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Attorney's Fees in Public Interest Litigation

David Mark Quiner

ATTORNEY'S FEES IN PUBLIC INTEREST LITIGATION

I. INTRODUCTION

It has traditionally been the practice in federal courts not to award attorney's fees to the prevailing party under the doctrine known as the American rule. This is different from the practice in English courts where the prevailing litigant has always been awarded the expense of his counsel fees. There are several possible reasons for the development of this American rule including "a public mistrust of lawyers, the American belief that every man should pay his own way as well as the expenses for defending himself, and the possibility of historical accident".[1]

This comment will explore the background of the American rule and its three exceptions: the bad faith exception, the common fund doctrine, and the private attorney general rationale. The focal point of this article will be the private attorney general exception; its origin, development, and ultimately, its demise. A critique will be given of the Supreme Court decision in *Alyeska Pipeline Service Co. v. Wilderness Society*[2] which ended the doctrine. Finally, an update will be given on the status of the rule and its exceptions since the Court's decision in *Alyeska* with a look into the future of fee awards in public interest litigation.

II. THE BACKGROUND OF THE AMERICAN RULE AND ITS EXCEPTIONS

A. *Background*

The American rule can be traced as far back as 1796, when the Supreme Court in *Arcambel v. Wiseman*[3] concluded that the American system of jurisprudence did not permit the award of attorney's fees to the successful litigant

1. Note, *Environmental Law—Attorneys' Fees—Fees Awarded Under Equity to Environmental Interest Litigants for Promoting Substantial Public Interests*, 51 N.D. L. REV. 530,534 (1974).
2. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975).
3. Arcambel v. Wiseman, U.S. (3 Dall.) 234 (1796).

as a matter of course. Numerous later cases also followed this proposition.

Several reasons have been given in support of the rule. One is that the rule gives free access to the courts without the threat of having to pay the fees of the adversary's attorney.[4] Another reason commonly given is that the rule limits the possible abuse in the awarding of fees.[5] However, the rule can act as a deterrent by restraining those parties who cannot afford attorney's fees from bringing an action supported by good cause. This restraint has been lessened to some degree by exceptions to the American rule. The exceptions to the rule fall into two categories: those which are statutorily created and those which are judicially created.

Several federal statutes authorize mandatory or discretionary fees. Statutes which authorize mandatory fees provide an automatic award of fees when the injury sustained is due to a direct violation of the statute or when a party has been ordered to obey an administrative agency's order. Among the better known federal statutes which provide for mandatory award of fees are: Section 4 of the Clayton Act,[6] Section 130(a) of the Truth-in-Lending Act,[7] and the Criminal Justice Act of 1964.[8]

Other federal statutes provide a discretionary award of fees.[9] The Federal Water Pollution Control Act (FWPCA)[10] is a good example of a federal environmental law providing for discretionary award of fees. Section 1365(d) of the Act reads:

4. King and Plater, *The Right to Counsel Fees in Public Interest Environmental Litigation*, 41 TENN. L. REV. 27, 34-35 (1973).
5. *Id.*
6. 15 U.S.C. § 15 (1976).
7. 15 U.S.C. § 1640 (1976).
8. 18 U.S.C. § 3006A(d) (1976).
9. Statutes leaving fee awards in the discretion of the courts include: the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976); the Fair Housing Act of 1968 § 812, 42 U.S.C. § 3612(c) (1976); the Federal Social Security Act, 42 U.S.C. § 406(b)(1) (1976); the Bankruptcy Act § 2(a)(21), 11 U.S.C. §11(a)(21) (1976); the Miller Act, 40 U.S.C. §§ 270a-270e (1976; the Federal Employees' Compensation Act, 5 U.S.C. § 8132 (1976); the Freedom of Information Act, 5 U.S.C. § 552 (a)(4)(E) (1976); and the Securities Act of 1933 § 11e, 15 U.S.C. § 77k(e) (1976). Attorney's fees have also been awarded under the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 412 (1976), even though not explicitly provided for in the statute.

> The Court, in issuing any final order or 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.

A recent case, *Natural Resources Defense Council v. Costle*,[11] reveals some of the factors that courts take into account when exercising their discretion in awarding attorney's fees. The case involved environmental plaintiffs who sought to compel the Administrator of the Environmental Protection Agency to perform certain non-discretionary duties under the pretreatment and toxic discharges section of the FWPCA.[12] A settlement agreement was reached which proved to be of importance in the subsequent administration of the FWPCA. Both the environmental plaintiffs and industrial intervenors sought attorney's fees under Section 1365(d).

