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Costs - Exercising Equitable Powers to Award Attorney's Fees to Losing Party Seeking Compliance with the National Environmental Policy Act - Sierra Club v. Lynn

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COSTS — Exercising Equitable Powers to Award Attorney's Fees to Losing Party Seeking Compliance with the National Environmental Policy Act. Sierra Club v. Lynn, 364 F. Supp. 834 (W.D. Tex. 1973).

A private developer, San Antonio Ranch, Ltd. (SAR), proposed to develop a new community just outside San Antonio, Texas. The Department of Housing and Urban Development (HUD) was partially to fund the project by issuing $18,000,000 in government-secured bonds.

When HUD approved the project, the Sierra Club and several local San Antonio public interest groups filed suit in the United States District Court of Texas, Western District. The suit named Lynn, Secretary of HUD, and SAR as defendants. The complaint alleged that SAR was ineligible for government assistance under the provisions of the Urban Growth and Development Act of 1970.[1] It also alleged that in approving the project HUD had acted arbitrarily, capriciously, and in violation of the National Environmental Policy Act of 1969 (NEPA).[2] Later, the Edwards Underground Water District intervened on the side of plaintiffs and alleged that the proposed development would also violate the Water Pollution Prevention and Control Act of 1972.[3]

After the trial began but before its completion, HUD prepared two additional impact statements. Meetings with eighteen public agencies were conducted, and four more meetings with the San Antonio Ranch Water Quality Advisory Board were held before that group finally approved the project. Furthermore, two independent studies were subsequently made in order to determine the potential impact of the project on San Antonio's only major water supply, the Edward Underground Reservoir. Several other untested hypotheses were subjected to rigorous testing.

Based upon this data, the court found that SAR qualified for the government assistance, that HUD had not acted arbitrarily and capriciously nor in violation of NEPA. Nonetheless, the court proceeded to award the plaintiffs $20,000 in

1. 42 U.S.C. § 4501 (1970).
2. (NEPA) 42 U.S.C. § 4321 (1970).
3. 33 U.S.C. § 1251 (Supp. 1973).

costs, including attorney's fees. The court held that the plaintiffs had performed an important service by creating a greater public awareness of the potential dangers of pollution to a valuable natural resource, that they had ensured the effectuation of a strong congressional policy, and that the court, in the exercise of its equitable powers, could award such fees as costs whenever overriding considerations and the interests of justice so required.[4]

I. THE GENERAL RULE ON ATTORNEY'S FEES AS A PART OF COSTS

As a general rule neither state nor federal courts will award attorneys' fees as a part of costs to the prevailing party, nor will they permit them to be recovered directly as a part of damages.[5] This rule is a product of the statutory history of the United States; it is not a vestige of an age-old common law principle.[6]

The traditional argument against awarding fees as a part of costs is that such an award would encourage frivolous complaints and deter defendants from exercising just defenses.[7] This argument has been effectively countered.[8] Furthermore, Rule 54(d) of the Federal Rules of Civil Procedure permits a federal court to award costs, including attorney's fees, as a matter of course.

However, the courts have, until recently, generally recognized only two exceptions to the general rule.[9] One permits a prevailing party to recover fees as a part of costs when a provision in a contract provides for it.[10] The other permits the fees to be recovered when a statutory provision allows such a recovery.[11]

4. Sierra Club v. Lynn, 364 F. Supp. 834 (W.D. Tex. 1973) (hereinafter cited as Lynn).
5. 6 MOORE'S FEDERAL PRACTICE ¶ 54.77 [2], at 1703 (2d ed. 1973).
6. Erhenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966).
7. *Id.*
8. Ehrenzweig, *Shall Counsel Fees Be Allowed?*, 26 CALIF. S.B.J. 107 (1951); Note, *Attorney's Fees: Where Shall the Burden Lie?*, 20 VAND. L. REV. 1216 (1967); Note, *The Allocation of Attorney's Fees After Mills v. Electric Autolite Co.*, 38 U. CHIC. L. REV. 316 (1971).
9. 20 AM. JUR.2d *Costs* § 72 (1962).
10. Annot., 8 A.L.R.2d 894 (1963).
11. *Id.*

