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Article 5

Recovery of Attorneys' Fees on Mooted Claims

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NOTE

RECOVERY OF ATTORNEYS' FEES ON MOOTED CLAIMS

The American Rule on attorneys' fees, requiring each party to bear the cost of his legal representation in civil suits regardless of outcome,[1] is pitted with exceptions. Numerous state and federal statutes provide for the reimbursement of a plaintiff's legal expenses.[2] The statutes seek to reward the plaintiff for successfully enforcing the law and to encourage other citizens to do likewise.[3] Even without statutory authorization, courts have allowed a complainant to recover attorneys' fees where his efforts have conferred a common benefit on a definable class.[4] Recovery under the common benefit banner derives from the theory of unjust enrichment.[5]

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[1] *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975). *Alyeska* involved an attempt to recover attorneys' fees under the private attorney general theory. Congress had mooted the plaintiffs' original action by amending the statute upon which it was based. Holding that the case fell within the American Rule and outside any of its exceptions, the Court refused to award attorneys' fees. *See* 28 U.S.C. §§ 1920, 1923(a) (1970) (court may tax as costs various specified items including nominal attorney's and proctor docket fees); CAL. CIV. PROC. CODE § 1021 (West 1955) (court may not award attorney's fees unless explicitly permitted by statute). *But see* ALASKA STAT. § 09.60.010 (1973) (reversing American Rule). The history behind the Alaskan statute is discussed in Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 647 (1974).

This Note uses the terms "attorneys' fees," "legal expenses," "legal fees" and "counsel fees" interchangeably. Petitions for attorneys' fees normally encompass lawyers' professional fees as well as all out-of-pocket expenses charged to clients. *See, e.g.*, Prandini v. National Tea Co., 557 F.2d 1015, 1017 (3d Cir. 1977).

[2] *See, e.g.*, Clayton Act § 4, 15 U.S.C. § 15 (1970); Fair Labor Standards Act § 16(b), 29 U.S.C. § 216(b) (1970 & Supp. V 1975); Civil Rights Act of 1964, tit. VII, § 706(k), 42 U.S.C. § 2000e-5(k) (1970); Merchant Marine Act of 1936, § 810, 46 U.S.C. § 1227 (1970); N.Y. LAB. LAW § 198 (McKinney Supp. 1977); OHIO REV. CODE ANN. § 1345.48 (Page Supp. 1976).

[3] *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 263 (1975). *Cf.* notes 181-88 and accompanying text *infra* (Congress intended that courts award statutory attorneys' fees only after proof of defendant's liability on merits).

[4] *See* Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); Fletcher v. A.J. Indus., Inc., 266 Cal. App. 2d 313, 72 Cal. Rptr. 146 (1968).

Common benefits come in many varieties. They may include such benefits as the protection of corporate democracy through proxy disclosure (*see, e.g., Mills*), the vindication of labor union democracy (*see, e.g.*, Hall v. Cole, 412 U.S. 1 (1973)), and environmental protection (*see, e.g.*, Woodland Hills Residents Ass'n v. City Council, 75 Cal. App. 3d 1, 141 Cal. Rptr. 857 (1977)). *See generally* note 5 *infra*.

[5] In Mills v. Electric Auto-Lite Co., 396 U.S. 375, 392 (1970), the Court stated: "To

allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense." Similarly, Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 167 (3d Cir. 1973), stated that the purpose of the fee award was "to compensate the attorney for the reasonable value of services benefiting the unrepresented claimant." *See* notes 35-39 and accompanying text *infra*. Thus, reimbursement comes from those who benefit. Often this class consists of non-parties. *See, e.g.*, Woodland Hills Residents Ass'n v. City Council, 75 Cal. App. 3d 1, 11, 141 Cal. Rptr. 857, 863 (1977) (plaintiffs' litigation benefited "many citizens of Los Angeles"). In some cases, however, such as shareholders' derivative suits, the recipient of the benefit is the defendant corporation. *See, e.g.*, Ramey v. Cincinnati Enquirer, Inc., 508 F.2d 1188, 1199 (6th Cir. 1974), *cert. denied*, 422 U.S. 1048 (1975); Fletcher v. A.J. Indus., Inc., 266 Cal. App. 2d 313, 320, 72 Cal. Rptr. 146, 150 (1968). This theory of recovery of legal expenses looks beyond the nominal designation of the corporation as a defendant to see that the interests of the corporation actually align with those of the plaintiff. The corporation therefore shares the cost of obtaining the benefit. *See generally* Note, *Attorneys' Fees in Shareholder Derivative Suits: The Substantial Benefit Rule Reexamined*, 60 CALIF. L. REV. 164, 169 (1972).

As a corollary to the proposition that reimbursement for attorneys' fees comes from those who benefit, the benefit must actually accrue to the class members before a court will award attorneys' fees. Thus in Van Gemert v. Boeing Co., 573 F.2d 733 (2d Cir. 1978), the Second Circuit refused to permit an assessment of legal expenses against unclaimed shares of a fund. The suit, a class action, had resulted in a six million dollar judgment against the defendant. The trial court placed this money in an escrow account, and ordered that attorneys' fees be paid to plaintiffs from the fund as a whole. Rejecting this approach, the court of appeals directed the trial judge to set a reasonable period of time for the class members to file proof of claims. After all the claims are processed, the trial court will assess attorneys' fees on a pro rata basis against the claimed shares.

The common benefit exception extends the common fund exception. The Supreme Court first sanctioned a common fund exception to the American Rule in Trustees v. Greenough, 105 U.S. 527 (1882). The common benefit extension allows a court to award attorneys' fees despite the absence of a monetary fund or property within the court's jurisdiction. *See* Schectman v. Wolfson, 244 F.2d 537, 540 (2d Cir. 1957) (dictum); D'Amico v. Board of Medical Examiners, 11 Cal. 3d 1, 25, 520 P.2d 10, 28, 112 Cal. Rptr. 786, 804 (1974).

Some authorities suggest that *Alyeska* reaffirmed only the common fund exception. *See, e.g.*, Foley v. Devaney, 528 F.2d 888, 892 (3d Cir. 1976). These authorities, however, read the case too literally. Although the *Alyeska* court spoke in the text of its opinion of a common fund, it cited without limitation *Mills*, which spoke of a common benefit. 421 U.S. at 257-58. Furthermore, the Court seemed to reaffirm the broader exception when it noted:

> In this Court's common-fund and common-benefit decisions, the classes of beneficiaries were small in number and easily identifiable. The benefits could be traced with some accuracy, and there was reason for confidence that the costs could indeed be shifted with some exactitude to those benefiting. In this case, however, sophisticated economic analysis would be required to gauge the extent to which the general public, the supposed beneficiary, as distinguished from selected elements of it, would bear the costs.

Id. at 265 n.39. Finally, three members of the *Alyeska* majority explicitly reaffirmed the common benefit theory in a dissent to the denial of certiorari in United Steelworkers v. Sadlowski, 98 S. Ct. 1627 (1978). The case involved the award of attorneys' fees to an intervenor in an action brought by the Secretary of Labor challenging a union election. In the dissenting opinion, Justice White, the author of *Alyeska*, noted: "The Third Circuit panel, in adopting a common-benefit theory, correctly observed that our opinion in *Alyeska Pipeline Co. v. Wilderness Society* . . . recognized the continuing vitality of that theory." *Id.* at 1629. The dissenters argued, however, that the court of appeals went beyond *Alyeska* because the class of beneficiaries was neither small nor easily definable, and

When litigating within an exception to the American Rule,[6]

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because the benefit conferred by the overturn of a local election could not be traced to the entire union membership.

Alyeska should therefore be read to stand for the following proposition: Absent a statute, courts will not reimburse a "private attorney general" for the common benefit conferred on the public, but they will reimburse a complainant with a personal stake in the case who confers a benefit on a definable class even if the suit does not bring an actual monetary fund into the court. Several courts and commentators have embraced this interpretation. *See, e.g.*, Academic Computer Sys., Inc. v. Yarmuth, 71 F.R.D. 198, 201 n.1 (S.D.N.Y. 1976); Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?*, 126 U. PA. L. REV. 281, 282, 301 n.97 (1977). The California Supreme Court, in Serrano v. Priest, 20 Cal. 3d 25, 46-47, 569 P.2d 1303, 1315, 141 Cal. Rptr. 315, 326-27 (1977), partially rejected *Alyeska*, holdiug that California courts can award attorneys' fees on a private attorney general theory where the plaintiff vindicates a right guaranteed by the California Constitution.

Although the common benefit exception does not require that a court have within its jurisdiction an actual fund or property, a court must find as a condition precedent to recovery that the benefit conferred was substantial. *See* Globus, Inc. v. Jaroff, 279 F. Supp. 807, 809 (S.D.N.Y. 1968). No generally accepted definition of "substantial" exists, but a few examples illustrate the scope of the exception. In Brennan v. United Steelworkers, 554 F.2d 586 (3d Cir. 1977), *cert. denied*, 98 S. Ct. 1627 (1978), the court of appeals reversed a lower court order denying recovery of attorneys' fees under the common benefit exception to a defeated candidate for local union office. The petitioner had assisted the Secretary of Labor in successfully attacking violations of the Labor-Management Reporting and Disclosure Act's election provisions (29 U.S.C. §§ 481-483 (1970)). The court found that vindication of the democratic process in an individual district could qualify as a substantial benefit conferred upon the entire union. 554 F.2d at 605. In Schectman v. Wolfson, 244 F.2d 537, 540 (2d Cir. 1957), defendants had mooted an action brought under § 8 of the Clayton Act (15 U.S.C. § 19 (1970)) to force the dismantling of interlocking directorships. The Second Circuit denied the plaintiff's request for attorneys' fees because the court found no substantial benefit. A California court, in Woodland Hills Residents Ass'n v. City Council, 75 Cal. App. 3d 1, 141 Cal. Rptr. 857 (1977), ruled that environmental protection afforded to the citizens of Los Angeles by the enforcement of land use development requirements constitutes a concrete benefit sufficient to support an award of attorneys' fees. *Id.* at 9, 141 Cal. Rptr. at 862.

As with the substantial benefit requirement, courts have not clearly defined the ascertainable class requirement. On the one hand, the class does not have to be a formal, certified class. *See* Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 166 (1939); United States v. American Soc'y of Composers, Authors & Publishers, 466 F.2d 917, 919 (2d Cir. 1972). On the other hand, in Burbank v. Twomey, 520 F.2d 744, 749 (7th Cir. 1975), the Seventh Circuit denied attorneys' fees to a state prisoner because the class of beneficiaries—purportedly all Illinois prisoners—was too indefinite. Prison authorities had mooted, by adopting new regulations, petitioner's challenge to the practice of not supplying a statement of reasons for disciplinary sanctions until after the prisoner had satisified the sanctions.

[6] Although beyond the focus of this Note, a third exception to the American Rule deserves mention. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59 (1975), declared that a court may award attorneys' fees as part of a fine levied against a defendant who has willfully disobeyed a court order or who has acted in bad faith. This exception will rarely affect a plaintiff's decision to institute suit. As one commentator put it, the petitioner "must win not only the merits of his case, but the sympathy of the court as well." Note, *Attorney Fees: Exceptions to the American Rule*, 25 DRAKE L. REV. 717, 726 (1976). Note, 8 CONN. L. REV. 551 (1976), discusses the scope of the third exception in light of *Alyeska*.

success in the form of a judgment for the plaintiff automatically qualifies him to petition for fee-reimbursement.[7] When a defendant moots an identical suit,[8] the plaintiff does not automatically lose his opportunity to recover legal expenses.[9] Under both the common benefit and statutory exceptions, however, the plaintiff must satisfy certain requirements established by the courts before qualifying to recover legal expenses on a mooted claim.

The requirements applicable to the common benefit exception substantially reduce the likelihood that the plaintiff will recover attorneys' fees.[10] Although differing on the details of these conditions precedent to recovery, in general terms courts require a determination that the mooted claim was meritorious[11] and a showing that the initiation of the meritorious suit caused the defendant to moot the action.[12] Part I of this Note will evaluate these obstacles to recovery and will suggest a substantial modification in the common law governing awards of attorneys' fees on mooted claims under the common benefit exception. Specifically, the requirement of a showing of meritoriousness in the underlying claim is both theoretically unsound and practically unnecessary. Causation and

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[7] Eligibility to petition does not guarantee that the plaintiff will ultimately recover his legal expenses. A court may consider additional factors, either as part of its discretionary power (*see, e.g.*, Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 166 (3d Cir. 1973)), or as part of a statutory scheme (*see, e.g.*, note 119 *infra*), in determining whether a plaintiff may recover attorneys' fees.

[8] For the purposes of this Note, a defendant moots a claim when he substantially satisfies the demands of the plaintiff's complaint so that a justiciable controversy no longer exists. *See* Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937); California v. San Pablo & T.R.R., 149 U.S. 308, 313-14 (1893).

[9] This Note discusses recovery of attorneys' fees in cases where the defendant acts unilaterally to moot the claim. It does not include a comprehensive discussion of recovery of legal expenses in cases settled by bilateral negotiations. Attorneys' fees are typically not an issue in settled cases. Settling parties usually reach agreement on the allocation of legal expenses. *See, e.g.*, Prandini v. National Tea Co., 557 F.2d 1015, 1017, 1021 (3d Cir. 1977); Ellis v. Flying Tiger Corp., 504 F.2d 1004, 1006 (7th Cir. 1972). Even when the parties stipulate this allocation, however, courts have the power to review and modify the stipulation if the settlement requires court approval. Such is the case under FED. R. CIV. P. 23. *See* Foster v. Boise-Cascade, Inc., 420 F. Supp. 674, 678-84 (S.D. Tex. 1976). When the parties do not resolve the attorneys' fee issue in the settlement agreement, and one of the parties petitions the court for an award, then many of the matters discussed in this Note come into play. Therefore, this Note will use settled cases for illustrative purposes where appropriate.