The court rejected the claims of the intervening industries saying that although the court's discretion to award attorney's fees is broad, an award of fees to defendants must be based on a finding that the defendants were the victims of a harassing or frivolous action.[13] The court did allow an award of attorney's fees to the environmental plaintiffs, since the action had been brought in the public interest. The rates charged by the plaintiffs' lawyers ranged from forty dollars to eighty dollars per hour.[14] The court found these rates to be within the usual rates charged in the District of Columbia area and therefore acceptable.[15]

In addition to the many federal statutory exceptions to the American rule, the federal courts have created several non-statutory exceptions based upon their powers "to do equity in a particular situation . . . whenever 'overriding

10. 33 U.S.C. § 1251 et seq. (1976).
11. NRDC v. Costle, 12 E.R.C. 1181 (D.D.C. 1978).
12. Note, *Environmental Financing Litigation*, 19 NAT. RESOURCES J. 679, 683 (1979).
13. *Id.* at 683.
14. *Id.* at 685.
15. *Id.*

considerations indicate the need for such a recovery' ".[16] Generally, the courts have taken the approach that fees may be awarded in the absence of statutory authorization when the "interests of justice so require".[17]

Generally, there are three main equitable exceptions to the American rule. They are commonly referred to as the bad faith or obdurate behavior exception,[18] the common fund doctrine,[19] and the private attorney general rationale.[20] There is a possible fourth exception which is a catch-all provision that gives the courts authority to award fees when the interests of justice have so required.[21] Two of these equitable exceptions, the obdurate behavior and common fund theory, were developed by the Supreme Court and are still effective today. The private attorney general exception was developed in the lower federal courts and was rejected by the Supreme Court in *Alyeska.* A closer look at all three exceptions will shed light on the Supreme Court's refusal to give the private attorney general rationale any credence.

B. The Bad Faith Exception

The first exception, the bad faith or obdurate behavior exception, says that where one party has shown bad faith by sustaining a frivolous action or defense against another, maliciously or without just cause, the court may award attorney's fees against him as a penalty.[22] This exception also applies to a party who unreasonably delays or disrupts litigation, or hinders the enforcement of a court order.[23]

16. Hall v. Cole, 412 U.S. 1, 5 (1973), *quoting* Sprague v. Ticonic National Bank, 307 U.S. 161, 166 (1939); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970).
17. Hall v. Cole, *supra* note 16, at 5.
18. *E.g.*, Guardian Trust Co. v. Kansas City S. Ry., 28 F.2d 233, 241 (8th Cir. 1928), *reversed on other grounds*, 281 U.S. 1 (1930); Fairley v. Patterson, 493 F.2d 598, 606 (5th Cir. 1974).
19. DOBBS, HANBOOK ON THE LAWS OF REMEDIES 199 (1973).
20. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) (per curiam).
21. Comment, *After Alyeska: Will Public Interest Litigation Survive?* 16 SANTA CLARA LAW REV. 267 (1976); Hall v. Cole, *supra* note 16, at 5.
22. Fairley v. Patterson, *supra* note 18 at 606.
23. Hutto v. Finney, 437 U.S. 678 (1978).

C. The Common Fund Doctrine

The second exception, known as the common fund doctrine, is used when an individual creates or protects a monetary fund or a property right from which others benefit through their interest in the fund or property right. The Supreme Court has expanded this doctrine over the years. The first application of the common doctrine was in *Trustees v. Greenough.*[24] The plaintiff, a bondholder in a trust fund, sued the trustees of the fund on behalf of himself and others similarly situated for waste in the disposition of lands held by the fund. The plaintiff won the action and then sought an award of attorney's fees. The Court allowed the award reasoning that one who is jointly interested with others in a common fund and who in good faith brings an action to save it from waste and destruction is entitled to an equitable reimbursement of his litigation expenses. The Court went on to say that the source of these costs could either be the fund itself or those who received the benefit of the action.[25]

In *Sprague v. Ticonic National Bank,*[26] the Court expanded the common fund doctrine to apply when a party sues on his own behalf to protect his interest in a monetary fund thereby benefiting other by his action. In this case an action was brought against an officer of the Ticonic National Bank to impose a lien on the proceeds of certain bonds in the amount of the plaintiff's trust deposit. The plaintiff won and in turn sought a recovery of her counsel fees. She petitioned the Court to award fees from the proceeds based on her argument that she had indirectly benefitted the other investors of the trust. The Court found that the plaintiff had in fact benefitted the other investors in the fund even though she had not brought a class action per se.[27] Therefore, the Court held that she was entitled to an award of fees and trial expenses out of the fund she had benefitted.