Congress has created several statutory provisions which permit attorney's fees to be recovered as a part of costs. For example, federal statutes now authorize the court to award fees as a part of costs in anti-trust suits,[12] copyright suits,[13] patent suits,[14] and securities suits.[15] However, the United States Supreme Court has refused to include fees as costs when a statute sets out several specific remedies but fails to include the recovery of attorney's fees among them.[16]

In addition to these traditional exceptions, the courts have also exercised their equitable powers to award fees as a part of costs when "overriding circumstances" and "the interests of justice" require it.[17] For example, courts have exercised this power in those cases in which the defendant has acted in "bad faith."[18]

Also, the courts have used their equitable powers to award fees to the prevailing party in so-called "common fund" cases.[19] Under this exception, an individual plaintiff has successfully litigated against the defendant to the benefit of third parties, even though it was not the plaintiff's original intention to do so.[20] This exception is frequently used in stockholder suits,[21] but it has not been limited only to those cases.[22] The exception has been applied restrictively to bar recovery of fees when no actual fund has been created,[23] or when the plaintiff has voluntarily undertaken the responsibility properly belonging to another.[24] It has most recently

12. 15 U.S.C. § 15 (1970).
13. 17 U.S.C. § 116 (1970).
14. 35 U.S.C. § 285 (1970).
15. 15 U.S.C. § 77k (1970).
16. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967). The Court seemed to limit the equitable exceptions to admiralty cases, common fund cases, and bad faith or obdurate behavior cases.
17. Mills v. Electric Autolite Co., 396 U.S. 375 (1970) (hereinafter cited as Mills).
18. Vaughn v. Atkinson, 369 U.S. 527 (1962). Because of the built-in limitations of this exception, the courts tend to avoid basing their decisions solely on this ground.
19. Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939).
20. *Id.*
21. Mills, *supra* note 17.
22. Hall v. Cole, 412 U.S. 4 (1973). Here the exception was applied in a suit brought by a union member against his union, which he charged with violating the Labor Management Reporting and Disclosure Act. The Court noted the benefits which accrued to all union members as a result of plaintiff's suit, even though no large common fund was involved.
23. Schechtman v. Wolfson, 244 F.2d 537 (2d Cir. 1957).
24. Gilson v. Chock Full O' Nuts Corp., 331 F.2d 107 (2d Cir. 1964).

been applied liberally to permit recovery of fees even though no significant pecuniary benefit resulted from the suit.[25] The minimum requirement must be a showing of substantial benefit to the common fund or group.[26]

The most significant equitable exception is frequently called the private attorney general exception.[27] This exception is relied upon regularly when certain elements are present in the litigation.

First, the suit is invariably brought under a federal statute which embodies a strong congressional policy.[28] An example of such a policy is civil rights legislation. Civil rights cases fit easily into the first equitable exception; however, the courts have refused to base their award of fees on this narrow exception.[29] Rather, they have stressed the need to encourage the effectuation of a strong congressional policy.[30] In fact, at least one circuit compels its courts to award attorney's fees to the prevailing plaintiff, unless they can set out specific findings of fact or other acceptable grounds which would justify refusing such an award.[31]

Secondly, under this exception the citizen has acted as a private attorney general by bringing suits which seek to enforce these federal laws.[32] Furthermore, nothing under the affected statute can be interpreted as precluding an award of attorney's fees.[33]

Finally, under this exception the plaintiff is generally seeking equitable relief rather than money damages.[34] Under such circumstances, the courts have awarded fees on two theories. One theory is that the plaintiff will prosecute a suit in which he will not recover money damages if he knows that he can recover his costs, including fees, if he is success-