[10] *See, e.g.*, Wechsler v. Southeastern Prop., Inc., 506 F.2d 631 (2d Cir. 1974); Levine v. Bradlee, 378 F.2d 620 (3d Cir. 1967).

[11] *See* notes 20-29 and accompanying text *infra*.

[12] *See* notes 73-94 and accompanying text *infra*. This Note cannot discuss the variations among all jurisdictions on the issues surrounding fee-reimbursement under the common benefit exception. Instead, it will concentrate on several leading jurisdictions in the belief that they will illustrate the major trends in the area.

the plaintiff's good faith[13] alone should concern the courts. Moreover, the defendant should bear the burden of proof on the causation issue if, but only if, the plaintiff seeks to recover his legal expenses from the defendant.[14]

To become eligible to recover legal expenses on a mooted claim under the statutory exception, a plaintiff must satisfy three requirements. Most courts agree that a plaintiff must show that initiation of legal action was necessary to obtain his objective[15] and that his suit caused the defendant to moot the claim.[16] Courts diverge on the content of the third requirement. Some require that the defendant's action substantially satisfy the demands of the plaintiff's complaint.[17] In the mooted claim context, this is by definition no additional requirement at all. Other courts hold a trial on the merits solely to determine whether the plaintiff is entitled to attorneys' fees.[18] Still other courts require a finding that the plaintiff probably would have prevailed on the merits if the case had gone to trial.[19] Part II of this Note will examine these three alternatives in light of legislative history and will propose a new test based upon the third option.

I

RECOVERY UNDER THE COMMON BENEFIT EXCEPTION

A. *Meritorious Claim*

1. *Present State of the Law*

Presented with a petition for an award of attorneys' fees, courts require a threshold finding that the mooted suit was meritorious.[20] This Note argues that the rationale for recovery of

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[13] *See* notes 44-50 and accompanying text *infra*.

[14] *See* notes 95-105 and accompanying text *infra*.

[15] *See* notes 169-73 and accompanying text *infra*.

[16] *See* notes 169-73 and accompanying text *infra*.

[17] *See* notes 174-90 and accompanying text *infra*.

[18] *See* notes 191-98 and accompanying text *infra*.

[19] *See* notes 199-202 and accompanying text *infra*.

[20] *See, e.g.*, Academic Computer Sys., Inc. v. Yarmuth, 71 F.R.D. 198, 201 (S.D.N.Y. 1976). The court held:

> Under the exception pursuant to which fees may be allowed to a party who has recovered or preserved a fund for the benefit of others in addition to himself, the requisite showing must be that (a) plaintiff had a meritorious claim, (b) a substantial benefit was conferred, and (c) the benefit was caused by the plaintiffs taking action.

legal expenses on mooted claims—unjust enrichment—does not justify the use of the meritorious claim test. Courts should reject this overly broad approach, and instead narrow their review to the legitimate concerns of courts asked to award fees: subject matter jurisdiction and equity.

Under the present law, courts apply one of two variants of the meritoriousness test. In *Kahan v. Rosenstiel*,[21] plaintiff minority shareholder filed an action against the controlling shareholder, the board of directors and a tender offeror. He alleged, inter alia, a Securities Exchange Act violation arising from an agreement by the controlling shareholder to sell his shares to the tender offeror at a price substantially higher than the remaining shareholders would receive. After the plaintiff filed suit, the tender offeror twice increased its offer, eventually paying the same price to all shareholders. The defendants then successfully moved to dismiss the suit as moot. Subsequently, the plaintiff petitioned the court to order the defendants to pay his legal expenses. The trial judge denied the petition on the ground that the petitioner's complaint could not have survived a motion to dismiss.[22] The Third Circuit reversed, finding "that plaintiff's pleadings state a cause of action which may be the basis for an award of counsel fees . . . ."[23] Thus, under the *Kahan* approach, the minimum standard of meritoriousness requires that the claim be able to withstand a motion to dismiss.[24]

Id. But see Note, *supra* note 5, at 183. The commentator stated that a petitioner could obtain an award on a mooted claim without encountering further obstacles if the court found that the claim was meritorious. The commentator further intimated that a showing of merit demonstrated a causal connection between the suit and the defendant's mooting act. Neither case law, as *Academic* indicates, nor logic supports this view. Situations could certainly arise where, despite a meritorious claim, the defendant could prove that it acted solely for business reasons. *See* note 72 and accompanying text *infra*.

[21] 424 F.2d 161 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970).

[22] 300 F. Supp. 447, 450 (D. Del. 1969).

[23] 424 F.2d at 174.

[24] Mumford v. Glover, 503 F.2d 878 (5th Cir. 1974), suggests a different approach. Union leaders, without membership approval, negotiated with the Mead Corporation an extension of a pension plan. Union members brought a class action under § 301 of the Labor-Management Relations Act (29 U.S.C. § 185 (1970)) against the union leadership, the company and the trustees of the pension fund, seeking termination of the unratified pension plan and a refund of payroll deductions. The trial court dismissed the suit for failure to state a claim upon which relief could be granted. While the case awaited appellate review, an agreement among the defendants to refund the pension deductions with interest mooted the claim. Citing *Kahan*, however, the court of appeals stated that "if the court below finds that the plaintiffs' original suit, even though dismissed, precipitated the refund, then counsel is entitled to recover the reasonable costs of bringing the original suit." 503 F.2d at 886. In addition the court found that the complainants could have sur-

Some courts demand a more persuasive demonstration of merit. The defendant in *McDonnell Douglas Corp. v. Palley*,[25] a mooted shareholder's derivative suit, challenged an award of legal fees to the plaintiff on the ground, inter alia, that the plaintiff had failed to file a meritorious cause of action. On its way to holding for the plaintiff, the Delaware Supreme Court enunciated its meritoriousness test:

> A claim is meritorious within the meaning of the rule if it can withstand a motion to dismiss on the pleadings if, at the same time, the plaintiff possesses knowledge of provable facts which hold out some reasonable likelihood of ultimate success. It is not necessary that factually there be absolute assurance of ultimate success, but only that there be some reasonable hope.[26]

In effect, this test requires that the claims be able to survive a motion for summary judgment.[27]

After reviewing the relevant case law, one commentator suggests that courts should apply the summary judgment standard to mooted claims that the defendant has never challenged by any motion, and the less stringent motion to dismiss standard where they have already denied such a motion.[28] The commentator argues that the two-pronged approach would accomplish the purpose

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vived a motion to dismiss had they based their suit on 28 U.S.C. § 1337 (1970) and the National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (1970). 503 F.2d at 883. The court then reversed and remanded the case for proceedings on the attorneys' fee issue and on the non-mooted issue of incremental damage caused to the membership by the delay in the refund. *Id.* at 886.

Although the court cited *Kahan*, it made no mention of the meritorious claim test. The court's language intimated that a plaintiff who could show causation could receive reimbursement even though the case is dismissed. This interpretation was not essential to the holding, however, because the Fifth Circuit found that it could sustain the complaint by employing a statute not pleaded by the plaintiffs.

[25] 310 A.2d 635 (Del. 1973).

[26] *Id.* at 637 (quoting Chrysler Corp. v. Dann, 223 A.2d 384, 387 (Del. 1966)).

[27] Although ostensibly requiring that the plaintiff present more than the minimum necessary to survive a motion for summary judgment, the *Palley* test actually adds no further significant obstacles. FED. R. CIV. P. 56(c) instructs the trial judge to grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact . . . ." If a genuine issue of material fact exists, each party has "some reasonable hope" for success. The *Palley* test does not require a showing that the petitioner probably would have prevailed on the merits. Therefore, for ease of discussion, this Note will refer to the *Palley* test as the summary judgment standard.

[28] Note, *supra* note 5, at 189. The commentator would have courts apply the less stringent standard where the defendant has already unsuccessfully made a motion to dismiss "since [surviving a motion to dismiss] is some indication that the plaintiff would have been able to prove the facts alleged in this pleading." *Id.* This rationale, however, fails to survive scrutiny. A court will sustain a motion for a judgment on the pleadings "where the undis-

behind the meritoriousness requirement, which, she contends, is to prevent an award in a collusive lawsuit.[29]

2. *Criticism of the Present Test*

The commentator rightly sought to reconcile the test with its rationale. The meritorious claim test must seek justification in the purpose underlying reimbursement for legal fees. In *Mills v. Electric Auto-Lite Co.*,[30] the Supreme Court set forth the foundation of the common benefit exception: "To allow the other [class members] to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich [them] unjustly at the plaintiff's expense."[31] If an unjust enrichment theory underlies the award of attorneys' fees on a mooted claim, the merit of the original claim bears no relevance to the subsequent claim for attorneys' fees. The defendant's reaction to the plaintiff's claim, not the merit of the claim, created[32] the common fund or benefit.[33] The plaintiff incurred expense procuring the defendant's reaction. The class should not receive the fruits of these expenditures while the individual who conferred the benefit has his recovery entirely consumed by legal expenses.[34]

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puted facts appearing in the pleadings, supplemented by any facts of which the court will take judicial notice, show that no relief can be granted." J.M. Blythe Motor Lines Corp. v. Blalock, 310 F.2d 77, 78-79 (5th Cir. 1962). That a complaint survives such a motion indicates nothing about the plaintiff's ability to prove the facts alleged.

[29] Note, *supra* note 5, at 189-90. Federal and most state courts refuse to hear collusive suits because collusiveness belies the existence of the case or controversy necessary for jurisdiction. *See, e.g.*, Lord v. Veazie, 49 U.S. 251 (1850); General Elec. Co. v. Bootz Mfg. Co., 289 F. Supp. 504 (S.D. Ind. 1968); San Francisco v. Boyd, 22 Cal. 2d 685, 693-94, 140 P.2d 666, 670 (1943). A suit suffering from a jurisdictional defect will not survive a motion to dismiss.

[30] 396 U.S. 375 (1970).

[31] *Id.* at 392.

[32] This section assumes that causation exists. For a discussion of the causation issue, see notes 71-94 and accompanying text *infra*.

[33] Seay v. Commissioner, 58 T.C. 32 (1972), illustrates this principle in a tax context. A corporation gave its ousted president $60,000 in settlement of his claim for breach of contract, and $45,000 for his claim of injury to personal reputation. On his tax return, the taxpayer included the $60,000 as income but did not include the $45,000 on the ground that I.R.C. § 104(a)(2) provides that damages recovered on personal injury claims do not constitute income. The IRS assessed a deficiency, arguing that the taxpayer had failed to prove any personal injury. Holding for the taxpayer, the Tax Court stated that "the determination of whether a settlement payment is exempt from taxation depends on the nature of the claim settled and not on the validity of the claim." 58 T.C. at 37.

[34] Some might argue that it is not "unjust" to enrich a class while not compensating the plaintiff who brings an unmeritorious claim. This position is based on the rationale that a complainant who brings an unmeritorious action cannot reasonably expect reimbursement, and that the courts should deny any award in order to discourage the initiation of unmeritorious suits. Unmeritorious does not equal spurious, however. *Cf.* Bell v. Hood, 327

Case law recognizes this distinction between the original claim and the claim for attorneys' fees. In *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*,[35] counsel for a class petitioned the court for fees after the judge had approved the settlement of an antitrust action. The court analogized the petition to an action in quantum meruit, and held that two possible "causes of action" could serve as the basis for an award.[36] One "cause" belongs to the plaintiff who brought the underlying suit, for the reasonable value of his service benefiting other class members, measured by the expenses incurred by him on behalf of the class.[37] The second possible "cause of action," and the one involved in *Lindy*, belongs to the attorneys representing the class, for the reasonable value of their services benefiting the class.[38] The court stated that the attorneys' claim could be subsumed in the plaintiff's claim for expenses,[39] although in this instance the attorneys asserted the claim on their own behalf.

The distinction between the original suit and the attorneys' fee petition becomes even clearer where the petitioner did not bring an original action. In *Gilson v. Chock Full O'Nuts Corp.*,[40] a shareholder employed an attorney to investigate possible securities violations by corporate insiders. The attorney informed the corporation of particular violations, but the corporation refused to sue the alleged violators. Apparently in response to the attorney's announced intention to file a complaint based upon the fruits of his investigation, the corporation instituted an action against the insiders, which resulted in a settlement. The shareholder and his counsel then brought an independent action in state court for reimbursement of the expenses they had incurred. After removal to federal court, the petitioners recovered for the benefit conferred upon the corporation.[41]

U.S. 678, 683 (1946) (action to recover damages for illegal search and seizure not "so patently without merit as to justify . . . dismissal for want of jurisdiction."). The denial seems unduly harsh and unrelated to its policy goals where the plaintiff did not bring the suit in bad faith. The denial also leads to the anomalous result that a class which undeservedly receives a benefit does not contribute toward the expenses of its good faith benefactor, while a class which deservedly receives a benefit must part with some of it.

[35] 487 F.2d 161 (3d Cir. 1973).

[36] *Id.* at 165.

[37] *Id.*

[38] *Id. Cf.* Prandini v. National Tea Co., No. 77-2261 (3d Cir. July 19, 1978) (statutory fee award may include compensation for time spent preparing and litigating fee petition, but common benefit award may not include such compensation because petition confers no benefit on class).

[39] *Id.* at 166.

[40] 326 F.2d 246, *aff'd on rehearing en banc*, 331 F.2d 107 (2d Cir. 1964).