24. Trustees v. Greenough, 105 U.S. 527 (1881).
25. *Id.* at 532-33.
26. Sprague v. Ticonic National Bank, 307 U.S. 161 (1939).
27. *Id.* at 165-67.

Mills v. Electric Auto-Lite Co.,[28] further extended the doctrine to apply in certain instances to an action brought under a federal statute which does not make a provision for the award of attorney's fees. In this case, the minority shareholders of a corporation brought suit under Section 14(a) of the Securities Exchange Act of 1934,[29] claiming that the proxies held by management were obtained by a misleading proxy statement. The plaintiffs prevailed, and the Court awarded them attorney's fees although the statute made no such provision. The Court said that the benefit conferred on a class need not be monetary in nature, but need only be substantial.[30]

The common fund doctrine was further expanded in *Hall v. Cole*,[31] in which an action was brought against a labor union's management under Section 101(a)(2) of the Labor-Management Reporting and Disclosure Act of 1959.[32] The plaintiff had been expelled from the union after circulating petitions among fellow union members, claiming that the union's management was incompetent and dictatorial in their administrative procedures. After the plaintiff won, he petitioned and received attorney's fees from the union funds. The Court said that the plaintiff had protected his right of free speech as well as the rights of all union members through his action and had furthered the interests of an important congressional policy.[33]

The common fund doctrine was originally applied when litigation resulted in a pecuniary benefit being directly bestowed on a definable class and the court had jurisdiction over a fund from which the class members could share an award of fees.[34] The doctrine has been expanded, however, to the present where it is applicable whenever a substantial benefit, be it monetary or otherwise, is shared by some ascertainable class.[35]

28. Mills v. Electric Auto-Lite Co., *supra* note 16.
29. 15 U.S.C. § 78n(a) (1976).
30. Mills v. Electric Auto-Lite Co., *supra* note 16, at 392-95.
31. Hall v. Cole, *supra* note 16.
32. 29 U.S.C. § 411(a)(2) (1976).
33. Hall v. Cole, *supra* note 16, at 7-9.
34. Trustees v. Greenough, *supra* note 24.
35. Mills v. Electric Auto-Lite Co., *supra* note 16.

D. The Private Attorney General Theory

In 1968, a case arose which did not fall under either of the two established exceptions to the American rule. The case was *Newman v. Piggie Park Enterprises, Inc.*,[36] and in this case was born the private attorney general exception. The case involved a class action based on Section 404(a) of the Civil Rights Act of 1964[37] alleging that Piggie Park had discriminated against plaintiff and others like him on the basis of race. Plaintiff prevailed in the action and then sought an award of attorney's fees under the Civil Rights Act which leaves such an award in the discretion of the court. After affirming the award of fees, the Supreme Court explained that from its inception in 1964, enforcement of the Civil Rights Act "would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law".[38] The Court went on to say:

> When a plaintiff brings an action under [the Act], he cannot recover damages. *If he obtains an injunction, he does so not for himself alone but also as a private attorney general, vindicating a policy that Congress considered of the highest priority.* If successful plaintiffs were routinely forced to bear their own attorney's fees, *few aggrieved parties* would be in a position to advance the public interest by invoking the injunctive powers of the federal courts.[39] [Emphasis supplied.]