25. Hall v. Cole, *supra* note 22.
26. Globus, Inc. v. Jaroff, 279 F. Supp. 807 (S.D.NY. 1968).
27. Note, *The Allocation of Attorney's Fees After Mills*, *supra* note 8
28. La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Calif. 1972) (hereinafter cited as La Raza).
29. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968).
30. Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971).
31. Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972).
32. Amos v. Sims, 340 F. Supp. 691 (N.D. Ala. 1972).
33. La Raza, *supra* note 28, at 98.
34. *Id.*

ful.[35] The other theory is that the award of fees is less an exercise of an equitable power and more a part of the total remedy granted to the plaintiff.[36]

Thus, while the courts have traditionally recognized two exceptions to the American rule against awarding attorney's fees as a part of costs, they have come to rely more and more on their inherent equitable powers to award fees. They especially rely upon their equitable powers in the private attorney general suits which are brought to enforce strong congressional policies and whose overriding circumstances dictate that the interests of justice will be served only by awarding fees to the plaintiff as a part of his costs.[37]

II. THE BASIS FOR THE DECISISON IN *Lynn*

Having conceded that the plaintiffs had technically lost the lawsuit, the court proceeded to reject the defendants' argument that it was highly questionable whether the court had the power "to impose upon the prevailing adverse party the burden of reimbursing plaintiffs' attorney's fees."[38] In reaching this decision the court took note of the traditional exceptions to the rule against awarding fees as a part of costs; however, it said it would not be bound by such "a hard and fast approach."[39]

The reasons for the court's decision can be traced to two factors. The first is its reliance upon the private attorney general exception. The second is its reliance upon the broad language of the United States Supreme Court in the *Mills* case.[40]

Clearly the plaintiffs in *Lynn* were acting as private attorneys general. In challenging both HUD's and SAR's

35. Newman v. Piggie Park Enterprises, Inc., *supra* note 29, at 402.
36. Amos v. Sims, *supra* note 32, at 694; Lee v. Southern Home Sites Corp., *supra* note 30, at 144.
37. Mills, *supra* note 17.
38. Lynn, *supra* note 4, at 847.
39. *Id.*
40. *Supra* note 17, at 391. Here the Court held that when the plaintiff's action had produced a substantial benefit and no statutory provision specifically precluded it, a court could award fees to the plaintiff if "overriding circumstances" and "the interests of justice" required it. The imprecision of this language was criticized in Note, *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 1, 217 (1970). However, the Court failed to limit the language in its most recent decision, Hall v. Cole, *supra* note 22.

compliance with federal statutes, they were giving meaning to the congressional intent expressed in the National Environmental Policy Act of 1969 (NEPA).[41] Their suit sought to prevent or eliminate damage to the environment.[42] It also demonstrated that America's success in coping with its environmental problems would rest largely upon "the continued vigilance of American public opinion and the continued vitality of citizens' efforts to protect the environment."[43] Finally, the suit forced HUD to comply fully with NEPA's requirement that exhaustive studies be completed prior to any action which would significantly affect the environment.[44]

However, because the plaintiffs had lost the suit, the court was compelled to go beyond the private attorney general exception to support its decision. It did this by relying upon the broad language in *Mills*. Consequently, the private attorney general exception itself became only one of the "overriding circumstances" which required an award of attorney's fees to the unsuccessful plaintiffs.

The second overriding circumstance would swing the balance. It was that, had the case been decided on the facts as they existed at the beginning of the suit, *the plaintiffs would have won.* The court stressed that the first "final" impact statement had not been "in truth and in fact a 'final' statement as contemplated by law."[45] The court also stressed that two additional impact statements were finally prepared, with the last one being completed just prior to the conclusion of the lawsuit.[46] Furthermore, the plaintiffs' activities made the public more fully aware of the dangers of pollution which threatened a valuable natural resource.[47] In the eyes of the court there existed those overriding circumstances which in the interests of justice required an award of attorney's fees to the unsuccessful plaintiffs.

41. (NEPA) 42 U.S.C. § 4321 (1970).
42. 42 U.S.C. § 4331 (1970).
43. *Presidential Message to Congress on the Environment,* 7 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1132, 1133 (Aug. 9, 1971).
44. 42 U.S.C. § 4332(C) (1970).
45. Lynn, *supra* note 4, at 848.
46. *Id.* at 838.
47. *Id.* at 847.