[41] *Id.* at 248, 331 F.2d at 110. The *Gilson* court awarded attorneys' fees without men-

Despite recognition of this distinction, courts have continued to focus on the original action by use of the meritorious claim test. A more rational approach to evaluating petitions for attorneys' fees would apply tests that speak directly to courts' legitimate concerns, specifically the equity of allowing recovery on this separate equitable cause of action and the subject matter jurisdiction of the court to hear the unjust enrichment claim. Elimination of the meritorious claim test does not require that courts ignore the underlying suit when they consider claims for attorneys' fees. Any examination of the original claim, however, should occur in the context of considering equitable and subject matter jurisdiction concerns. Of course, the subject matter jurisdiction requirement is not unique to petitions for attorneys' fees. It is a separate concern of different origin from the test used to determine whether a party should receive a fee award. Nevertheless, the fee-shifting context generates unusual jurisdictional problems.[42]

3. *Proposed Test*

An attorney petitioning for fees on an unjust enrichment theory invokes the court's general equitable powers.[43] Therefore, courts should develop a distinct equity test to replace the meritorious claim test. Plaintiffs seeking equitable relief " 'must come with clean hands.' "[44] This judicial maxim "closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief . . . ."[45] A court confronted with a claim for fees should examine the underlying action to determine if the plaintiff and his attorney brought the original suit in bad faith.[46] The unmeritoriousness of a claim brought in good faith

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tioning the meritorious claim test. In Coran v. Snap-On Tools Corp., 408 F. Supp. 1060, 1062 (E.D. Wis. 1976), the court held that res judicata did not bar the plaintiff-shareholder from bringing an independent action to recover attorneys' fees against the corporation for benefit conferred in a mooted "short swing" profits action.

[42] *See* notes 51-70 and accompanying text *infra*.

[43] Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 165 (3d Cir. 1973).

[44] Precision Co. v. Automotive Co., 324 U.S. 806, 814 (1945).

[45] *Id.*

[46] In light of the two possible causes of action that the *Lindy* court mentioned, a judge sitting in equity must distinguish between the plaintiff and his attorney when examining the original suit for evidence of bad faith. A plaintiff might know that the complaint is groundless but conceal this information from his attorney. FED. R. CIV. P. 11 requires that an attorney sign every pleading, thus certifying "that to the best of his knowledge, information, and belief there is good ground to support it." This rule cannot, however, place an affirmative duty on the attorney to investigate, prior to filing, the facts supporting his client's complaint, other than those facts reasonably available to him. Notice pleading and

should not bar the petitioner from equitable relief.

The commentator cited above asserted that the purpose of requiring meritorious claims is to avoid granting legal fees in collusive suits.[47] The narrower equity test would ensure the denial of an award in such suits. Under present law, a court may determine on its own initiative that a case is collusive, in which event it must dismiss the action.[48] Similarly, a collusive suitor violates the good faith test of equity.

Another rationale underlying the meritorious claim test is the desire to avoid awarding fees in nuisance suits. Courts often express concern over "strike suits"—groundless actions brought to extort money by threatening to entangle the defendants in extensive discovery.[49] Such concern does not, however, justify the broad scope of the meritorious claim test. Defendants settle rather than moot most strike suits for two reasons. First, the plaintiff seeks only personal gain, not class benefit; he will not insist that the defendant cure the alleged wrong. Second, even in a certified class action, the defendant can settle for much less than his cost of mooting the case because he has bargaining power in the threat that if he litigates, the plaintiff and the class will probably receive nothing.[50] If a defendant does moot a nuisance suit, the equity

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discovery relegate factual investigation to the period after filing. *Cf.* 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1334, at 503 (1969) (courts ought to employ signature rule only when attorney deliberately presses unfounded claim); 47 VA. L. REV. 1434, 1438 (1961) (interpretation of Rule 11 that indiscriminately demands knowledge of probative facts supporting pleading in allegations may place prohibitive burden upon counsel initiating actions in substantive areas where precision unobtainable prior to discovery).

[47] *See* note 29 and accompanying text *supra*.

[48] FED. R. CIV. P. 12(h)(3) requires federal courts, by their own motion if necessary, to dismiss actions over which they lack subject matter jurisdiction. Since federal and most state courts lack jurisdiction over collusive suits (*see* note 29 *supra*), courts must dismiss them. *See* General Elec. Co. v. Bootz Mfg. Co., 289 F. Supp. 504 (S.D. Ind. 1968) (writ of replevin set aside where parties had colluded to invoke court's power to move shipment out of strikebound plant). *Cf.* Moore v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 47, 48 (1971) (dismissing appeal for lack of subject matter jurisdiction because "both litigants desire[d] precisely the same result"). *See generally* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 12, at 40 (3d ed. 1976).

[49] *See, e.g.*, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741 (1975); Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 371 (1966); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 548 (1949); Foster v. Boise-Cascade, Inc., 420 F. Supp. 674, 680 (S.D. Tex. 1976). *See generally* Note, *Reimbursement for Attorneys' Fees from the Beneficiaries of Representative Litigation*, 58 MINN. L. REV. 933, 957-58 (1974).

[50] This reasoning also applies to those cases in which the defendant runs a slight risk of losing on the merits and incurring an enormous liability. To illustrate: In J. I. Case Co. v. Borak, 377 U.S. 426 (1964), the Supreme Court held that a trial court had the power to void a merger tainted by a securities law violation and to order the defendant corporation

test would defeat a petition for attorneys' fees.

In essence, courts in fee-shifting cases should substitute concerns of bad faith for concerns about the merit of the original action.

4. *Subject Matter Jurisdiction*

The second legitimate judicial concern, subject matter jurisdiction, speaks to the courts' power to order the transfer of funds between private parties. Although this requirement applies to all actions—not just petitions for fee awards—and although it operates independently of any test for determining the propriety of granting a fee award, unusual jurisdictional problems can arise in the fee petition context. Article III of the Constitution limits the judicial power of the federal courts to certain subject matter[51] beyond which they have no jurisdiction.[52] Federal Rule of Civil Procedure 12(h)(3) authorizes a court to raise the jurisdictional question on its own motion. The parties may not waive the subject matter requirement nor may a court ignore the issue.[53] State courts, as repositories of general jurisdiction, are exempt from this concern.[54]

A federal court may not consider a petition for legal fees unless it has jurisdiction over the matter. In a majority of cases, the petition will arise as an incident to an action already within the jurisdiction of the court.[55] If the court had jurisdiction over the

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to pay damages to shareholders. The defendant, if he chooses not to litigate, will settle rather than moot such a case, because mooting would require a costly untangling of the completed merger. The merger example suggests a general rule: An unmeritorious suit having high nuisance value because of the enormous cost, albeit slim chance, of losing on the merits will not be mooted; it will be settled. The same cost of losing that creates the nuisance value negates the possibility that the defendant will voluntarily "lose," i.e., moot the claim. *Cf.* Clanton v. Allied Chem. Corp., 409 F. Supp. 282, 284 (E.D. Va. 1976) (court notes that defendants often settle rather than take small risk of losing at trial). If for some reason the defendant did moot the case, the equity test would apply. The court would make an award if satisfied that the plaintiff caused a substantial benefit to accrue to a definable class, unless the plaintiff brought the action in bad faith.

[51] U.S. CONST. art. III, § 2. This limitation is reflected in FED. R. CIV. P. 12(h)(3). *See generally* C. WRIGHT, *supra* note 48, at §§ 7-8.

[52] *See* Stewart v. United States, 199 F.2d 517, 519 (7th Cir. 1952) (dictum).

[53] *See* Kern v. Standard Oil Co., 228 F.2d 699, 701, *opinion supplemented*, 230 F.2d 954 (8th Cir. 1956).

[54] *See* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953). *See generally* C. WRIGHT, *supra* note 48, at § 7.

[55] *See, e.g.*, Ramey v. Cincinnati Enquirer, Inc., 508 F.2d 1188 (6th Cir. 1974), *cert. denied*, 422 U.S. 1048 (1975).

mooted suit, then it has jurisdiction over any ancillary matters that arise from the suit.[56]

The jurisdictional issue becomes more complex if the petitioner conferred a benefit through some means other than formal legal action. The Second Circuit, in *Grace v. Ludwig*,[57] devised an imaginative solution to overcome this potential difficulty. The case arose from a decision by Berkshire Industries to file an application with the Securities and Exchange Commission. The corporation was seeking permission to absorb its 91%-owned subsidiary, American-Hawaiian Steamship Company, through a "short form" merger. Plaintiffs, minority stockholders of American-Hawaiian, and plaintiffs' counsel (LLB) intervened in the SEC proceeding to oppose the application on the grounds, inter alia, that Berkshire had violated the Investment Company Act and the Securities Exchange Act of 1934.[58] After extensive hearings, Berkshire withdrew its application and substantially increased its offer for the minority shares. LLB asked the SEC to award attorneys' fees to it, but the agency denied the claim for lack of jurisdiction. Plaintiffs then brought suit in federal district court against Berkshire, American-Hawaiian and several of American-Hawaiian's minority shareholders in an effort to obtain reimbursement for legal fees.

The defendant minority shareholders urged that the district court lacked jurisdiction to entertain the suit. The court of appeals rejected plaintiffs' attempt to rest jurisdiction upon the jurisdictional sections of the Investment Company Act and the Securities Exchange Act of 1934.[59] Those sections grant jurisdiction only over violations of the statutes or the rules promulgated thereunder: Berkshire did not violate the statute or rules because it withdrew its application.[60] The court sustained jurisdiction, however, under 28 U.S.C. § 1331, which grants jurisdiction where the amount in controversy exceeds $10,000 and "arises under the Constitution, laws, or treaties of the United States." The court stated that "this action for fees and expenses does arise under the stated substantive sections of the Investment Company Act and the Securities Exchange Act. Even though the minority stockholder de-

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[56] *See* Lee v. Terminal Transp. Co., 282 F.2d 805, 806-07 (7th Cir. 1960), *cert. denied*, 365 U.S. 828 (1961); Globus, Inc. v. Jaroff, 279 F. Supp. 807, 809 (S.D.N.Y. 1968).

[57] 484 F.2d 1262 (2d Cir. 1973), *cert. denied*, 416 U.S. 905 (1974).

[58] *Id.* at 1265.

[59] *Id.* at 1266.

[60] *Id.*

fendants did not violate the sections, it is alleged that they benefitted from the LLB representation."[61] Thus, an unjust enrichment action can arise under a federal law because the courts consider fee-shifting a remedial incident to a federal right.

Thomas v. Honeybrook Mines, Inc.,[62] a case involving the Anthracite Health and Welfare Fund, illustrates that identical original suits can give rise to different results depending upon the jurisdictional basis of the petition for legal fees. Anthracite coal operators had agreed to make royalty payments to the Fund to provide pensions for retired miners. In the early 1960's, many operators were delinquent in their royalty payments. The Fund trustees—appointees of the United Mine Workers of America—refused to take any action to collect these overdue payments. In 1963, the Pensioned Anthracite Coal Miners Protest Executive Committee filed a diversity action in federal court against the United Mine Workers alleging that the union had failed to enforce the royalty payment provisions of the Anthracite Wage Agreement. The court granted defendant's motion to dismiss for lack of subject matter jurisdiction. Plaintiff appealed the dismissal. Three days before argument on appeal, the Fund trustees sued Honeybrook Mines in federal court for overdue payments. The Committee intervened in the *Honeybrook Mines* litigation. After the Fund trustees obtained a judgment against Honeybrook Mines, the Committee requested that the Fund pay the Committee's legal expenses arising from the dismissed suit, even though the court of appeals had upheld the dismissal, and legal expenses connected with its role as intervenor in *Honeybrook Mines*. The trustees refused, and the issue

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[61] *Id.* The Second Circuit employed a similar approach to sustain jurisdiction in Gilson v. Chock Full O'Nuts Corp., 331 F.2d 107, *aff'g en banc* 326 F.2d 246 (2d Cir. 1964). A shareholder (Gilson) and his counsel (Levy) brought an action in state court to recover legal expenses from the corporation even though Gilson had not taken any formal legal action on behalf of the corporation. Gilson had employed Levy to discover whether insiders had engaged in stock transactions in violation of § 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b) (1970). Levy then informed the corporation of particular violations and requested that the corporation institute suit to recover "short swing" profits. Initially, the corporation refused to act. Realizing that the statute of limitations would soon run out, Levy prepared to bring a derivative suit. Before he was to file the complaint, the corporation sued the insiders and recovered $56,000 in settlement. The corporation, confronted with the shareholder's unjust enrichment action, removed the case to federal court. The Second Circuit sustained jurisdiction based on § 16(b), reasoning that since the section creates federal rights, "its remedial incidents also are a matter of federal law." 331 F.2d at 109. The suit for reimbursement therefore arose under the laws of the United States within the meaning of 28 U.S.C. § 1331 (1970). 326 F.2d 246, 247 (2d Cir. 1964).

[62] 428 F.2d 981 (3d Cir. 1970), *cert. denied*, 401 U.S. 911 (1971).

came before the Third Circuit. That court stated that although dismissed,

> [the first suit] cannot be ignored for purposes of the present application, if, as we believe, the record discloses that it was instrumental in prodding the cautious trustees into more aggressive action. It was on May 18, 1964, three days before the argument in this court on the appeal from dismissal of the committee's . . . lawsuit, and fourteen months after that suit had been filed, that the Fund trustees finally filed the complaint against Honeybrook Mines which resulted in recoveries here in issue.[63]

Thus, the Third Circuit implicitly held that a federal court can award attorneys' fees under *Mills v. Electric Auto-Lite Co.* even though it lacks subject matter jurisdiction over the mooted claim.[64]

The *Honeybrook Mines* court did not discuss the jurisdictional issue. The source of the court's power to award legal fees for work done in a dismissed action over which it lacked subject matter jurisdiction is not immediately apparent. Two possibilities exist. First, if the trustees based their complaint in *Honeybrook Mines* on a federal statute, such as the National Labor Relations Act,[65] the *Grace* approach would provide jurisdiction for the award.[66] Second, if instead the trustees brought a diversity action against Honey-

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[63] 428 F.2d at 984.