This suggested to the lower federal courts that a third exception to the American rule was appropriate when a party bringing the action served an important congressional policy affecting many people.[40] This exception, coupled with the Court's easing of standing requirements,[41] provided a ready forum in the courts for litigants involved in actions concerning the public interest of society. The Supreme Court

36. Newman v. Piggie Park Enterprises, Inc., *supra* note 20.
37. 42 U.S.C. § 2000a-3(a) (1976).
38. Newman v. Piggie Park Enterprises, Inc., *supra* note 20, at 401.
39. *Id.* at 402.
40. *See, e.g.*, Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974); Cornist v. Richland Parish School Bd., 495 F.2d 189 (5th Cir. 1974).
41. King and Plater, *supra* note 4, at 28.
42. NAACP v. Button, 371 U.S. 415, 439 (1963).

in *NAACP v. Button*[42] recognized the need for such litigation by saying, "under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances". The courts realized that a single individual or small group would rarely have the money necessary to stop discrimination or pollution or the violation of a civil right. As a result, they acted to make attorney's fees "part of the effective remedy a court should fashion to encourage public-minded suits".[43]

In the seven year period after *Piggie Park*, the lower federal courts expanded the private attorney general doctrine to award fees in a spectrum of cases. In *Lee v. Southern Home Sites*,[44] a plaintiff filed suit under a federal statute governing property rights of citizens[45] after he was denied the right to purchase a real estate parcel from the defendant promoter. The statute provided no authorization for a fee award. Nevertheless, the court awarded plaintiff his fees after he had prevailed on the merits. The court reasoned that the award was appropriate since a strong congressional policy was being enforced, and that a fee award would act to encourage private litigation and enforce that policy.[46]

Further cases stretched the private attorney general rationale to include the awarding of fees to plaintiffs under the Civil Rights Act of 1871,[47] the Civil Rights Act of 1866[48] and the environmental laws.[49] The rationale has been used as a basis for the award of fees where the suit was for damages,[50] where the plaintiff was not obligated to pay his counsel,[51] and even where the plaintiffs lost their action.[52] An award has even been made to a prevailing defendant.[53]

During this period, the Supreme Court was also confronted several times with the private attorney general

43. Sims v. Amos, 340 F. Supp. 691, 694 (D. Ala. 1972).
44. Lee v. Southern Home Sites Corp., 429 F.2d 290 (5th Cir. 1970).
45. 42 U.S.C. § 1982 (1976).
46. Lee v. Southern Home Sites Corp., *supra* note 44, at 295.
47. Wallace v. House, 377 F.Supp. 1192 (W.D. La. 1974).
48. Lee v. Southern Home Sites Corp., *supra* note 44.
49. La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972).
50. Lyle v. Teresi, 327 F.Supp. 683 (D. Minn. 1971).
51. La Raza Unida v. Volpe, *supra* note 49.
52. McEnteggart v. Cataldo, 451 F.2d 1109 (1st Cir. 1971).
53. United States v. Ghaly, 319 F.Supp. 874 (D.R.I. 1970).

doctrine. For example, in *Fleishman Distilling Corp. v. Maier Brewing Co.*,[54] the Court declined to award fees under the Lanham Act[55] since that law clearly expressed its remedies and yet said nothing regarding fee awards. Then again in *F.D. Rich Co. v. Industrial Lumber Co.*[56] the Court refused to award counsel fees in the absence of statutory authorization and went on to say that Congress was the proper place to resolve the issue of fee awards without express statutory authority under the private attorney general doctrine. These cases preceded *Alyeska*, in 1975, when the Court put an end to any further exceptions regarding fee awards under the American rule.

III. THE ALYESKA CASE

A. Background Information

In March, 1970, three environmental groups consisting of the Wilderness Society, Environmental Defense Fund, Inc., and Friends of the Earth filed action to prevent the Secretary of the Interior from issuing permits required for the construction of the trans-Alaska oil pipeline.[57] The injunction was granted in the first case[58] and again on appeal.[59]

54. Fleishman Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967).
55. 15 U.S.C. § 1117 (1976).
56. F. D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116 (1974).
57. Wilderness Society v. Hickel, 325 F.Supp. 422 (D.D.C. 1970).
58. *Id.* at 424.
59. Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir. 1973) *cert denied* 411 U.S. 917 (1973). The Secretary had indicated his intent to grant oil pipeline right-of-way and special land use permits to the oil companies owning Alyeska Pipeline Service. A preliminary injunction was granted in the first case, Wilderness Society v. Hickel, *supra* note 57. The district court based its decision on the grounds that the requested right-of-way would violate § 28 of the Mineral Leasing Act of 1920 (MLA), 30 U.S.C. §185 (1976), and that there had been a failure to comply with § 2 of the National Environmental Protection Act (NEPA), 42 U.S.C. § 4321 et seq. (1976). The injunction was later dissolved and the complaint dismissed (this decision was not reported, *see* Wilderness Society v. Morton, at 851), after the petitioner Alyeska and the State of Alaska intervened as defendants, and further study was made by the Department of the Interior and reports filed. The Department released an Environmental Impact Statement and an Economic and Security Analysis. After the period of time set aside for public comment passed, the Department announced its decision to approve the permits. At this time the MLA and NEPA issues were briefed and argued.