III. THE IMPLICATIONS OF THE HOLDING IN *Lynn*

Despite the apparent reasonableness of the court's decision, the question still remains whether or not the court abused its equitable powers in awarding fees to the unsuccessful plaintiffs. The court has relied upon the right reasons to reach the right decision. Unfortunately, it has applied that decision to the wrong defendant and has, to that extent, abused its equitable powers.

Had the judgment been levied against HUD, it would have been sound both economically and equitably. It is sound economically because it is aimed at an efficient allocation of resources. An optimal allocation of society's resources requires that the full costs of producing each good or service be taken into account.[48] Because HUD had inadequately prepared its impact statements, the plaintiffs were compelled to assume the burden and the substantial costs of litigation to ensure full compliance by HUD with the law.

> Whenever a busineses activity imposes costs for which it is not required to pay, . . . the price mechanism will not ensure a proper allocation of resources. . . . One of the primary functions of a legal system should be, then, to ensure that costs such as these do not remain external to the enterprise which creates them.[49]

Under this analysis, the attorney's fees are an external cost generated by inadequate studies originally made by HUD. Therefore, they should be made a part of the total cost of the proposed project. To the extent that they are, the cost has been internalized and the resources more equitably allocated. By imposing the costs, the legal system is successful in imposing all real social costs on HUD and has been successful in making the costs both private to HUD and public to society which will ultimately benefit from the development.[50] Consequently, the decision to impose the costs, in-

48. JACOBY, *The Environmental Crisis*, in ENVIRONMENTAL LAW AND POLICY 36 (J. Krier ed. 1971).

49. Baxter, *The SST: From Watts to Harlem in Two Hours*, 21 STAN. L. REV. 1, 39 (1969).

50. *Id.* at 40.

cluding attorney's fees, on a successful defendant would not be a misapplication of the cost internalization concept.

Similarly, if the decision were applied to HUD, it would be equitable. Even though there is no express provision in NEPA which permits a court to award fees as a part of costs, such an award is not automatically precluded.[51] Congress has specifically permitted such recoveries when suits have been brought to force compliance with another type of environmental legislation.[52]

The environment is everyone's business. When public policy in this area has been strengthened, everyone is better off.[53] Plaintiffs' suit in *Lynn* forced untested government hypotheses to be tested.[54] More importantly, it forced a federal agency to comply with a federal law and to inform the general public of potential threats to a valuable natural resource.[55] To that extent it helped to create a responsible and informed citizenry, which is "the foundation on which environmental progress rests in our society."[56]

Lastly, since the relief sought in actions brought under NEPA is usually equitable, the award of fees as costs is a reasonable exercise of the court's equitable powers. Such an award would do much to encourage continued vigilance by private citizens and groups and to encourage such groups to prosecute legitimate claims, despite the high costs of litigation and the absence of the possibility of recovering significant money damages.[57] To award the fees ensures vindication "of significant public policy and, at the same time, creates a widespread benefit."[58]

Unfortunately, the court was barred from levying the costs against HUD because another statute prohibits such an

51. Mills, *supra* note 17.
52. 42 U.S.C. § 1857h-2(d) (1970). This section of the Air Quality Act specifically provides for an award of costs, including attorney's fees, when the court deems such an award appropriate.
53. La Raza, *supra* note 28, at 100.
54. *Supra* note 4, at 850.
55. *Id.* at 847.
56. *Presidential Message on the Environment, supra* note 43, at 1132.
57. La Raza, *supra* note 28, at 100.
58. Nat'l Resources Defense Council v. Environmental Protection Agency, 484 F.2d 1331, 1333 (1st Cir. 1973).

award.[59] In its desire to do equity for the plaintiffs, the court imposed an inequity upon the private developer. It is for this reason alone that the court may be said to have abused its discretion and to have made an erroneous judgment.