[64] Surprisingly, earlier in the same year the same court decided that the ability to withstand a motion to dismiss is a condition precedent to an award of attorneys' fees on a mooted claim. Kahan v. Rosenstiel, 424 F.2d 161 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970). *See* notes 21-24 and accompanying text *supra*. A strict application of the motion to dismiss standard will not support the result in *Honeybrook Mines*. A court will dismiss an action if it finds a jurisdictional infirmity in the pleadings. Application of the equity test, however, would sustain the result. Only the presence of bad faith would cause a court to deny attorneys' fees to a plaintiff under the equity test. *See* notes 43-46 and accompanying text *supra*. A second alternative—a modified motion to dismiss standard—would also sustain the *Honeybrook Mines* result. Under this test, a court would apply the motion to dismiss standard to the merits of the case, but not to the jurisdictional aspects. This approach is consistent with one of the major purposes behind the use of the meritorious claim test—fear of strike suits—since strike suits, by definition, lack merit. *See* note 49 and accompanying text *supra*. This narrower standard, however, inadequately fulfills another suggested purpose of the meritorious claim test—prevention of awards in collusive suits—since all collusive suits fail jurisdictionally whether or not they lack merit. *See* note 29 and accompanying text *supra*. No court has articulated this modified motion to dismiss standard, but the test would explain the apparent inconsistency between *Kahan* and *Honeybrook Mines*. Assuming that the *Honeybrook Mines* court did use a narrower meritorious claim test, this Note's criticism of the present test would also apply to the modified standard because both focus on the merit of the underlying action rather than on the plaintiff's bad faith.

[65] 29 U.S.C. §§ 151-68 (1970 & Supp. V 1975). Congress granted federal courts jurisdiction over proceedings arising under federal legislation regulating commerce in 28 U.S.C. § 1337 (1970).

[66] *See* notes 57-61 and accompanying text *supra*.

brook Mines, the court could have found that it had ancillary jurisdiction over the Committee's reimbursement claims against the funds obtained in *Honeybrook Mines*.[67] The Supreme Court stated in *Fulton National Bank v. Hozier*[68] that

> when a federal court has properly acquired jurisdiction over a cause it may entertain, by intervention, dependent or ancillary controversies; but no controversy can be regarded as dependent or ancillary unless it has direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit.[69]

The Committee's reimbursement claim did have a direct relation to the trustees' recovery because the Committee alleged that its activity prompted the trustees to initiate the principal suit against Honeybrook Mines. Neither of these theories would be available to establish federal subject matter jurisdiction over the Committee's attorneys' fee claim if the trustees had brought their action against Honeybrook Mines in state court on a non-federal claim or if the trustees had recovered the delinquent payments by non-judicial methods. If federal courts lack jurisdiction to award legal fees in a given case, however, the petitioner can bring an unjust enrichment action in state court.[70]

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[67] *See generally* C. WRIGHT, *supra* note 48, at § 9.

[68] 267 U.S. 276 (1925).

[69] *Id.* at 280.

[70] *See, e.g.*, Gilson v. Chock Full O'Nuts Corp., 326 F.2d 246, *aff'd on rehearing en banc*, 331 F.2d 107 (2d Cir. 1964) (attorneys' fee action originally brought in state court).

A petitioner instituting an independent action to recover legal expenses, whether in state or federal court, must obtain personal jurisdiction over the beneficiaries (in personam) or over the fund or property (quasi-in-rem). To obtain jurisdiction over the fund, he would have to sue in the same court that handled the action that produced the fund. If a petitioner wants to recover his legal expenses from a representative of the ultimate beneficiaries, such as a corporation in the wake of a mooted shareholder's derivative suit, he should have little difficulty in obtaining in personam jurisdiction. If a petitioner represented a certified class, and the suit conferred a benefit on the class without bringing an actual fund before the court, he must overcome a major obstacle before he can obtain a judgment against the class members for legal expenses. In a certified class action, a judgment may bind the non-party class members without violating the due process requirements of the Constitution if the class has adequate representative parties. *See* Hansberry v. Lee, 311 U.S. 32, 42-43 (1940). When the class representative and his legal counsel seek legal expenses from the class members, the representative's interest conflicts with the interest of the class members and, therefore, he is no longer a constitutionally adequate representative. *See* National Ass'n of Regional Medical Programs v. Mathews, 551 F.2d 340, 346 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 954 (1977). To overcome the loss of this condition precedent to in personam jurisdiction, the named party should give the class adequate notice that he intends to demand contribution from them and should petition the court to appoint independent counsel to represent the class on the attorneys' fee issue. *See* Haas v.

In sum, the rationale behind the award of attorneys' fees—unjust enrichment—does not support the use of the meritorious claim test. In its stead, courts should employ an equity test and a jurisdictional test. These narrower tests will enable a petitioner who has conferred a substantial benefit on a definable class to recover attorneys' fees in some court if he brought the initial action in good faith.

B. *Causation*

1. *Standard of Proof*

The preceding discussion of the meritorious claim test assumed causation. No one doubts that courts should require a causal link between the pending lawsuit and the defendant's action to moot the claim.[71] If the plaintiff's suit did not cause the defendant to confer a substantial benefit on a definable class, then the class was not unjustly enriched at the plaintiff's expense. For example, regardless of the pending action, the defendant may have mooted the claim in response to business conditions[72] or a change in the regulating statutes.[73] The issue, then, is not whether courts should

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Pittsburgh Nat'l Bank, 77 F.R.D. 382 (W.D. Pa. 1977); Miller v. Mackey Int'l, Inc., 70 F.R.D. 533 (S.D. Fla. 1976).

The petitioner may wish to recover attorneys' fees directly from individual members of a definable—but non-certified—class. Commentators posit two obstacles—one legal and one practical. As for the legal obstacle, commentators state that a petitioner may not obtain an in personam judgment for attorneys' fees against beneficiaries. *See* Note, *supra* note 6, 25 DRAKE L. REV. at 731. *Cf.* Berger, *supra* note 5, at 298 n.84 (courts unwilling to impose binding in personam obligations for attorneys' fees against beneficiaries); Note, *supra* note 49, at 944 (courts do not attempt to tax nonparticipating beneficiaries directly). These commentators apparently overlook Grace v. Ludwig, 484 F.2d 1262 (2d Cir. 1973), *cert. denied*, 416 U.S. 905 (1974), in which the court did not suggest that the plaintiff acted improperly by suing the minority shareholders directly. *See* notes 57-61 and accompanying text *supra*. No sound legal rationale exists for denying a benefactor an in personam judgment on an unjust enrichment claim so long as he can establish with reasonable accuracy each beneficiary's proportionate share of the expenses. Nevertheless, a practical obstacle does exist. Plaintiffs conferring a relatively small benefit on each of many class members will find it economically infeasible to obtain personal jurisdiction over each beneficiary.

[71] *See* Wolf v. General Motors—UAW Supp. Unemployment Benefit Plan Bd. of Admin., 569 F.2d 1266 (3d Cir. 1978) (common benefit exception depends upon proven causal relationship between counsel's efforts and benefit).

[72] *See, e.g.*, Academic Computer Sys., Inc. v. Yarmuth, 71 F.R.D. 198, 200-02 (S.D.N.Y. 1976). The court found compelling an inference that bondholders' apathy caused the abandonment of a solicitation of consents for the elimination of certain restrictions on a trust indenture. The court noted that the defendant did not terminate its solicitation upon learning of the lawsuit. Rather, the defendant terminated its effort to obtain the needed two-thirds approval when after ten months of work only 56% of the bondholders had responded.

[73] *See, e.g.*, Ackerman v. Board of Educ., 387 F. Supp. 76 (S.D.N.Y. 1974). The court

require a showing of causation, but rather what standard of causation they should employ. Great diversity of opinion exists among courts, and even within courts, as to the appropriate standard.

Two Third Circuit cases decided in the same year conflict on their facts on this issue. In *Kahan v. Rosenstiel*,[74] the court stated that the petitioner could recover attorneys' fees if his efforts "*caused* others to benefit."[75] In *Thomas v. Honeybrook Mines, Inc.*,[76] the same circuit held that the Committee's litigious efforts "*forced* the Fund trustees to commence the delinquency lawsuits, that these lawsuits produced the fund and that the committee's counsel fees . . . are properly payable out of the Fund."[77] Earlier in the opinion, however, the *Honeybrook Mines* court stated that the issue on the fee petition was "whether or not the committee . . . *helped* to create a fund for the class for which it acted."[78] Moreover, an examination of the facts suggests that the court may actually have found that the Committee, at most, *helped* to create the fund. The court concluded that the plaintiff should receive attorneys' fees for its prior suit, which was dismissed for lack of subject matter jurisdiction.[79] The trustees had filed their first complaint fourteen months after the Committee had initiated its suit and after the district court had dismissed the Committee's suit. Did the Committee's suit *force* the trustees to make a move or did it merely *contribute* to the trustees' action? A vigorous dissent stated:

> If the majority is of the opinion that the Committee is entitled to counsel fees simply for having "helped" to create the recoveries for the Fund, then this is a departure from existing case law and a wide expansion of the fund cases doctrine. . . . In this Circuit's recent Kahan opinion, . . . the Court stated that a necessary prerequisite for recovery of counsel fees was a determination that it was "the plaintiff's effort which *caused* others to benefit." (Emphasis supplied.) But if as strongly appears, the majority is concluding as a matter of law that the Committee's actions "produced" the recoveries involved, I completely disagree.[80]

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found that the defendant mooted the claim in response to an amendment of Title VII of the Civil Rights Act which brought employment discrimination by state agencies within the Act's ambit.

[74] 424 F.2d 161 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970). For a discussion of this case, see notes 21-24 and accompanying text *supra*.

[75] 424 F.2d at 167 (emphasis added).

[76] 428 F.2d 981 (3d Cir. 1970), *cert. denied*, 401 U.S. 911 (1971). For a discussion of this case, see notes 62-64 and accompanying text *supra*.

[77] 428 F.2d at 985 (emphasis added).

[78] *Id.* (emphasis added).

[79] *See* notes 62-64 and accompanying text *supra*.

[80] 428 F.2d at 988 (footnote omitted).

Similar confusion as to the proper standard of causation exists in the Second Circuit. In *Wechsler v. Southeastern Properties, Inc.*[81] the New York State Attorney General initiated an investigation of a public stock offering made by Southeastern. Several weeks later, Wechsler filed a class action against Southeastern on behalf of all purchasers of the offered stock. Four months after Wechsler filed, the Attorney General initiated a formal action against Southeastern. The district court then directed that the Wechsler action be held in abeyance until the court could determine whether the Attorney General's suit would adequately protect the interests of all involved. The Attorney General eventually reached a settlement, in the nature of a consent injunction, with the defendant. After concluding that the injunction adequately protected the interests of the class, the court dismissed Wechsler's suit as moot and denied his petition for attorneys' fees, finding that he had not directly assisted the Attorney General.[82]

In affirming the denial of legal fees, the Second Circuit stated:

> An essential condition precedent to the award . . . is a showing that the attorney's services were a competent producing cause of the supposed benefit conferred. . . . Where . . . the private action follows upon the coattails of a government suit or investigation which has provided the basis for the claim, it has been suggested that the court's inquiry be directed at whether the services rendered played any part in achieving a successful result . . . .[83]

The court then applied this standard to the case at hand: "Wechsler did not offer to submit any direct or circumstantial evidence (such as affidavits from the Attorney General's Office or from the defendants) tending to show that he or the pendency of his action materially assisted the Attorney General's investigation and prosecution of the state court action or added any pressure leading to settlement."[84] Thus, under the *Wechsler* test, a petitioner can recover legal fees if he can show that his suit contributed to the creation of a benefit.[85] This "contributed" standard is more liberal than the "caused" standard employed by the *Kahan* court and by the dissent in *Honeybrook Mines*.

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[81] 506 F.2d 631 (2d Cir. 1974).

[82] *Id.* at 633.

[83] *Id.* at 635.

[84] *Id.* at 636.

[85] Technically, the "contributed" standard in *Wechsler* is dictum because the court found no evidence tending to show that Wechsler's suit helped the Attorney General.

Another Second Circuit case, *Grace v. Ludwig*,[86] applied an even stricter standard of causation than that used by the *Kahan* court. In *Grace*, the plaintiffs' counsel (LLB) had sued in federal district court to recover legal fees for its intervention in an SEC proceeding that involved review of an application for a "short form" merger. The trial judge dismissed the complaint for failure to state a claim upon which relief could be granted.[87] In affirming the dismissal, the Second Circuit noted:

> LLB takes the position . . . that it pulled the "laboring oar" in the SEC proceedings and that primarily through its efforts [the applicant] continuously increased its offer to the public shareholders. In the posture this case reaches us, these allegations must be accepted as true. We cannot accept, however, the premise that *but for* LLB's intervention the SEC would have approved as "fair and reasonable" the initial offer of [the applicant]. If LLB had never appeared how can we properly assume that the SEC would have been so totally supine or so derelict as to give its approval to a price which plaintiffs urge was not merely unconscionably low but was in fact the product of a deception and fraud . . . .[88]

The result would have been different, the court continued, had the plaintiffs filed a shareholders' derivative suit after the SEC had been so derelict in its duty as to grant the application,[89] that is, had the plaintiffs clearly been the sole producing cause.

At the other extreme lies *Rosenthal v. Burry Biscuit Corp.*[90] The Delaware Court of Chancery declared that "a plaintiff may not be deprived of a fee by action taken by a defendant which has the effect of curing the alleged wrong and rendering the controversy moot, unless it be demonstrated that the curing of the defect is in nowise related to the lawsuit . . . ."[91]

Thus, a review of five cases representing three jurisdictions yields four distinct standards of causation: "sole producing," "caused," "contributed" and "minimum relation." This diversity

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[86] 484 F.2d 1262 (2d Cir. 1973), *cert. denied*, 416 U.S. 905 (1974). For a discussion of this case, see notes 57-61 and accompanying text *supra*.

[87] 484 F.2d at 1265.

[88] *Id.* at 1268 (emphasis in original).

[89] *Id.* at 1269.