On appeal, in Wilderness Society v. Morton, *supra*, the court of appeals reversed the lower court and again issued an injunction holding that the width provisions of the MLA would be violated. The court did not rule on the NEPA issues. The Supreme Court would not hear the

The environmental groups then brought action as private attorneys general to recover their fees from the United States Interior Department, the State of Alaska, and Alyeska. The counsel fees sought to be recovered included over 4,455 hours of time. The court of appeals held that to recover fees against the Department of Interior would violate a statute which barred such action.[60] As for the State of Alaska, it had voluntarily intervened in the suit to present its view of the public interest aspect of the case. The court said that to tax the state under these circumstances would "undermine rather than further the goal of ensuring adequate spokesmen for public interests".[61] The court did hold that Alyeska could be held to pay one-half of the fees even though there was no statutory authority for it and the two equitable exceptions, obdurate behavior and common fund, did not apply.[62] The court based its finding on the private attorney general rationale since the plaintiffs had acted to protect important statutory rights.[63] The court was of the opinion that a fee award would be a good incentive to encourage public interest litigation by private parties to enforce environmental laws. The court felt that if they failed to award the requested fees this would act as a deterrent to such action especially where wealthy defendants such as Alyeska were involved.[64] It was also recognized that plaintiffs' action had caused Congress to enact legislation designed to control the use of public lands.

B. The Court's Holding

On appeal, the Supreme Court reversed the court of appeals for three reasons: 1) An 1853 statute limited the amount of attorney's fees which a prevailing party could

59. Continued—
case, but Congress immediately passed legislation to grant the permits to Alyeska and allow the pipeline construction to commence under the Trans-Alaska Pipeline Authorization Act, Pub. L. 93-153, Tit. II, 87 Stat. 584 (1973). This act permitted the construction to proceed without further action under NEPA.

60. 28 U.S.C. § 2412 (1976).

61. Alyeska Pipeline Service Co. v. Wilderness Society, *supra* note 2, at 246.

62. *Id.*

63. *Id.*

64. *Id.*

recover from his opponent;[65] 2) There was possible conflict between fee recovery under the private attorney general rationale and a statute prohibiting the taxing of fees against the United States Government;[66] and 3) Congress was the proper entity to authorize any further exceptions to the American rule.

The 1853 statute referred to standardized costs allowable in federal court litigation and limited attorney's fees to specified amounts.[67] In civil actions, this amount is generally limited to twenty dollars.[68] The substance of this act with some modification has been carried forward in later judicial codes and is still in effect at present.[69] The Court also feared a possible conflict with a federal statute which prohibits the taxing of attorney's fees against the United States or its agencies in a civil action.[70] The Court reasoned that since one of the main functions of a private attorney general was to make public officials act according to their duties and insist upon enforcement of the law, fees would frequently be awarded against the government and its officials.[71]

The final reason given by the Court in refusing to award fees was its reluctance to undertake and endorse a legislative function. The Court did recognize the federal courts' equitable power to shift fees under the two traditional exceptions, but refused to extend this power beyond what it already was and create a third exception.[72] The Court said the two recognized exceptions were "unquestionable assertions of inherent power in the courts to allow

65. 10 Stat. 161 (1853).
66. 28 U.S.C. §§ 1920, 1923 (1976).
67. 28 U.S.C. § 1923 (1976). This act provides in part:
> a) Attorney's and proctor's docket fees in courts of the United States may be taxed as costs as follows:
> $20 on trial or final hearing . . . in civil, criminal, or admiralty cases . . .;
> . . .;
> $5 on discontinuance of a civil action;
> $5 on motoin for judgment and other proceedings on recognizances;
> $2.50 for each deposition admitted in evidence.