As the preceding discussion has indicated, the duty under NEPA lay with HUD. NEPA requires that only the federal agency be responsible for an impact statement.[60] It was in the interest of SAR to gather as much information about the potential impact on the environment of the project as it could. However, SAR had no affirmative duty under NEPA to do so. In fact,even if it had prepared an impact statement and HUD had relied upon it solely for its decision, SAR would have incurred no liability, for a federal agency cannot substitute a private party's impact statement for its own.[61] The duty of a federal agency to prepare an impact statement under NEPA is nondelegable.[62] Thus, there was no way in which SAR could violate NEPA, and there was no way in which the court could use NEPA to justify entering a judgment against SAR.

One possibility remained whereby the court could shift the burden of paying plaintiffs' costs to SAR without abusing its discretion. Under the Water Pollution Prevention and Control Act of 1972,[63] a private party has an affirmative duty not to pollute. However, the court held that SAR had not violated the act.[64] The court pointed out that even the EPA had not set new standards under the act; therefore, here was nothing to enforce. Besides, HUD had required that SAR maintain the present level of purity and that it install elaborate end expensive monitoring equipment to protect against pollution. The court also found that SAR would not be discharging toxic polutants in toxic amounts into the un-

59. 28 U.S.C. § 2412 (1970). Under this provision a court may not award attorney's fees as a part of costs in any action brought by or against the United States or any agency or official of the United States, acting in his official capacity, unless another statute specifically authorizes such an award.
60. 42 U.S.C. § 4332(C) (1970).
61. Greene County Planning Bd. v. Fed. Power Commission, 455 F.2d 412 (2d Cir. 1972).
62. *Id.* at 423.
63. 33 U.S.C. § 1251 (Supp. 1973).
64. Lynn, *supra* note 4, at 844

derground reservoir.[65] Thus, the remaining ground upon which the award might have been made was effectively eliminated by the court itself. There remains no way to justify the award within the logical extensions of the law. Unless viewed as a radical departure from the current law, the decision must be regarded as an abuse of the court's equitable discretion.

IV. CONCLUSION

Lynn does not stand for the proposition that all plaintiffs who bring a suit as a private attorney general will automatically recover their costs, including attorney's fees, win or lose. Rather, the case stands for a fundamentally sound proposition. The decision is not a radical departure from the current law when viewed in its entirety. Under such a view, the decision affirms the sound equitable notion of looking not at who won or who lost, but at what benefit was conferred.[66]

For example, the reasoning of *Lynn* presents a viable argument for an award of costs, including attorney's fees, in any case where, though the plaintiff ultimately loses, he would have prevailed on the facts as they existed at the time litigation began. It will also have value in those suits where the issues are particularly complex and where the plaintiff has prevailed on most of the issues raised in the complaint, even though he may not have prevailed on all of them.[67] Finally, the reasoning retains its vitality in any case where the plaintiff prevails in an action brought as a private attorney general action which seeks to effectuate a strong congressional policy.

Under these circumstances *Lynn* will continue to be valid in actions which are brought to enforce anti-trust laws, patent laws, copyright laws, securities laws, civil rights laws, and air and water pollution control laws. It will have vitality in these cases because affirmative duties are present and the

65. *Id.*
66. Nat'l Resources Defense Council v. Environmental Protection Agency, *supra* note 58, at 1338.
67. *Id.*

statutes either expressly permit the recovery of such costs or, at least, do not expressly preclude it.

On the other hand, in future cases arising under NEPA, *Lynn* appears to have no vitality. No matter how many times a government agency is found to have been derelict in its statutory duty under NEPA, the plaintiff, win or lose, will be unable to recover his costs, including attorney's fees. He will be barred from such a recovery because, until Congress amends NEPA to permit such a recovery, 28 U.S.C. § 2412 (1970) will prohibit courts from awarding costs against the United States or any agency or official who is acting in his official capacity. He will also be barred from such a recovery because any private individual, sued as a co-defendant, cannot be held liable, for he has no affirmative duty to act under NEPA.

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