[90] 42 Del. Ch. 279, 209 A.2d 459 (1949).

[91] *Id.* at 281, 209 A.2d at 460. The court made the statement regarding attorneys' fees after denying plaintiffs' motion for judgment on the pleadings. The court determined that it should dismiss the suit as moot after holding a hearing on the issue of attorneys' fees.

creates uncertainty which may spawn needless litigation. Courts should analyze the issue and develop a uniform standard of causation. The "contributed" standard appears to offer those qualities that would make the best uniform test. It requires a sufficiently substantial relationship between the plaintiff's suit and the benefit conferred to ensure that the class was indeed unjustly enriched at the petitioner's expense. Yet the standard does not demand that a petitioner who incurred great expense on behalf of his class prove that his efforts were the sole cause of the benefit. This balance comports with the view expressed by the Third Circuit in *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*[92] that attorneys' fee awards are not an all-or-nothing proposition. *Lindy Bros.* instructs trial judges confronted with a petition for legal fees to set the amount of the award according to the following criteria: (1) the hours expended by the attorneys in pursuit of the benefit; (2) the value of the attorneys' services to the beneficiaries; (3) the contingent nature of success; and (4) the quality of the attorneys' work. The fourth criterion subdivides into the novelty of the issues, the value of the benefit conferred,[93] and the complexity of the issues.[94] These criteria allow the judge to adjust the award after considering the extent of the petitioner's contribution to the benefit conferred upon the class.

2. *Burden of Proof*

Under any standard of causation, a close case may turn upon who bears the burden of proof. Recent federal decisions hold that the petitioner has the burden of proof on the causation issue. In *Kahan v. Rosenstiel*,[95] for example, the Third Circuit remanded the case to the district court "where plaintiff has the burden of proving the allegations set forth in his complaint and petition."[96] The Second Circuit, in *Wechsler v. Southeastern Properties, Inc.*,[97] agreed:

> [T]he mere institution of a stockholder's action does not guarantee that the plaintiff will be awarded attorney's fees upon his suit

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[92] 487 F.2d 161 (3d Cir. 1973).

[93] The monetary value of the benefit conferred may be the only means by which the court can measure the quality of the attorneys' performance where the defendant moots the case before any significant in-court proceedings occur.

[94] 487 F.2d at 166-69. For a similar list of considerations, see ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-106(B) (1975). Berger, *supra* note 5, at 315-26, suggests an interesting new formula for calculating the amount of attorneys' fee awards.

[95] 424 F.2d 161 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970).

[96] *Id.* at 174 (footnote omitted).

[97] 506 F.2d 631 (2d Cir. 1974).

> being mooted by the successful prosecution or settlement of some other action. Causation must still be shown and the burden of establishing it remains with the plaintiff. Chrysler Corp. v. Dann, 223 A.2d 384, 386-387 (Del.1966).[98]

More recently, in *Academic Computer Systems, Inc. v. Yarmuth*,[99] a federal district court held:

> Under the exception pursuant to which fees may be allowed to a party who has recovered or preserved a fund for the benefit of others in addition to himself, the requisite showing must be that (a) plaintiff had a meritorious claim, (b) a substantial benefit was conferred, and (c) the benefit was caused by the plaintiffs taking action. . . . The burden of proof of these essentials is on the plaintiff who seeks the recovery. *Wechsler, supra.*[100]

Note that *Yarmuth* follows *Wechsler*, and that *Wechsler* follows *Chrysler Corp. v. Dann*, a Delaware Supreme Court decision. Although the *Kahan* court did not cite *Chrysler Corp. v. Dann* on the burden of proof issue, it did cite the case elsewhere in its opinion;[101] thus the Delaware holding probably influenced the Third Circuit on the burden of proof issue.

In *McDonnell Douglas Corp. v. Palley*,[102] the Delaware Supreme Court clarified the meaning of *Chrysler Corp. v. Dann*:

> As to burden of proof, the mootness tests of Rosenthal v. Burry Biscuit Corporation, 42 Del.Ch. 279, 209 A.2d 459 (1949) and Mintz v. Bohen, Del.Ch., 210 A.2d 569 (1965) apply: where a stockholder's derivative suit has been rendered moot by subsequent action of the defendant, the latter has the burden of showing no causal connection between the two in order to defeat the stockholder's claim for legal fees and expenses.
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> McDonnell contends that the mootness rule of *Burry Biscuit* was rejected by this Court in *Chrysler*. Such was not intended; indeed, *Burry Biscuit* was cited with approval in *Chrysler*. To clarify any doubt arising from language in *Chrysler*, we hereby expressly approve the mootness rule of *Burry Biscuit*.[103]

Sound policy supports the *Palley* holding. Since the defendant knows why it mooted the plaintiff's claim and has easier access to

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[98] *Id.* at 635.
[99] 71 F.R.D. 198 (S.D.N.Y. 1976).
[100] *Id.* at 201.
[101] 424 F.2d at 167.
[102] 310 A.2d 635 (Del. 1973).
[103] *Id.* at 637.

evidence proving its motivation,[104] the defendant should bear the burden of proof on the issue of causation.[105] Thus *Wechsler*, decided more than one year after *Palley*, not only miscites *Chrysler Corp. v. Dann* as authority but also represents unsound policy. Where the plaintiff seeks to recover attorneys' fees from the defendant, as in a shareholder's derivative suit, federal courts should shift the burden of proof on the issue of causation to the defendant. Where the plaintiff seeks to recover legal expenses from a fund benefiting nonparties, the plaintiff should shoulder the burden of proof because neither the plaintiff nor the other beneficiaries have superior access to evidence of causation.

C. *Conclusion*

A plaintiff can recover attorneys' fees on a mooted claim under the common benefit theory. As the law presently stands, however, the plaintiff will receive an award only if the court finds that his initial suit was meritorious[106] and that the defendant mooted the claim in response to the suit.[107] Courts diverge as to the specifics of both the meritorious claim test[108] and the causation test.[109] The rationale underlying the common benefit theory—that

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[104] *Cf.* Miller v. Miller, 301 Minn. 207, 227, 222 N.W.2d 71, 82 (1974) (burden of proof on questions of good faith, fair dealing, and loyalty of officer to corporation should rest upon officer because relevant facts more likely to be within his knowledge).

In the shareholder's derivative suit context, the defendant corporation (functionally its directors) will always know why it mooted the suit. Three possible scenarios exist. (A) The shareholder sues on behalf of the corporation to enforce a right against a third party who has wronged the corporation. The corporation has the same directors at all relevant times—when it initially refuses to sue the third party, when it moots the derivative suit by suing and recovering from the third party, and when the plaintiff demands attorneys' fees. The directors faced with the demand for fees have first-hand knowledge of the reasons for mooting the derivative suit. (B) The shareholder sues on behalf of the corporation to recover damages against individual directors who wronged the corporation. The old board is purged, but the new directors fail to move against the former directors to recover damages. At some later date, the corporation sues or settles with the former directors. The new board, which will receive the plaintiff's petition for attorneys' fees, knows why the corporation instituted its own suit or settled the claim. (C) The shareholder sues on behalf of the corporation to recover damages from individual directors who wronged the corporation. In a single transaction, the old board is purged and the former directors voluntarily pay damages to the corporation. The members of the new board, some of whom may have served on the old board, know the circumstances surrounding the change in leadership, and are in a better position than the shareholder to explain the motivation behind the change.

[105] *See generally* C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 337, at 787 (2d ed. E. Clearly 1972).

[106] *See* notes 20-42 and accompanying text *supra*.

[107] *See* notes 71-94 and accompanying text *supra*.

[108] *See* notes 21-29 and accompanying text *supra*.

[109] *See* notes 74-91 and accompanying text *supra*.

the beneficiaries would be unjustly enriched at the plaintiff's expense if they did not contribute to his legal costs—does not support the use of the meritorious claim test.[110] A more appropriate approach to evaluating petitions for attorneys' fees would speak directly to the legitimate concerns of the court—equity and subject matter jurisdiction.[111] The principal problem in the causation area arises from the great diversity of standards now in use.[112] A rational uniform standard would require a substantial causal link between the plaintiff's suit and the defendant's action, but would not require that the plaintiff's suit be the sole cause of the defendant's action.[113] Finally, federal courts have compounded the plaintiff's difficulties by saddling him with the burden of proof on the issue of causation.[114] Although appropriate where the plaintiff seeks to recover from a fund that benefits nonparties, this allocation conflicts with sound policy where the plaintiff seeks reimbursement from the defendant. The defendant knows better than the plaintiff why it mooted the claim, and has easier access to evidence proving its motivation.[115]

II

RECOVERY UNDER THE STATUTORY EXCEPTION

A. *Interpretation of the Statutes*

1. *Introduction*

Statutes authorizing fee awards constitute the second major exception to the American Rule on attorneys' fees.[116] When a defendant moots a claim grounded on a statute that permits recovery of attorneys' fees, the plaintiff does not automatically lose his opportunity to obtain a fee award.[117] The language of many statutes,

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[110] *See* notes 30-41 and accompanying text *supra*.

[111] *See* notes 42-70 and accompanying text *supra*.

[112] *See* notes 74-91 and accompanying text *supra*.

[113] *See* notes 92-94 and accompanying text *supra*.

[114] *See* notes 95-101 and accompanying text *supra*.

[115] *See* notes 102-05 and accompanying text *supra*.

[116] Although Congress had already passed numerous statutes authorizing attorneys' fee awards, the *Alyeska* decision prompted the passage of several additional fee provisions. *See, e.g.*, Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. § 1988 (West Supp. 1977). The Senate report accompanying the bill stated: "The purpose of this amendment is to remedy anomalous gaps in our civil rights laws created by . . . *Alyeska Pipeline Service Co. v. Wilderness Society* . . . ." S. REP. No. 1011, 94th Cong., 2d Sess. 1, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5908, 5909.

[117] Litigation under legislation providing a statutory penalty may represent an excep-

however, does not require such a result and, in fact, the language of some statutes appears to preclude it. Fee-shifting statutes fall into two generic categories.[118] The first category encompasses statutes that permit a grant of attorneys' fees to a "prevailing" plaintiff.[119] "Prevailing" language lends itself to flexible interpretation,

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tion to this statement, but a defendant would not normally moot such an action. For example, § 4 of the Clayton Act, 15 U.S.C. § 15 (1970), provides: "Any person who shall be injured . . . by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee." A defendant litigating under this provision probably would not moot the action, i.e., would not voluntarily pay the plaintiff threefold the damages alleged in the complaint, because juries almost never award the full amount demanded. Should the defendant do so, however, case law indicates that the court would not grant attorneys' fees to the plaintiff. In the context of a settled claim, the court in Detroit v. Grinnell Corp., 495 F.2d 448, 468-69 (2d Cir. 1974) stated:

> Section 4 of the Clayton Act . . . which provides for the award of attorneys' fees in civil antitrust suits generally, does not authorize award of attorneys' fees to a plaintiff who does not recover a judgment or who settles his claim with the defendant . . . .The only basis for awarding an attorney's fee in such cases is the equitable fund theory doctrine . . . .

Accord, Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 164 (3d Cir. 1973).

[118] This Note cannot discuss the particular law surrounding each attorneys' fee provision in every federal and state statute. Rather, it will illustrate general trends in the field through the use of several statutes of current interest.

[119] *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (1970); CAL. GOV'T CODE § 6259 (West Supp. 1977) (inspection of public records); N.Y. LAB. LAW § 198 (McKinney Supp. 1977) (employee wage claims). The precise language varies from statute to statute. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (1970) states that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." The Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (1976), provides that the court may give an award to a complainant who has "substantially prevailed." Under the Railway Labor Act, 45 U.S.C. § 153(p) (1970), the court must award attorneys' fees to a petitioner who "finally prevail[s]." These nuances do not affect recovery of legal fees on mooted claims. *See* note 148 *infra*. Thus, the two categories set forth in the text reflect judicial treatment of statutory language.

Some statutes allow attorneys' fees to the "prevailing party," be he plaintiff or defendant. *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (1970). Others provide only "prevailing plaintiffs" with awards. *See, e.g.*, Fair Housing Act of 1968, 42 U.S.C. § 3612(c) (1970). The distinction between "party" and "plaintiff" bears no significance where the defendant has mooted the claim.

In some statutes Congress had ordained that courts "shall" award attorneys' fees to prevailing plaintiffs. *See, e.g.*, Communications Act of 1934, 47 U.S.C. § 206 (1970). Other statutes provide that courts "may" grant fee awards. *See, e.g.*, Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (1976). Under the optional fee provisions, courts employ a different test for each statute to guide their discretion. In a few of the statutes, Congress provided the tests. For example, the Fair Housing Act of 1968, 42 U.S.C. § 3612(c) (1970), states: "The court may grant . . . reasonable attorney fees in the case of a prevailing plaintiff: *Provided*, That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees." For other statutes, courts provide their own tests. In Newman v. Piggie Park Ent., 390 U.S. 400 (1968), an action involving Title II of the Civil Rights Act of

and courts have encountered little difficulty in construing such provisions to include mooted claims.[120] The second category of statutes allows attorneys' fees upon "judgment"[121] or upon the issuance of a "final order."[122] On its face, this language seems to preclude an award of fees in a mooted case. In fact, neither Congress nor the courts read this language to bar recovery.[123]

2. *Prevailing Party*

A substantial number of federal statutes providing fee-reimbursement to the prevailing plaintiff cover areas of contemporary national interest, such as civil rights[124] and open government.[125] As a result, courts have had ample opportunity to construe this legislation. The leading case interpreting "prevailing" plaintiff is *Parker v. Matthews*.[126] Dorothy Parker had filed an administrative complaint with the Department of Health, Education and Welfare (HEW) alleging discrimination based on race and sex, and demanding immediate promotion from her position as a GS-9 to GS-13. A HEW staff officer conducted an investigation and recommended that Ms. Parker receive the promotion. HEW advanced

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1964, 42 U.S.C. § 2000a-3(b) (1970), the Court stated that "one who succeeds in obtaining an injunction . . . should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." 390 U.S. at 402. Under still other statutes, courts employ tests suggested by legislative history. When confronted with a petition for attorneys' fees under the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (1976), for example, courts examine four factors to determine whether an award should issue: (1) the public benefit; (2) the commercial benefit to the complainant; (3) the nature of the complainant's interest in the records sought; and (4) the reasonableness of the government's legal basis for withholding the material. *See* Founding Church of Scientology, Inc. v. Marshall, 439 F. Supp. 1267, 1270 (D.D.C. 1977). The Senate version of the Freedom of Information Act expressly included these criteria. The conference committee removed them from the final version of the bill, but stated: "By eliminating these criteria, the conferees do not intend to make the award of attorney fees automatic or to preclude the courts, in exercising their discretion as to awarding such fees, to take into consideration such criteria." H.R. REP. No. 1380, 93d Cong., 2d Sess. 10 (1974). Courts have chosen to use the deleted criteria to guide their discretion. This secondary level of eligibility, however, exceeds the scope of this Note. Part II considers only the two threshold questions of eligibility: (1) Can a plaintiff ever recover statutory attorneys' fees on a mooted claim, and if so, (2) What tests common to all fee-shifting statutes must a plaintiff satisfy to become eligible for an award?