68. *Id.*
69. *Supra* note 66.
70. 28 U.S.C. § 2412 (1976).
71. Alyeska Pipeline Service Co. v. Wilderness Society, *supra* note 2, at 267.
72. *Id.* at 270-71.

attorney's fees in particular situations, unless forbidden by Congress,"[73] but further noted that neither of the two exceptions were applicable here. Thus, it was the Court's view that fee awards under the traditional court-created rules are available absent express statutory authority, but any further equitable fee awards would have to be expressly authorized by Congress.[74]

C. Critique

The most recent version of the 1853 statute relied upon by the Court left out the language found in the previous versions which said "no other compensation shall be taxed and allowed".[75] The omission of this phrase might be viewed as an intent by Congress to endorse the equitable exceptions created by the courts. The Court rejected this reasoning,[76] however, and improperly viewed the fee statute as a bar to equitable fee awards in this instance.

In like manner, the Court further rejected the private attorney general rationale by saying that it conflicted with the federal statute which bars fee recovery in actions brought against the United States or its agencies.[77] It appears that this argument is weak at best since the statute here presented would not bar taxing public or private parties other than the federal government and in any event the statute would not be a bar to recovery in this case. It must be remembered that the court of appeals awarded one-half of the plaintiffs' counsel fees as against Alyeska, not against the government or its officials. The statute expressly prohibits this. It is clear that it could not be done, nor was it.

Although the general rule does not permit recovery of fees by the successful party, both legislative and judicial created exceptions have been recognized. And while Congress can, expressly or impliedly, restrict the fees available under a particular statute, implied restrictions on the judicial

73. *Id.* at 259.
74. *Id.* at 271.
75. *Id.* at 256 n. 29.
76. *Id.*
77. *Id.* at 267. The statute is 28 U.S.C. § 2412 (1976).

power to do equity are disfavored.[78] The fee statute had never before been viewed by the Court as a legislative version of the American rule or a restraint on the awarding of fees. Neither this statute, nor the fact that some statutes provided for fee awards while others do not, had prevented the Court from adopting two other equitable exceptions.

Finally, the Court said it would not undertake and endorse a legislative function. Furthermore, it said any further exceptions to the American rule would have to come from Congress. The Court's majority rejected the rationale of *Lee v. Southern Homes Corp.*,[79] where a lower federal court found authority to grant an award of counsel fees in the absence of express statutory authorization. That court reasoned that the fees could be awarded if a similar statute with a similar Congressional purpose contained fee award provisions. The Supreme Court was of the opposite view, however, an opined that Congress included attorney fee provisions in selected statutes and not in others.[80] Thus, Congressional silence in statutes regarding fee awards was not viewed as a go-ahead to eliminate the American rule and create an exception whenever the courts felt public policy might be furthered.

However, Congressional silence need not be viewed as a prohibition, but may instead be viewed as an authorization for the Court to exercise its equitable powers and decide the fees issue.[81] As was previously noted, the Court in *Mills* and *Hall* relied on the rule that any implied restrictions upon its equitable power are viewed with disfavor. One wonders why, then, the Court here viewed the implied restriction (i.e. that since Congress had not expressly authorized a further exception to the American rule, then it was not within the Court's equitable powers to do so) favorably even though it in fact does place a self-imposed restriction on the judiciary's equitable power.

78. *Id.* at 270-71.
79. Lee Southern Home Sites Corp., *supra* note 44.
80. Alyeska Pipeline Service Co. v. Wilderness Society, *supra* note 2, at 271.
81. *Id.* at 281 (Marshall, J., dissenting).

It is not apparent that the private attorney general exception would totally ruin the existence of the American rule as viewed by the majority. Justice Marshall in his dissent suggested guidelines to ensure the preservation of the rule while allowing the exception:

> The reasonable cost of plaintiff's representation should be placed upon the defendant if (1) the important right being protected is one actually or necessarily shared by the general public or some class thereof; (2) the plaintiff's pecuniary interest in the outcome, if any, would not normally justify incurring the cost of counsel; and (3) shifting that cost to the defendant would effectively place it in a class that benefits from the litigation.[82]

The Court was obviously fearful of eliminating the American rule altogether, and reacted by making the private attorney general exception its arbitrary cut-off point. The problem of manageability of the exception was a concern of the majority, but they should not be so willing to defeat the alternative before giving it time to operate. Indeed, the exception had been in existence and operating since *Piggie Park* in 1968 and no court had complained of the exception being unmanageable. Regardless of manageability considerations, one is hard-pressed to see how even an over-general use of the exception would completely eliminate the American rule as the Court opined.

