the court's decision. This analysis would have clearly communicated to

factors, the role of the third factor in determining public interest status is viewed as subordinate to the other considerations of breadth of impact and overall social benefit of the litigation.

49. See generally E. LARSON, FEDERAL COURT AWARD OF ATTORNEY'S FEES 301-12 (1981); PRACTICING LAW INSTITUTE, PUBLIC INTEREST PRACTICE AND FEE AWARDS (H. Newberg ed. 1980).

50. See, e.g., Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (Supp. V 1981).

51. See, e.g., 15 U.S.C. § 72 (1982).

52. See, e.g., Consumer Product Safety Act, 15 U.S.C. §§ 2072-73 (1982); Social Security Act, 42 U.S.C. § 406(b) (1976); 42 U.S.C. § 3612(c) (1976).

53. See, e.g., Securities Exchange Act of 1934, 15 U.S.C. § 78r(a) (1982).

54. See, e.g., Federal Water Pollution Control Act, 33 U.S.C. § 1365(d) (1976); Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1415(g)(4) (1976); Clean Air Act, 42 U.S.C. § 7604(d) (Supp. V 1981).

55. See *supra* text accompanying notes 23-28.

potential plaintiffs the basis on which the court's decision rested. Thus, these broad public policies supported a finding in favor of plaintiff's public interest status in *Board of Realtors*. Any of these policies may have been, but was not, articulated by the court to justify plaintiff's public interest status. An unequivocal recognition of the broad public interests at stake in *Board of Realtors* would have supported a determination that the presence of these factors outweighed the plaintiff's economic incentives and entitled him to public interest status.

Similarly, in *Kenai Lumber* the court could have justified its decision without consideration of the economic incentive factor. The court could have determined that no public interest was involved in that the contract modifications were minor, hence insignificant in the statutory context.⁵⁶ Alternatively, the court could have held that the litigation lacked the breadth of impact reflective of a genuine public concern in that it involved only the rights of three private parties. The court could have characterized the suit as one that involved traditionally personal and private interests, akin to tort,⁵⁷ child support,⁵⁸ and child custody⁵⁹ proceedings. These proceedings have too attenuated an impact on the general social welfare to be deemed matters of public interest. Finally, the court could have focused on the language of the statute⁶⁰ which grants the Commissioner discretion regarding contract provisions and methods of sale. The court could have deemed that the contract modification issue had already been scrutinized by the Commissioner; hence, implicitly, the public's interests had already been served. Once again, the economic incentive factor was an unnecessary consideration which needlessly obscured and complicated the court's analysis.

IV. THE RAMIFICATIONS OF THE ECONOMIC INCENTIVE FACTOR

A. The Impact on Potential Public Interest Plaintiffs

If the goal of the public interest exception is to encourage litigation concerning important public interests, uncertainty surrounding the determination of public interest status can have several detri-

56. See *supra* text accompanying notes 29-33.

57. *Hiller v. Kawasaki Motors Corp.*, 671 P.2d 369, 374 (Alaska 1983) (tort claim alleging defects in a snowmobile was not a matter involving the public interest).

58. *Cooper v. State*, 638 P.2d 174, 179 (Alaska 1981) (when parent challenged a child-in-need-of-aid petition, the court held that any purported public interest was too attenuated where the parent only sought to vindicate her own interests, and not to benefit the public).