[120] *See* notes 124-54 and accompanying text *infra*.

[121] *See, e.g.*, Securities Act of 1933, 15 U.S.C. § 77k(e) (1970); OHIO REV. CODE ANN. § 3733.10 (b) (Page Supp. 1978) (actions against trailer park operators).

[122] *See, e.g.*, Federal Water Pollution Control Act, 33 U.S.C. § 1365(d) (Supp. V 1975).

[123] *See* notes 155-66 and accompanying text *infra*.

[124] *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C § 2000e-5(k) (1970).

[125] *See, e.g.*, Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (1976).

[126] 411 F. Supp. 1059 (D.D.C. 1976), *aff'd sub nom.* Parker v. Califano, 561 F.2d 320 (D.C. Cir. 1977) (government did not raise prevailing party issue on appeal).

Ms. Parker to GS-11, but stated that it would disregard the staff officer's report and recommendation. Ms. Parker then filed suit in federal court under the Civil Rights Act of 1964,[127] seeking promotion to GS-13 and back pay. Defendant's answer denied all allegations of the complaint. Two months after the plaintiff filed her suit, HEW reversed its position and issued a formal decision admitting that it had discriminated against Ms. Parker and agreeing to promote her retroactively to GS-13. The parties entered into a formal settlement of the pending suit. The plaintiff then petitioned the court for statutory attorneys' fees.[128] HEW opposed the peti-

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[127] 42 U.S.C. § 2000e-16 (Supp. V 1975). Originally, Title VII of the Civil Rights Act of 1964 did not apply to federal employees. *See* Brown v. General Servs. Admin., 425 U.S. 820, 825 (1976). Congress eliminated this immunity in 1972. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 11, 86 Stat. 111 (codified at 42 U.S.C. § 2000e-16 (Supp. V 1975)).

[128] The petitioner invoked 42 U.S.C. § 2000e-16(d) (Supp. V 1975), which incorporates 42 U.S.C. § 2000e-5(k) (1970). The latter statute provides:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

The final clause contrasts with the general waiver of sovereign immunity with respect to litigation costs, 28 U.S.C. § 2412 (1970), which explicitly excludes attorneys' fees.

If a federal court had subject matter jurisdiction over a mooted or settled claim, then it retains jurisdiction to consider the award of attorneys' fees. *See* Cueno v. Rumsfeld, 553 F.2d 1360, 1363 (D.C. Cir. 1977). Plaintiffs must request an award of statutory legal fees as part of the original action and may not bring an independent action to recover these fees. *See* Rural Fire Protect. Co. v. Hepp, 366 F.2d 355, 362-63 (9th Cir. 1966) (discussing Fair Labor Standards Act, 29 U.S.C. § 216(b) (1970 & Supp. V 1975)). This limitation contrasts sharply with the law regarding recovery of attorneys' fees under the common benefit exception. *See* notes 35-41 and accompanying text *supra*. The disparate origins of the two exceptions justify this difference. Conferral of a common benefit gives rise to an independent claim based on unjust enrichment. Prevailing under a statute, on the other hand, entitles the plaintiff only to what the statute provides. He remains tied to the original cause of action. Moreover, the language of the attorneys' fee provisions indicates that Congress intended courts to award attorneys' fees as part of costs (*see, e.g.*, 42 U.S.C. § 2000e-5(k) (1970)), or simultaneously with the award of costs (*see, e.g.*, 29 U.S.C. § 216(b) (1970 & Supp. V 1975)).

Under the common benefit exception, the right to a fee award accrues directly to the plaintiff's attorney. *See* notes 35-41 and accompanying text *supra*. Under the statutory exception, earlier cases held that the right to recover legal fees accrued exclusively to the plaintiff, and not to his attorney. *See* First Iowa Hydro Elec. Coop. v. Iowa-Illinois Gas & Elec. Co., 245 F.2d 630, 632 (8th Cir.), *cert. denied*, 355 U.S. 871 (1957) (Clayton Act, 15 U.S.C. § 15 (1970)); Ferraro v. Arthur M. Rosenberg Co., 156 F.2d 212, 214-15 (2d Cir. 1946) (Fair Labor Standards Act, 29 U.S.C. § 216(b) (1970 & Supp. V 1975)). *But see* Maddrix v. Dize, 153 F.2d 274, 276 (4th Cir. 1946) (Fair Labor Standards Act, 29 U.S.C. § 216(b) (1970 & Supp. V 1975)). More recent cases, however, evidence a greater willingness to award fees directly to attorneys. In Rodriguez v. Taylor, 569 F.2d 1231 (3d Cir. 1977), for example, the court considered whether a successful plaintiff, represented without charge by a federally funded legal services organization, could recover attorneys' fees

tion, arguing that a prevailing party is one who has obtained a favorable judgment after a full adjudication on the merits. The court rejected HEW's proposition: "If the Court were to adopt defendant's suggested meaning plaintiffs would be forced to try every case for the purpose of insuring an award of attorneys' fees."[129] Such a result, the court noted, would contravene the policy of encouraging settlement of litigation.[130] The court also found that the defendant's interpretation would undermine the policy considerations behind the attorneys' fee provision. Civil rights plaintiffs are often impecunious. The attorneys' fee provision enables them to obtain counsel who can effectively enforce their rights to freedom from discrimination.[131] If a defendant could escape reimbursement by mooting the claim, plaintiffs would have difficulty finding competent counsel who would be willing to risk receiving less than adequate compensation. Relying on these considerations, the court granted the petitioner's request.

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under 29 U.S.C. § 216(b) (1970 & Supp. V 1975). In affirming the assessment of a fee award against the defendant, the court stated: "The presence of an attorney-client relationship suffices to entitle prevailing litigants to receive fee awards. . . . Of course, since the object of fee awards is not to provide a windfall to individual plaintiffs, fee awards must accrue to counsel." 569 F.2d at 1245. *Accord*, Hairston v. R & R Apts., 510 F.2d 1090, 1093 (7th Cir. 1975). *Cf.* Serrano v. Priest, 20 Cal. 3d 25, 47 n.21, 569 P.2d 1303, 1315 n.21, 141 Cal. Rptr. 315, 327 n.21 (1977) (propriety of direct award to plaintiff's public interest attorney in exercise of court's equitable powers no longer questioned).

These two lines of cases are reconcilable. The statutory language of the various fee provisions suggests that a court should award attorneys' fees to a plaintiff as part of the judgment. For example, the Servicemen's Group Life Insurance Act, 38 U.S.C. § 784(g) (1970), provides: "[T]he court, as a part of its judgment decree, shall determine and allow reasonable fees for the attorneys . . . ." The attorney will then look to his client for payment. *See* Ferraro v. Arthur M. Rosenberg Co., 156 F.2d 212, 215 (2d Cir. 1946). This system properly underscores the central role of the client in litigation. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-1 (1975) explains: "The professional responsibility of a lawyer derives from his membership in a profession which has the duty of *assisting* members of the public to secure and protect available legal rights and benefits" (emphasis added). When the plaintiff stands to reap a windfall, however, sound policy supports giving the award directly to the legal services organization. Fee awards to legal aid offices will enhance their ability to enforce congressionally favored rights of plaintiffs unable to obtain private counsel. *See* Rodriguez v. Taylor, 569 F.2d 1231 (3d Cir. 1977). *See generally* Note, *1976 Developments in Welfare Law*, 62 CORNELL L. REV. 1050, 1072-76 (1977).

Preexisting fee arrangements between the prevailing party and his attorney do not affect the propriety of an award of reasonable attorneys' fees under a statute. *See* Sargeant v. Sharp, No. 77-1239 (1st Cir. May 16, 1978). The *Sargeant* court held that the client, who had already paid her counsel a contingent fee, should receive reimbursement for the amount paid with any excess of the award going to counsel.

[129] 411 F. Supp. at 1062.

[130] *Id.*

[131] *Id.*

In *Foster v. Boorstin*,[132] the District of Columbia Circuit extended the holding of *Parker v. Matthews* to mooted claims. The facts of *Foster* are indistinguishable from those underlying *Parker* except that the parties in *Foster* did not enter into a formal settlement of the suit.[133] In granting the plaintiff's petition for attorneys' fees, the court stated:

> Surely the effectiveness of this incentive for persons of limited means would be greatly diminished if the complainant were forced to bear the expense of his attorneys' fees whenever the Government chose to award the requested relief after a court action had been filed but prior to a judgment or a court order.[134]

The court would not permit defendants to weaken the civil rights law by impairing one of its primary enforcement tools.[135]

Parker and *Foster* represent a recent trend.[136] The legislative history accompanying Title VII of the Civil Rights Act of 1964 neither required nor prohibited the development of this trend. In debates surrounding Title VII's adoption, Congress paid scant attention to the attorneys' fee provision.[137] Only Senator Humphrey referred to the rationale for providing plaintiffs with an opportunity to recover their legal fees. He stated that the drafters included the provision to "make it easier for a plaintiff of limited means to bring a meritorious suit."[138] The Senator's statement gives little

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[132] 561 F.2d 340 (D.C. Cir. 1977).

[133] In *Foster*, a black bindery foreman filed a "complaint of discrimination" with his employer, the Library of Congress, alleging that two white supervisors had discriminated against him by selecting a less qualified applicant for promotion to GS-12. Two months after the foreman filed his complaint, the Coordinator of the Library's Equal Opportunity Office cancelled it for "failure to prosecute." The plaintiff appealed the cancellation, but the Deputy Librarian concurred with the Coordinator. The foreman then sued his employer in federal district court pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1970 & Supp. V 1975), seeking the promotion, back pay and attorneys' fees. Three weeks after the plaintiff filed his action, the Deputy Librarian rescinded the cancellation of the administrative complaint. After the Library's Equal Opportunity Office investigated the complaint, the plaintiff received a promotion to GS-12. The plaintiff then successfully petitioned the court for legal fees.

[134] 561 F.2d at 342.

[135] *See id.* at 342-43. *Accord*, Fischer v. Adams, No. 77-1264 (1st Cir. May 17, 1978) (party who prevailed on merits of discrimination complaint in administrative proceeding before Civil Service Commission may receive fee award from federal district court under 42 U.S.C. § 2000e-5(k) (1970) after defendant mooted complaint for back pay).

[136] Parker v. Matthews, the leading case cited on the issue of attorneys' fees on mooted claims, was decided in 1976.

[137] *See* Parker v. Califano, 561 F.2d 320, 334 app. (D.C. Cir. 1977), *aff'g* Parker v. Matthews, 411 F. Supp. 1059 (D.D.C. 1976).

[138] 110 CONG. REC. 12724 (1964).

guidance on the issue of mooted claims. The legislative history of the Civil Rights Attorney's Fees Awards Act of 1976,[139] however, unequivocally supports recovery of attorneys' fees on mooted civil rights claims. This Act tracks the language of the counsel fee provisions of Titles II[140] and VII[141] of the Civil Rights Act of 1964[142] and was designed to "achieve uniformity in the remedies provided by Federal laws guaranteeing civil and constitutional rights."[143] After reviewing the major civil rights legislation of the past fifteen years, the Senate Report[144] accompanying the bill stated:

> All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.
>
> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.[145]

The Report then concluded that "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief."[146] The House Report concurred with its

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[139] 42 U.S.C.A. § 1988 (West Supp. 1977). The statute provides:
In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

[140] 42 U.S.C. § 2000a-3(b) (1970).

[141] 42 U.S.C. § 2000e-5(k) (1970).

[142] H.R. REP. No. 1558, 94th Cong., 2d Sess. 5 (1976).

[143] *Id.* at 1.

[144] Congress enacted the Senate version, which differed from its House counterpart only in minor details.

[145] S. REP. No. 1011, 94th Cong., 2d Sess. 2, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5908, 5910.

[146] *Id.* at 5, [1976] U.S. CODE CONG. & AD. NEWS at 5912. Following the sentence quoted above, the Report cited several cases, without explanation, including Thomas v. Honeybrook Mines, Inc., 428 F.2d 981 (3d Cir. 1970), *cert. denied,* 401 U.S. 911 (1971). Unlike the other cases included in the string cite, *Honeybrook Mines* involved not statutory attorneys' fees, but the common benefit exception. *See* notes 62-63 and accompanying text

Senate counterpart on this point: "A 'prevailing' party should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion. Similarly, after a complaint is filed, a defendant might voluntarily cease the unlawful practice."[147] Thus, Congress and the courts agree that a civil rights plaintiff can be a prevailing party on a mooted claim for the purpose of an attorneys' fee award.