Justice Marshall's dissent also focused on the apparent inconsistency in the Court's opinion.[83] Justice Marshall demonstrated how prior cases had recognized that the granting of attorney's fees has an independent basis in the equitable power of the courts apart from any express statutory authorization.[84] Justice Marshall said he was "at a loss to understand how [the Court] can also say that this independent judicial power succumbs to Procrustean stat-

82. *Id.* at 284-85 (Marshall, J., dissenting).
83. *Id.* at 272-88 (Marshall, J., dissenting).
84. *Id.* at 274-76 (Marshall, J., dissenting). Recogntiion is also found in the majority opinion, at 259.
85. *Id.* at 277-78 (Marshall, J., dissenting).
86. *Id.* at 282-83 (Marshall, J., dissenting).
87. *Id.* at 284-87 (Marshall, J., dissenting).
88. *Id.* at 278 (Marshall, J., dissenting).

utory restriction—indeed, to statutory silence—as soon as the far from bright line between common benefit and public benefit is crossed".[85] Justice Marshall also did not share the Court's concern that the American rule would be all but eliminated if the exception was allowed to stand. Indeed, the Court had laid down guidelines for the proper use of all exceptions in the courts.[86] He then went on to demonstrate how the criteria set forth in *Piggie Park* had all been satisfied in *Alyeska*.[87] As for the previously established equitable exceptions Justice Marshall commented, "I can only conclude that the Court is willing to tolerate the 'equitable' exceptions to its analysis, not because they can be squared with it, but because they are by now too well established to be casually dispensed with".[88]

Justice Marshall does make sense. The line between common benefit and public benefit is not at all clear. And even if it were, the Supreme Court, to which we have entrusted our highest hopes and expectations of fairness and justice, should not be so willing to strike down an equitable exception that benefits and encourages a party to bring an action which profits the public in general by enforcing a law supposedly created in their best interest. The private attorney general rationale has benefitted many in the past and has the potential to benefit countless more.

IV. THE FUTURE OF PUBLIC INTEREST LITIGATION AFTER *Alyeska*

In the future, litigants who seek to recover counsel fees where there exists no statutory basis for awarding them, must come within one of the previously established exceptions to the American rule. A recent case, *In re THC Financial Corp. Litigation*,[89] involved the application for attorney's fees and expenses from a class settlement fund. The fund was established after the collapse of THC, a large industrial loan company in Hawaii. Counsel fees were awarded to the class according to certain guidelines set down by the court. When setting forth its decision to award

89. *In re* THC Financial Corp. Litigation, 86 F.R.D. 721 (D. Hawaii 1980).

the fees the court said, "The fee awarded should be substantial enough to operate as a proper incentive for the future initiation of class litigation serving the public interest".[90]

United States Steel Corp. v. United States[91] indicated that where fee-shifting determination is, by statute, left to the discretion of the court, such considerations as the public interest in encouraging such suits, conduct of the parties and economic considerations will be given priority. In this case, the court denied an award of fees against the Equal Employment Opportunity Commission which brought the suit because fees had previously been taxed only against private litigants.

Recovery is still valid under the obdurate behavior exception to the American rule. In the recent case of *Roadway Exp., Inc. v. Piper*,[92] the defendant Roadway Express, sought a fee award after plaintiff's counsel unreasonably delayed the discovery proceedings in an employment discrimination action to the point that the case was dismissed with prejudice. The Supreme Court ruled that while attorney's fees were not recoverable under the federal statute in question,[93] they were nevertheless still proper under the bad faith exception.

In like manner, the common fund doctrine is also still a valid premise on which to successfully recover fees. In *Boeing Co. v. Van Gemert*,[94] the Supreme Court held that counsel fees could still be awarded under the doctrine. This case involved a class action suit against Boeing for failing to give proper notice of the corporation's intention to call certain convertible debentures. The Court affirmed the award of fees to the class and stated, "The common fund doctrine reflects the traditional practice in courts of equity, . . . and it stands as a well-recognized exception to the general prin-

90. *Id.* at 738.
91. United States Steel Corp. v. United States, 519 F.2d 359, 364 (3rd Cir. 1975).
92. Roadway Express, Inc. v. Piper, ... U.S. ....., 100 S.Ct. 2455 (1980).
93. 28 U.S.C. § 1927 (1976).
94. Boeing Co. v. Van Gemert, 444 U.S. 472 (1980).