59. *Id.*

60. See ALASKA STAT. § 38.05.120 (1977) set out *supra* note 30.

mental effects. First, it may discourage public interest plaintiffs from initiating *meritorious* public interest suits because of this uncertainty and the consequent risk of payment of the opposing party's attorney's fees. The Alaska Supreme Court has recognized that the risk of paying attorney's fees to the opposing party significantly deters the initiation of public interest litigation.⁶¹ Moreover, the cost to a potential plaintiff is not merely measured in terms of the opponent's attorney's fees. Public interest plaintiffs may also expend great amounts of time and effort, neglect their businesses, and encounter the stresses which accompany any litigation. These additional costs also deter public interest plaintiffs from initiating suit. If the court deems it necessary to scrutinize the economic incentives of the plaintiffs, it should also assess the practical costs of litigation. To do otherwise is analogous to calculating the profits of a corporation without considering the expense of generating those profits. By emphasizing the financial motives of the plaintiff, the court obscures the real issue presented by the litigation; that is, the public interest inquiry. In addition, the analysis exaggerates the true economic interest possessed by the plaintiff by ignoring the costs of litigation.

Another effect of this uncertainty about what does and does not constitute a matter of public interest is that plaintiffs may be encouraged to bring a number of *unworthy* non-public interest claims. The purpose of these suits would be to test the boundaries of the public interest exception. Such suits appear to be justifiable at present because the court's application of the relevant factors to determine public interest status is confusing. A plethora of such "unworthy" cases may be routinely filed, resulting in an unnecessary backlog of cases.

B. The Impact on Counsel

The uncertainty generated by the economic incentive factor makes it difficult for counsel to advise potential public interest plaintiffs. Rendering advice becomes a "hit or miss" approach, with counsel often able to find abundant case law to support either side of the controversy. Counsel is thus unable to accurately assess the character of the client's claim. This uncertainty results in an unnecessary waste of resources. Many unnecessary appeals may result because plaintiff's counsel is unsure of the criteria used by the court to determine public interest status. The court's energies are wasted, its docket is strained, and years may elapse. The practitioner's everyday decisionmaking can be greatly facilitated by court opinions that clearly state the relevant factors considered and the objective ration-

61. See generally *supra* note 11.

ale used by the court. This would also promote the efficiency and integrity of the legal system.

C. The Impact on the Lower Courts and Judicial Discretion

Finally, even if there were no immediate effect on potential public interest plaintiffs, the lack of clear standards will mean that attorney fee issues will continue to be one of the most litigated questions in the Alaska courts because they are a matter of practical significance in every lawsuit. The number of public interest claims may well continue to increase, thereby compounding the problem. While it is recognized that the award of attorney's fees is a discretionary matter for the court, and thus by nature does not suggest any bright line test, a modicum of guidance could be provided. The analysis underlying this discretion can be useful, if explained, to counsel. It is to be hoped that as a result of this guidance that relatively consistent results can be reached by the court given similar facts and circumstances.⁶²

Uncertain guidelines for the application of the economic incentive factor may have an impact on the overall notion of judicial discretion. Without guidelines for the lower courts, their decisions regarding public interest status may frequently be reversed. These reversals could suggest that lower courts do not, in fact, possess the discretion granted by the Alaska attorney's fees rule.⁶³ Guidelines from the Supreme Court of Alaska would enable the lower courts to exercise their discretion consistently, thereby eliminating many perhaps unnecessary and unwarranted appeals.

In addition, the number of cases involving public interest litigation would almost certainly be reduced in the long term by providing more guidance. Greater guidance could shorten each trial by excluding consideration of clearly nonpublic interest allegations and by deterring altogether the making of unfounded allegations. It is suggested that "no effect" on the current state of affairs is manifestly unsatisfactory because unnecessary litigation can be avoided by providing more objectively ascertainable standards to judge the presence or absence of a public interest claim.

A possible procedural alternative⁶⁴ for dealing with the confu-

62. Inconsistency in the application of the factors can be expected to be communicated to the public. The current case law may suggest to the public that the court operates without method; this message may discourage the initiation of public interest lawsuits.