Courts have similarly interpreted prevailing plaintiff language to include mooted claims outside the civil rights area. For example, the Freedom of Information Act (FOIA) provides that a "court may assess against the United States reasonable attorney fees . . . in any case under this section in which the complainant has substantially prevailed."[148] The Senate Report[149] accompanying the bill noted that many witnesses viewed an attorneys' fee provision "as crucial to effectuating the original congressional intent that judicial review be available to reverse agency refusals to adhere strictly to the Act's mandates. Too often the barriers presented by court costs and attorneys' fees are insumountable [*sic*] for the average person requesting information, allowing the government to escape compliance with the law."[150] After reviewing the Act's legislative history, Judge Friendly asserted in *Vermont Low Income Advocacy Council, Inc. v. Usery*[151] that a plaintiff could recover statutory attorneys' fees on a mooted claim. Illustrating his analysis with a hypothetical, he stated that "Congress clearly did not mean that where an FOIA

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supra. Undoubtedly, the Report cited *Honeybrook Mines* for the proposition that a plaintiff can recover legal fees on a mooted claim.

[147] H.R. REP. No. 1558, 94th Cong., 2d Sess. 7 (1976).

[148] 5 U.S.C. § 552(a)(4)(E) (1976). The nuances in language among the "prevailing party" statutes, discussed in note 119 *supra*, do not affect the recovery of legal fees on mooted claims. Courts in FOIA cases, interpreting a statute that provides an award to plaintiffs who have "substantially prevailed," cite for support Title VII cases applying a statute that provides attorneys' fees to the "prevailing party." *See, e.g.*, American Fed'n of Gov't Emp. v. Rosen, 418 F. Supp. 205, 208 (N.D. Ill. 1976). Likewise, courts in civil rights cases cite indiscriminately to FOIA cases. *See, e.g.*, Foster v. Boorstin, 561 F.2d 340, 342-43 (D.C. Cir. 1977). Courts have not yet had occasion to determine whether statutes that grant legal fees to a plaintiff who "finally prevails," such as the Railway Labor Act, 45 U.S.C. § 153(p) (1970), will support an award on a mooted claim. However, the court in Parker v. Matthews, 411 F. Supp. 1059 (D.D.C. 1976), *aff'd sub nom.* Parker v. Califano, 561 F.2d 320 (D.C. Cir. 1977), stated that "[t]he use of the words 'finally prevails' does not appear to distinguish these statutes from those that use the words 'prevailing party.'" 411 F. Supp. at 1064 n.4.

[149] Except for a minor deletion (*see* note 119 *supra*), Congress passed the Senate version of the attorneys' fee provision. *See* H.R. REP. No. 1380, 93d Cong., 2d Sess. 10 (1974).

[150] S. REP. No. 854, 93d Cong., 2d Sess. 17 (1974).

[151] 546 F.2d 509 (2d Cir. 1976).

suit had gone to trial and developments made it apparent that the judge was about to rule for the plaintiff, the Government could abort any award of attorney fees by an eleventh hour tender of the information requested."[152] The District of Columbia Circuit, in *Cuneo v. Rumsfeld*,[153] reached the same conclusion:

> In enacting section 552(a)(4)(E) Congress sought to encourage the average person, who would ordinarily find the barriers of court costs and attorney fees insurmountable, to pursue legitimate FOIA actions. The effectiveness of this incentive would be greatly diminished if the complainant was forced to bear the costs whenever the government chose to release the requested information during the pendency of the action but prior to a judgment or a court order.[154]

Thus, a plaintiff litigating under a statute that has prevailing plaintiff language does not lose his eligibility to recover attorneys' fees solely because the defendant moots the claim.

3. *Final Order or Judgment*

Numerous federal statutes permit courts to award attorneys' fees to litigants upon "judgment"[155] or upon the issuance of a "final order."[156] A literal reading of this language would preclude an award of legal fees if the defendant moots the claim. Such a reading would be unreasonable. These statutes embody the same policies that support the award of fees on mooted claims under prevailing party language. For example, in the FOIA cases, the courts rejected a flat prohibition of awards on mooted claims because it would create inefficiency by forcing plaintiffs to litigate to judgment to obtain attorneys' fees,[157] and would inhibit enforcement of the Act by greatly limiting an important incentive for citizens' suits.[158] This same reasoning applies to legislation such as section 431(c) of the Labor-Management Reporting and Disclo-

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[152] *Id.* at 513. The third exception to the American Rule—defendant's bad faith—would also support an award of attorneys' fees in Judge Friendly's hypothetical. *See* note 6 *supra*.

[153] 553 F.2d 1360 (D.C. Cir. 1977).

[154] *Id.* at 1365 (footnote omitted).

[155] *See, e.g.*, Securities Act of 1933, 15 U.S.C § 77(k)(e) (1970).

[156] *See, e.g.*, Federal Water Pollution Control Act, 33 U.S.C. § 1365(d) (Supp. V 1975).

[157] *See* Kaye v. Burns, 411 F. Supp. 897, 902 (S.D.N.Y. 1976) (dictum). This rationale speaks only to settlements because a plaintiff does not have the option to pursue the case if the defendant moots it.

[158] *See* Cuneo v. Rumsfeld, 553 F.2d 1360, 1365 (D.C. Cir. 1977).

sure Act of 1959,[159] which grants any union member a right of action against his labor organization if the organization denies him access to its annual financial report. Section 431(c) provides that a "court in such action may, . . . in addition to any judgment awarded to the plaintiff . . . , allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."[160]

Fortunately, neither Congress nor the courts have interpreted "judgment" or "final order" to bar recovery on mooted claims. Legislative history on this question is scarce and no federal court has decided this precise point, but substantial evidence indicates that the issue is not seriously in doubt. For instance, section 505(d) of the Federal Water Pollution Control Act Amendments of 1972 provides that "[t]he court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate."[161] The Senate Report accompanying the bill stated:

> The Courts should recognize that in bringing legitimate actions under this section citizens would be performing a public service and in such instances, the courts should award costs of litigation to such party. This should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions.[162]

The seemingly restrictive "final order" language did not prevent the Senate committee from explicitly sanctioning fee awards on mooted claims.

Cases dealing with "judgment" statutes support, at least by analogy, awards on mooted claims. Section 11(e) of the Securities Act of 1933 provides:

> In any suit under this or any other section of this subchapter the court may . . . require an undertaking for the payment of the

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[159] 29 U.S.C. § 431(c) (1970). In support of the proposed Act, Senator McClellan stated that "racketeering, corruption, abuse of power, and other improper practices" would never be prevented until Congress mandated "minimum standards of democratic process." 105 CONG. REC. 6471 (1959).

[160] 29 U.S.C. § 431(c) (1970).

[161] Federal Water Pollution Control Act, 33 U.S.C. § 1365(d) (Supp. V 1975).

[162] S. REP. No. 414, 92d Cong., 2d Sess. 81, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 3668, 3747.

> costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant . . . if the court believes the suit or the defense to have been without merit . . . .[163]

In *Oil & Gas Income, Inc. v. Trotter*[164] the plaintiff had sued O.B. Trotter and Woods Exploration and Producing Company, alleging a violation of section 12 of the Securities Act of 1933 arising from misstatements or omissions of material fact in a registration statement and prospectus. After several inconclusive hearings, the plaintiff settled with Woods Company, then voluntarily dismissed his suit against both Woods Company and Trotter. Trotter petitioned the court for costs and attorneys' fees. The district court granted Trotter's petition after finding that the plaintiff's suit lacked merit. The appellate court affirmed the award without discussing the interpretive difficulties presented by the "judgment" language in the statute.[165] If the statute permits an award of attor-

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[163] Securities Act of 1933, 15 U.S.C. § 77(k)(e) (1970).

[164] 395 F.2d 753 (5th Cir. 1968).

[165] *Id. Accord,* Klein v. Shields & Co., 470 F.2d 1344 (2d Cir. 1972). In *Klein,* the trial court dismissed with prejudice the plaintiff's claim under the Securities Act of 1933 and awarded attorneys' fees to the defendant under 15 U.S.C. § 77(k)(e) (1970). The Second Circuit remanded the case because the trial judge had failed to make an explicit finding that the plaintiff's suit lacked merit. *Id.* at 1347-48. The appellate court apparently assumed that the judgment language did not bar a fee award, since the court made no reference to the issue.

In International Indus., Inc. v. Olen, 66 Cal. App. 3d 521, 135 Cal. Rptr. 906 (1977), the plaintiff voluntarily dismissed his suit. The court awarded attorneys' fees to the defendant under CAL. CIV. CODE § 1717 (West 1973). Section 1717 reads:

> In any action on a contract, where such contract specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.
>
> . . . .
>
> As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

The court supported its interpretation of the statute with four reasons. First, the word "judgment" includes any judgment, not just a judgment on the merits. Settlement of costs is a judgment for costs. Therefore, the court may award attorneys' fees upon entering such a judgment. Second, the statute states that costs include attorneys' fees. A party is entitled to receive ordinary costs on a voluntary dismissal, so he should receive his full costs including legal fees. Third, the targets of the statute, adhesion contracts with attorneys' fee clauses, permit plaintiffs to recover fees short of a judgment on the merits. Therefore, to provide full reciprocity, § 1717 must operate short of a judgment on the merits. Finally, a voluntary dismissal terminates the litigation just like a judgment on the merits. *Olen* overruled Associated Convalescent Ents. v. Carl Marks & Co., 33 Cal. App. 3d 116, 108 Cal. Rptr. 782 (1973).

neys' fees to a defendant when a plaintiff voluntarily dismisses his suit, a plaintiff should surely be eligible to recover attorneys' fees when a defendant moots the action.[166]

In sum, legislative history, case law and reason all indicate that a plaintiff litigating under a statute that includes "prevailing party," "judgment" or "final order" language does not lose his eligibility to recover attorneys' fees merely because the defendant moots the claim.

B. *Conditions Precedent to Eligibility*

1. *Present Diversity of Tests*

As with the common benefit exception,[167] the defendant's action in mooting a claim does not automatically entitle the plaintiff to receive statutory attorneys' fees. Courts require the plaintiff to satisfy certain prerequisites before he becomes eligible for a fee award. As with the common benefit exception,[168] courts diverge markedly in their tests of eligibility.

All courts appear to agree on two basic requirements. Judge Friendly presented these requirements most succinctly in *Vermont Low Income Advocacy Council, Inc. v. Usery*: "In order to obtain an award of attorney fees in an FOIA action, a plaintiff must show at minimum that the prosecution of the action could reasonably have been regarded as necessary and that the action had substantial causative effect on the delivery of the information."[169] Other decisions under the Freedom of Information Act[170] and under the civil rights statutes[171] apply these conditions precedent. These two requirements promote the efficient use of judicial resources. If a plaintiff could have achieved his objectives through nonjudicial means, the court should not encourage future plaintiffs to waste courts' time by reimbursing this plaintiff for his expenses.

In *Usery* Judge Friendly denied the plaintiff's petition for attorneys' fees because it failed both requirements. Invoking the

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[166] A plaintiff in effect moots the case when he requests a voluntary dismissal. Such a dismissal does not give the defendant anything, but it removes the need for him to litigate the action. When a defendant moots a claim, he not only removes the need for the plaintiff to litigate, but also gives something to the plaintiff. Thus mooting more closely resembles a judgment than does voluntary dismissal.

[167] *See* notes 20 & 71 and accompanying text *supra*.

[168] *See* notes 21-29 & 74-91 and accompanying text *supra*.

[169] 546 F.2d 509, 513 (2d Cir. 1976).

[170] *See, e.g.*, Goldstein v. Levi, 415 F. Supp. 303, 305 (D.D.C. 1976).

[171] *See, e.g.*, Parker v. Matthews, 411 F. Supp. 1059, 1064 (D.D.C. 1976).

Freedom of Information Act, the plaintiff had requested certain documents from the Boston office of the Department of Labor.[172] The Boston office refused the request, relying on one of the statutory exemptions from the Act as support for its decision. The plaintiff appealed to the Solicitor of Labor in Washington. The Solicitor's good faith attempt to process the appeal within the statutory time period fell victim to administrative difficulties. Although notified of the reason for the delay, the plaintiff ignored an opportunity to discuss the problem with a staff member of the Washington office and instead promptly filed suit. Before the action came to trial, the Solicitor solved the administrative problems, reviewed the appeal, overruled the Boston office, and released the documents. The court found that "the result here was not one whit different than if [plaintiff] had withheld legal action and shown some understanding of the problem created for the Solicitor by the failure of the regional office to locate the documents."[173]

Having established a necessary suit that substantially caused the defendant's reaction, the plaintiff faces yet a third condition precedent. Courts diverge widely on the content of this third requirement for fee-reimbursement. Some courts hold the plaintiff eligible if the defendant's action substantially satisfies the demands of the plaintiff's complaint. This requirement is illusory in the context of a mooted suit because a defendant cannot moot a claim unless he substantially satisfies the plaintiff's demands. In *American Federation of Government Employees v. Rosen*,[174] a federal district court held that "plaintiffs have substantially prevailed within the meaning of the Freedom of Information Act . . . where they are denied documents in the possession of a federal agency, file suit . . . and while the litigation is pending, defendants surrender the demanded documents."[175]

Another federal court, in *Founding Church of Scientology, Inc. v. Marshall*,[176] employed the same "result" test. The plaintiff had requested certain documents from the Department of Labor under

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[172] 5 U.S.C. § 552 (1976).

[173] 546 F.2d at 515. Compare Judge Friendly's standard of causation to those discussed under the common benefit exception. *See* notes 74-91 and accompanying text *supra*. The standard of causation recommended in Part I for use in common benefit cases appears to parallel Judge Friendly's standard for use in statutory cases. The arguments made in support of the common benefit standard apply with equal force to the statutory standard. *See* notes 92-94 and accompanying text *supra*.

[174] 418 F. Supp. 205 (N.D. Ill. 1976).