ciple that requires every litigant to bear his own attorney's fees . . . ."[95]

In another case, *Securities and Exchange Commission v. First Securities Co. of Chicago*,[96] the court said that despite the Supreme Court's decision in *Alyeska* which severely limited federal courts' equitable power to award attorney's fees, particularly for private attorney general services, such power still exists. The court here refused to view its equitable power as a dying principle which the Supreme Court could dictate as it saw fit.[97]

Unfortunately, the general effect of the *Alyeska* decision has been to deny fee awards to public interest litigants and thereby deprive them of a significant source of funding which they might have enjoyed had the private attorney general concept survived. Since *Alyeska*, fee awards have been denied to parties bringing action to attend public school without racial discrimination, and to protect their constitutional right to vote without harassment.[98] In one case[99] fees were also denied a plaintiff who prevailed in an action to enforce an environmental law.

The future of the private attorney general doctrine appears dim at the present. Most federal courts will understandably be quite unwilling to award fees under a doctrine which the highest court in the land has said is no longer valid. No Congressional action has been taken despite the Supreme Court's mandate that any further encroachment upon the American rule would have to be expressly authorized by Congress. The Supreme Court has remained firm in their position in the few cases that have addressed the issue since *Alyeska*.[100]

It is possible that the previously established exceptions, the bad faith exception and the common fund doctrine, may

95. *Id.* at 478.
96. SEC v. First Securities Co. of Chicago, 528 F.2d 449 (7th Cir. 1976).
97. *Id.* at 453.
98. *See* O'Neal v. Gresham, 519 F.2d 803 (4th Cir. 1975); McCrary v. Runyon, 515 F.2d 1082 (4th Cir. 1975).
99. NRDC v. EPA, 512 F.2d 1351 (5th Cir. 1975).
100. *See* Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412 (1978); Runyon v. McCrary, 427 U.S. 160 (1976).

be expanded in the future to encompass the area of litigation previously under the private attorney general rationale. Fees are always recoverable where a party can show bad faith on the part of his opponent. The common fund doctrine appears to be the exception which is most easily expanded. It now may be applied when a litigant bestows a substantial benefit (like a private attorney general) on a class be it monetary or otherwise.[101] The major obstacle a private attorney general might have in recovering counsel fees under this doctrine would be proving that his action benefitted some ascertainable class. This class would have to be a definable entity rather than the public at large. In the past, most private attorney general actions were brought to enforce a law which was of interest to all, rather than a certain class.

V. CONCLUSION

Alyeska has effectively eliminated a major source of money which facilitates much public interest litigation. It is undeniable that public interest suits are beneficial to all and, thus, society as a whole has been injured by the Supreme Court's decision. It is difficult to accurately predict the damage society may suffer because of this; no doubt it will be extensive.

Public interest suits often require lengthy preparation and great expense since complex legal and factual issues are involved. And as is frequently the case, the action is brought by a party who can least afford to pay for a lengthy and complex litigation. As the state of the law now stands, parties and groups which are genuinely concerned for the environment and other public interest issues will simply be barred from seeking legal redress in the courts. In other words, society is being deprived of their legal watch-dogs who make sure laws are being properly enforced and adhered to.

101. Mills v. Electric Auto-Lite Co., *supra* note 16.

Various courses of action are now possible, but the main call for help must go to the Congress. *Alyeska* should be heeded as a call for legislative action to re-establish the means by which much public interest litigation is made possible. As the law now stands, a party may only be awarded counsel fees where there is express statutory authority or an established equitable exception. As shown earlier, many federal statutes have such fee award provisions. The problem could be solved by a statute specifically allowing for the private attorney general exception under proper guidelines. The Congress acted quickly in 1973 when the court of appeals issued an injunction stopping the construction of the pipeline by passing legislation allowing the work to begin. It is not unreasonable then, to ask Congress to intervene now and restore an important right.

The public has played an important role in the enforcement of the law in the past. *Piggie Park* started a trend which grew rapidly in the years in which it was permitted. Courts are often the one and only place where effective relief can be obtained. Congress must restore the access to the courts in public interest litigation which *Alyeska* took away.

MARK QUINER