63. See ALASKA R. CIV. P. 82(a).

64. Another possible alternative, if the judiciary simply seeks to encourage uneconomical litigation involving the public interest, would be for the legislature to place a cap on the amount that is recoverable in public interest litigation. But for the legislature to make predictions of favorable economic stakes is precarious since

sion surrounding public interest status would be to allow a pretrial determination by the court of the public interest status of the litigants, the breadth of impact of the litigation, and the propriety of the suit being brought by the plaintiff.⁶⁵ A pretrial decision could aid parties in their preparation of proof of public interest status. It could also result in less work for the court during trial by eliminating speculation about economic incentives and by providing a concrete record for appeal of all relevant facts. Another advantage of a pretrial determination is that possibly incorrect determinations about the impact of the litigation or about the parties' possible economic incentives could be avoided. The pretrial determination would enable the court to consider the ramifications of the lawsuit outside the hectic pace of trial. A thoughtful and unhurried analysis of the impact of the litigation would be possible. Thus, the objective of this pretrial determination would be to screen out clearly nonpublic interest lawsuits as soon as possible. A more efficient judicial system would result in that the consideration of such issues could be dealt with early on. This alternative may also discourage the making of such claims when they are neither useful for stalling tactics, settlement negotiations, nor potential reimbursement based on uncertain case law.

V. CONCLUSION

If the goal of the public interest exception to attorney's fees awards is to encourage public interest litigation, unnecessary uncertainty is created by focusing on the economic incentives of the plaintiffs. The definition and scope of public interest litigation should be more articulately defined and evaluated. This suggested analysis recognizes that the economic incentives of a party, while relevant, are not entitled to paramount and controlling consideration if a true underlying public interest is involved in the litigation. The court should recognize that the existence of a substantial economic interest is not necessarily inconsistent with the public interest character of the litigation. The focus should be on the public interest character of the litigation — its overall impact on society — and not on the underlying motives of the plaintiff — motives which are inherently subjective and about which only arbitrary determinations can be made.

the amount involved in the litigation is frequently unknown. Furthermore, the amount involved is often impossible to determine before judgment is entered, and at best, only a general standard could be implemented which would only arbitrarily serve the needs of the public.

65. It is recognized that a favorable determination regarding public interest status may encourage litigants to exert all efforts and, therefore, maximize costs to litigate the issues. Pursuant to the court's broad discretion, however, the recovery of attorney's fees could always be limited to a reasonable amount. This oversight function should prevent overexpenditures for legal fees.

While the exercise of judicial discretion is expressly provided for by rule⁶⁶ and is a necessary element in an area concerned with notions of the reasonableness of compensation, its use without accompanying guidelines seriously hinders the precedential value of Alaska court opinions. Unarticulated and unexplained discretion leads to confusion in applying the relevant factors. Before the public interest exception was declared, a considerable financial risk existed for plaintiffs initiating public interest lawsuits. This risk existed because of the possibility of paying attorney's fees; it existed regardless of the degree to which their claims promoted public interests. Such a state of affairs is incompatible with the recognized goal not to deter potential public interest litigants from bringing suit by the risk of payment for the opposing party's attorney's fees.⁶⁷

Furthermore, this situation makes plaintiffs unsure of the public interest nature of their claims. Therefore, they may bring suit to test the boundaries of the public interest exception. Unnecessary appeals based on public interest characterizations made by the trial court may follow almost as a matter of course. Inevitably, lower court decisions involving public interest issues will be reversed. This sequence of events suggests that the discretion of the lower courts involving attorney fee awards is not as broad as imagined. Thus, lower courts would benefit from a more thorough articulation by the Supreme Court of Alaska of guidelines for determining the public interest nature of a claim. The impact of uncertainty also reaches the level of attorney counseling. Perhaps the most revealing aspect of the ill effects of this uncertainty is the continued assertion of public interest status by Alaska litigants. With some elucidation of the important considerations behind the public interest exception, in light of the facts and circumstances of a given case, this unnecessary waste of resources can be curtailed and public interest litigation can be effectively encouraged.

Virginia Cella Antipolo

66. ALASKA R. CIV. P. 82(a).

67. See *supra* note 13 and accompanying text.