[175] *Id.* at 209.

[176] 439 F. Supp. 1267 (D.D.C. 1977).

the Freedom of Information Act. The Department claimed that one of the statutory exemptions applied to the request and declined to release the documents. After exhausting administrative avenues, the plaintiff sued to compel disclosure. Following considerable procedural maneuvering, the Department "determined that release of the information would not harm the Department or the public interest."[177] Although it released the material, the Department continued to maintain that the exemption covered the documents. The court awarded attorneys' fees to the plaintiff, stating: "The only requirement is that the movant 'substantially prevail,' which he may do by causing the release of the information through litigation."[178] The court then moved from this "result" test to a second level of analysis: It applied four fee-reimbursement factors originally suggested by the Senate Committee on the Judiciary but omitted from FOIA as enacted.[179] One of these factors is whether the agency had a reasonable basis in law for withholding the documents. On this point the trial judge stated:

> Although the released documents are available for the Court's determination of the validity of the exemptions, the Court must decline the invitation to rule explicitly on the very issues mooted by the release of the information in this case. Instead, the Court considers the material only insofar as it may disclose a reasonable basis for the Department's withholding.[180]

The court concluded that the Department's claimed exemption had no reasonable basis in law.

The "result" test employed by the *Rosen* and *Founding Church* courts is inappropriate in light of the statutory origin of the attorneys' fee provision. The Senate Report accompanying the Freedom of Information Act states:

> [I]f a complainant has been successful in proving that a government official has wrongfully withheld information, he has acted as a private attorney general in vindicating an important public policy. In such cases it would seem tantamount to a penalty to require the wronged citizen to pay his attorneys' fee to make the government comply with the law. However, the bill specifies four criteria to be considered by the court in exercising its discretion: (1) "The benefit to the public, . . ."; (2) "the commercial benefit

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[177] *Id.* at 1269.

[178] *Id.*

[179] *See* note 119 *supra.*

[180] 439 F. Supp. at 1270.

> to the complainant"; (3) "the nature of" the complainant's "interest in the records sought"; and (4) "whether the government's withholding of the records sought had a reasonable basis in law."[181]

The Senate Report assumes that the plaintiff has already proven that the agency illegally withheld the documents. After finding that the defendant violated the law, the court then employs the four factors to determine whether a fee award should issue on the facts of the pending case. Neither *Rosen* nor *Founding Church*, however, required a finding that the defendant violated the law. Congress did not intend to reimburse the plaintiff who extracts from a government agency a document that the agency had a statutory right to keep confidential.[182] Congress did not intend to provide an incentive for plaintiffs to bring unmeritorious actions.[183]

Judge Tamm recognized, in *Nationwide Building Maintenance, Inc. v. Sampson*,[184] that a statutory duty is a prerequisite to liability for statutory attorneys' fees: "Certainly where the government can show that information disclosed after initial resistance was nonetheless exempt from the FOIA a plaintiff should not be awarded attorney fees . . . ."[185] Unfortunately, Judge Tamm also asserted that "[t]his is an issue which should be addressed to the courts' discretionary evaluation of the reasonableness of the government's resistance to a FOIA plaintiff's request, not a reason for requiring a judgment of wrongful withholding as a prerequisite for the exercise of that discretion."[186] The latter statement is difficult to reconcile with the former. A court finding that the defendant did not

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[181] S. REP. No. 854, 93d Cong., 2d Sess. 19 (1974). The conference committee eliminated the four criteria from the final version of the bill, but courts have adopted them. *See* note 119 *supra*.

[182] Congress included the attorneys' fee provision to ensure that private litigants could afford to prod the government into compliance with the law. *See* S. REP. No. 854, 93d Cong., 2d Sess. 17 (1974). If the government is complying with the law, the reason for an award vanishes. This analysis applies with equal force to other fee-shifting statutes. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 263 (1975) (purpose behind most fee provisions to encourage private enforcement of law).

[183] Part I of this Note argues that courts should discontinue the use of the meritorious claim test in common benefit cases. Part II argues that courts must determine that the underlying action was meritorious before they may award statutory attorneys' fees. No inconsistency exists because the origins of the two exceptions differ greatly. Conferral of a common benefit gives rise to an independent claim based on unjust enrichment. Success under a statute gives the plaintiff only what the statute provides. He thus remains tied to the original cause of action.

[184] 559 F.2d 704 (D.C. Cir. 1977).

[185] *Id.* at 712 n.34.

[186] *Id.*

violate the law should never reach discretionary considerations. If a court does reach discretionary considerations, a showing of "reasonableness of the government's opposition does not preclude a recovery of costs and attorney fees."[187]

The same criticism attaches to the "result" test when courts apply it to civil rights statutes. In the process of denying an award of attorneys' fees on an interlocutory appeal in a Title VII action, the District of Columbia Circuit stated:

> [W]e cannot believe Congress would have countenanced assessing fees against a defendant absent any showing of discrimination. For all we now know, the defendants in this case may be entirely blameless . . . . It follows that since [plaintiff] has yet to demonstrate discrimination, an award of counsel fees would be inappropriate at this time.[188]

Thus, a court should not award attorneys' fees unless the plaintiff has demonstrated that the defendant has violated the underlying statute.

Moreover, courts applying the rationale of *Rosen* and *Founding Church* cannot properly hold the defendant's mooting act to be an admission of liability. In *Clanton v. Allied Chemical Corp.*,[189] the court suggested several reasons for a defendant's mooting of a claim, none of which significantly relates to the issue of liability. For example, a defendant might wish to avoid the costs of a trial, the adverse publicity of a trial, and the risk of losing at trial even if the risk is slim.[190] Thus, mootness alone does not prove liability, and a demonstration of liability must precede the award of attorneys' fees.

Clanton illustrates a second alternative for the third condition precedent. In that case, the parties entered into a settlement in which the defendant agreed to pay $200,000 to the class for its claims of back pay, to discontinue use of allegedly unlawful employment tests or educational criteria, to commence an affirmative hiring program for black applicants and a training program for incumbent black employees, and to appoint an officer to receive employee complaints of noncompliance with the settlement agreement.[191] In the settlement agreement, the defendant also

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[187] Cuneo v. Rumsfeld, 553 F.2d 1360, 1366 (D.C. Cir. 1977) (Tamm, J.).

[188] Grubbs v. Butz, 548 F.2d 973, 976 (D.C. Cir. 1976) (footnote omitted).

[189] 409 F. Supp. 282 (E.D. Va. 1976) (settlement action involving Title VII claim).

[190] *Id.* at 284.

[191] *Id.* at 283.

maintained that it had not violated Title VII,[192] just as the Department of Labor in *Founding Church* had disclaimed any FOIA violation upon releasing the documents.[193] The settlement agreement did not address the attorneys' fee issue. Had the court employed the "result" test, it would undoubtedly have found that the plaintiff qualified as the prevailing party for the purpose of a fee award.[194] The *Clanton* court, however, accepted the proposition that the court should award legal fees only after the plaintiff has prevailed on the question of liability.[195] Moreover, it believed that any examination of the facts of the case short of a full trial on the merits would force the court to speculate as to who was the prevailing party.[196] The court therefore scheduled a trial on the merits to ascertain whether the plaintiff was the prevailing party.[197] The trial judge hoped that the great expense associated with a trial on the merits would prompt the parties to settle.[198]

A serious problem arises if the judge's order does not induce the desired results. If the parties cannot settle the attorneys' fee issue because of personality conflicts, disagreements on monetary issues, the defendant's fear of collateral estoppel benefiting other potential plaintiffs, or the doctrinal positions of one of the parties, then the court has saddled itself with a trial on the merits solely to determine the award of attorneys' fees. The risk that the parties will be unable to resolve the matter among themselves is greater on a mooted claim than on a settled claim because normally the mooting defendant has already displayed unwillingness to deal with the plaintiff.

Parker v. Matthews,[199] a Title VII case, offers a third alternative for the third condition precedent. In *Parker*, the parties settled, but did not agree on the attorneys' fee issue. Instead of giving the parties another opportunity to settle the matter themselves, the court declared the plaintiff to be the prevailing party. The court rested its conclusion on "a close scrutiny of the totality of the circumstances surrounding the settlement, focusing particularly on the necessity for bringing the action and whether the party is the

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[192] *Id.*

[193] 439 F. Supp. at 1269. *See* notes 176-80 and accompanying text *supra*.

[194] *See* notes 176-80 and accompanying text *supra*.

[195] 409 F. Supp. at 284-85. *See* notes 189-90 and accompanying text *supra*.

[196] 409 F. Supp. at 284-85.

[197] *Id.* at 285.

[198] *Id.*

[199] 411 F. Supp. 1059 (D.D.C. 1976), *aff'd sub nom.* Parker v. Califano, 561 F.2d 320 (D.C. Cir. 1977).

successful party with respect to the central issue—discrimination."[200] The *Parker* court realistically assumed that at this stage of the proceedings, if the parties had not already done so, they would not settle the attorneys' fees issue themselves. The *Parker* approach improves on the *Clanton* system by avoiding the effort and expense of a full trial on the merits. Absent a trial on the merits, however, the risk of error in the reimbursement decision increases. Congress intended to award legal fees only to plaintiffs who had meritorious claims.[201] But courts need only take reasonable steps to ensure that awards coincide with congressional intent. *Clanton* exceeds the bounds of reason; the "result" test applied in *Rosen* and *Founding Church* altogether ignores congressional intent. The *Parker* approach, by examining what evidence presently exists and by requesting affidavits, can reduce the risk of error to a reasonable level.[202] As presently constructed, however, the *Parker* test fails to provide the trial judge with adequate guidance for focusing his "close scrutiny of the totality of the circumstances." Courts in the future will need to refine this broadly brushed approach.

2. *Proposed Test*

Although plaintiffs can recover statutory attorneys' fees on mooted claims,[203] courts are still developing prerequisites to eligibility.[204] This Note proposes a modified *Parker* test. A court confronted with a petition for statutory attorneys' fees on a mooted claim should scrutinize the totality of the circumstances surrounding the termination of the controversy, using all evidence reasonably accessible through affidavits[205] and an evidentiary hearing. In

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[200] 411 F. Supp. at 1064. The central issue in an FOIA case is whether the defendant unlawfully withheld information.

[201] *See* notes 181-83 and accompanying text *supra*.

[202] The amount of evidence before the court will bear a direct relationship to the importance of the attorneys' fee issue. If the court does not have much evidence before it, the parties have probably not engaged in extensive discovery and trial preparation. Therefore, the amount of the fee award, if granted, will not be a large sum. Conversely, if the court has voluminous evidence before it, the parties have probably engaged in extensive discovery and trial preparation and, therefore, the amount of the fee award may be substantial. Thus, the court will be more likely to make a correct decision where more money is at stake.

[203] *See* notes 116-66 and accompanying text *supra*.

[204] *See* notes 167-202 and accompanying text *supra*.

[205] *Cf.* Goldstein v. Alodex Corp., 409 F. Supp. 1201, 1205-06 (E.D. Pa. 1976) (after parties settled Securities Act case court accepted affidavits to determine liability of two outside directors seeking indemnification from corporation).

the absence of instructive statutory language or legislative history, a court undertaking this inquiry should emphasize the following factors:

(1) Whether the plaintiff needed to invoke the power of the court to achieve the desired end;
(2) Whether the plaintiff's action contributed to the defendant's decision to moot the claim;
(3) Whether the defendant is particularly sensitive to public opinion;
(4) Whether the costs of a trial would have unreasonably burdened the defendant;
(5) Whether an adverse judgment on the merits would have significantly affected the defendant;
(6) Whether the plaintiff would probably have prevailed on the key issue or issues presented by the underlying statute; and
(7) Whether the statute includes special restrictions that apply to the facts of the case.

Factors (1) and (2) protect the judiciary and society from unnecessary costs and burdens by denying awards to plaintiffs who could have achieved their objectives through nonjudicial means.[206]

Factors (3) through (5) direct the court's attention to considerations other than the merits of the case that may have forced the defendant to moot the claim. The legislative intent behind statutory attorneys' fees will not support an award if pressures other than the merits of the case forced the defendant to moot the plaintiff's claim and if the probability of plaintiff's success in a trial on the merits is uncertain.[207]

Factor (6) directs the court to determine, as best as it can, which party would probably have prevailed on the merits. This finding will in large part determine whether a fee award should issue. Congress intended to reimburse only plaintiffs who promote national policy and enforce their rights against defendants who act unlawfully.[208] The burden of proof on factor (6) rests upon the party who would have had the burden at a trial on the merits. For example, under the Freedom of Information Act[209] the burden of establishing an exemption from mandatory disclosure of government records rests with the agency.[210]

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[206] *See* notes 169-73 and accompanying text *supra*.
[207] *See* notes 189-90 and accompanying text *supra*.
[208] *See* notes 181-88 and accompanying text *supra*.
[209] 5 U.S.C. § 552 (1976).
[210] *See* 5 U.S.C. § 552(a)(3) (1976).

Factor (7) directs the court's attention to congressional restrictions included in the statute. For example, section 11(e) of the Securities Act of 1933 provides for attorneys' fees only "if the court believes the suit or the defense to have been without merit."[211] If a court decides that it should grant an award on the basis of factors (1) through (6), the court must then determine the effect of factor (7) on its decision.

CONCLUSION

A defendant cannot automatically preclude a plaintiff from recovering attorneys' fees under either the common benefit exception or the statutory exception to the American Rule by mooting the underlying suit. Courts impose certain conditions precedent to eligibility, however, under both exceptions. The present tests of eligibility have serious flaws. For fee petitions based on the common benefit exception, courts should discontinue the meritorious claim test and substitute an equitable test. For fee petitions grounded on the statutory exception, courts should adopt a test that blends equal measures of judicial efficiency and congressional intent.

Thomas J. Hopkins

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[211] 15 U.S.C. § 77k(e) (1970).